Debarred—navigating the World Bank's sanctions process

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Corporate Crime analysis: Partners Patrick Rappo, Lucinda Low, Brigid Benitez and associate Helen Aldridge, from Steptoe & Johnson LLP, consider the complexities of the World Bank sanctions process and give advice on how companies can remain both vigilant and compliant.

What is the history behind the World Bank's sanction and debarment system?

Set up in 1944 as an international financial institution to facilitate post-war reconstruction and development, the World Bank has developed significantly in the intervening period. Currently it has 188 member countries and in 2014 alone, committed over $65.6bn to projects in low and middle income countries by way of loans, grants, equity investments, and guarantees. In 2013 it also set itself the ambitious goals of ending extreme poverty and promoting shared prosperity by 2030.

The World Bank, often criticised in the past for the lack of safeguards around funding, now bullishly protects funds provided to its clients—and their contractors and consultants—from fraud and corruption, primarily through the use of its investigations and sanctions regime. Since new standards were introduced in October 1996, over 650 entities and individuals have been debarred from eligibility for contracts awarded for World Bank projects, or from participation in new activities in connection with World Bank projects. In the 2014 fiscal year (FY14), the World Bank sanctioned 71 entities and individuals for misconduct. Of those sanctioned, 64 entities/individuals were debarred, resulting in cumulative debarments of 199 years, and an average debarment of three years and one month. Notably, the median duration of all investigations completed in FY14 was twelve months.

The process often starts with an audit, keying off the World Bank's audit and inspection rights in the relevant contracts—but the term audit can be deceptive. More often an audit signals an investigation, with the goal of prosecution if misconduct is found. For firms that are dependent on financing by the World Bank or other international financial institutions (IFIs), the resulting sanction or debarment could be terminal to their business.

In spite of the huge increase in the World Bank's safeguarding activities in the past 15 years and the potentially damaging impacts on businesses, it is not just uninitiated companies that have a limited understanding of the World Bank's processes and procedures. Although this article will focus on the World Bank, other leading IFIs such as the European Bank for Reconstruction and Development, and the European Investment Bank have similar systems in place. We will deal with some of the practicalities of negotiating one's way through this labyrinth.

How does the sanctions process work in practice?

The World Bank's sanction process is encompassed in its Consultant and Procurement Guidelines (the Guidelines). In recognition of its fiduciary responsibility to its shareholders to ensure that proceeds lent are only used for the purpose for which the loan was made, the World Bank includes its Guidelines in loan or grant agreements between the World Bank and borrower countries. The borrowing country then incorporates those Guidelines in its public request for proposals/tenders and any associated contracts—the purpose of which is to carry out the activity on which the loan/grant was based.

At present, the World Bank has five sanctionable practices:

- corruption
- fraud
- collusion
- coercion, and
- obstruction

Sanctions are imposed following a set of procedures described below, with the ultimate punishment being the exclusion of an entity or individual temporarily or permanently from eligibility for participation in World Bank-financed contracts. This

includes ineligibility not just from contract awards, but also from selection as a subcontractor, consultant, supplier or service provider to a company that receives such awards. As of 15 April 2012, the complete list of sanctions available under the World Bank's Sanctions Procedures are:

- a reprimand (this is usually in the form of a formal 'Letter of Reprimand')
- debarment (the sanctioned party is debarred for a specific period of time or permanently)
- conditional non-debarment (the sanctioned party is not debarred—however, they must comply with certain defined conditions within a certain time frame, and if those conditions are not met, they can then be debarred for a period of time or permanently, as specified)
- debarment with conditional release (the sanctioned party is debarred for a minimum period of time, after which the sanctioned party may be released upon completion of certain conditions set by the World Bank), and
- restitution or remedy (the sanctioned party may be required to pay the borrower restitution or take some action to remedy any harm done by its misconduct)

It should be noted that most sanctions are made public and that the World Bank maintains a publicly accessible listing of ineligible firms and individuals.

The World Bank's current sanction system has two tiers:

- the Suspension and Debarment Officer (SDO), and
- the Sanctions Board

The system has evolved to include a third body, the Integrity Vice Presidency (INT), which is the unit that receives and investigates complaints. Using, among other tools, the audit clauses included within the company or respondent entity contract with the borrowing government, INT is able to gather and assess evidence. INT does not, however, have compulsory powers beyond the scope of the audit clause of the relevant contract(s)—for example, they cannot subpoena records. Thus, to the extent they seek documents or information that goes beyond the scope of the audit clause, INT depends on the voluntary cooperation of a company or others, or information provided to them by law enforcement authorities with compulsory powers. Once it has gathered evidence which indicates to INT that it is more likely than not that a contractor or consultant (designated the respondent) is engaged in a sanctionable practice, it then produces a Statement of Accusations and Evidence (SAE), and refers the matter to the SDO.

The SDO will then review the referral and decide if, based on the INT submission alone, it is more likely than not that the respondent has engaged in a sanctionable practice. If so, the respondent will be temporarily suspended from eligibility and concurrently notified of the referral, and of the SDO's recommended sanctions. The respondent (and any other parties on which sanctions may be imposed) has an opportunity at this first stage to contest the SDO's recommendations and the temporary suspension. The SDO may also propose the imposition of sanctions on affiliated firms, including parent companies, based on determinations of either culpability or responsibility for sanctionable practices. This can include consortium partners, subcontractors or subconsultants, and individuals. The respondent also has an opportunity to appeal the SDO's recommendations to the Sanctions Board, which will review the case on a de novo basis and issue a written decision, which is immediately effective, and since May 2012, publicly available. If the respondent does not appeal the SDO's recommended sanction within the prescribed time period, it will become final. This is a quasi-judicial administrative process. The decision of the Sanctions Board is final and non-appealable.

While INT's investigation is ongoing (ie prior to a sanctions referral), INT can also apply to the SDO to make a respondent subject to temporary suspension. If the SDO approves the request, a Notice of Temporary Suspension (NTS) is issued which renders the subject ineligible to receive new World Bank-financed contracts. This so-called early temporary suspension (ETS), like the temporary suspension that is imposed when the SDO issues a Notice of Sanctions Proceedings to a respondent, is not publicly announced. However, it is made available to the World Bank internally and to its clients. ETS is limited in time to an initial duration of six months, which can be extended for a further six months upon request by INT. INT have made increasing use of this proactive power in the recent past, which can be seen as a further indication of their bullish approach.

What is the World Bank's standard of proof?

The World Bank's standard of proof is low, only requiring 'evidence sufficient to support a reasonable belief…that it is more likely than not that the Respondent has engaged in [the alleged sanctionable practice(s)]'. As such it equates to the civil standard of proof in the context of UK civil proceedings, and means that the hurdle can be met if a 'preponderance of the evidence supports a finding that the Respondent engaged in a Sanctionable Practice'.

In addition to this, the Sanctions Board, and before it the SDO, do not have to comply with formal rules of evidence. Thus the Sanctions Board has the discretion to determine the weight and relevance of all of the evidence, including circumstantial evidence and evidence provided by co-accused, and draw any inferences they deem reasonable. However, any assertion should have an evidentiary basis in the record, or it remains a mere assertion and not a substantiated fact. As such, it is notable that in recently published Sanctions Board decisions, probative weight has been attached to the testimony of co-accused, whose credibility has been criticised, but where the respondent was unable to provide documentary evidence to refute allegations made against it. It is important to bear in mind that once INT makes a prima facie case against the respondent, the burden of proof then shifts to the respondent to prove that it is 'more likely than not' that the respondent's conduct did not amount to a sanctionable practice.

What have been some of the most common sanctions imposed to date? How are these defined?

Fraudulent practices

A substantial majority of sanctions imposed have involved fraudulent practices. Under the current definition, fraud is defined as when the respondent:

> '(i) engaged in any act or omission, including a misrepresentation, that (ii) knowingly or recklessly misled or attempted to mislead a party (iii) to obtain a financial or other benefit or to avoid an obligation.'

This is a very wide definition.

Under this definition, the action does not need to be deliberate—recklessness is sufficient. Nor does the fraud need to succeed—an attempt is sufficient. The submission of forged or misleading performance and/or experience certificates, or bolstered CVs in response to contractual bid tenders, is one of the most common ways in which a company puts itself at risk of being sanctioned for fraud.

Corrupt practices

The majority of the remaining sanctions against respondents have been for corrupt practices, currently defined as when the respondent:

> '(i) offered, gave, received or solicited, directly or indirectly, any thing of value (ii) to influence the action of a public official in the procurement process or in contract execution.'

This definition bears similarities to both the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act 2010. Yet unlike the FCPA, there is no safe harbour for facilitation payments, and the standard of proof is considerably lower than in a criminal context.

It is also important to bear in mind that proof of payment to, or influence over, public officials is not necessary for a finding of corrupt practice. The definition encompasses situations where a respondent pays a private party with the intent to exert influence over a public official acting in the procurement process or contract execution, and it does not matter if all of the funds earmarked for payment are not disbursed. In one case, the corrupt practice and 'thing of value' was the giving of a job at a State-owned corporation, to a World Bank staff member's son (Sanctions Case No 208). It is notable that the World Bank's Guidelines from 2004 onwards include World Bank staff in the definition of public officials. Although previous Guidelines did not include this, it was seen as a clarification of a pre-existing standard rather than an amendment.

Collusive practices

Of the remaining sanctionable practices, collusive practices are akin to cartel offences, and are defined as 'an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party'.

Coercive practices

Coercive practices are defined as 'impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party'.

These are harmonised definitions that are used by all of the IFIs that participate in a cross-debarment regime that gives mutual recognition to the sanctions imposed by other participating institutions.

Obstructive practices

The last sanctionable practice—which is not harmonised and is used only by some of the IFIs—relates to obstruction of investigations, hence it deals with activities that occur after the World Bank has commenced an inquiry. Obstructive practices are defined as:

> '(i) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or (ii) acts intended to materially impede the exercise of the Bank's contractual rights of audit or access to information.'

Again, the broad wording is to be noted as well as the bullish approach that is taken by INT when assessing whether they have been materially impeded.

Can companies be responsible for the actions of employees and subsidiaries?

The Sanctions Board has found respondent entities directly and/or vicariously liable for acts performed by their presidents, owners, sole shareholders, consortium partners, subcontractors, subconsultants and CEOs, or authorised representatives acting in the course and scope of their duties. If a respondent wishes to put forward a 'rogue employee defence', compelling evidence is required, such as oral testimony to the INT during its investigation. Furthermore, the respondent will need to demonstrate its compliance efforts.

INT has aggressively targeted and pursued not just companies, but individuals within companies, and associated parent companies and subsidiaries. INT has in recent years sought to sanction on the basis not just of culpability, but also asserted responsibility—particularly for parent companies on a 'failure to supervise' theory. The World Bank's authority to do so is currently being litigated.

Although sanctions are not automatically applied to successors and assigns of the respondent, they are presumed to be imposed unless the successors/assigns are able to demonstrate that the application of such sanctions would impose a disproportionate penalty upon the successors/assigns. Once a sanctions determination has been made, and the successor/assign notified, a right to appeal the determination is only available where there are grounds of abuse of discretion.

If a sanctionable practice is deemed to have been committed, what type of sanctions can be imposed?

Once the Sanctions Board or SDO determines that it is more likely than not that the respondent engaged in a sanctionable practice, it then needs to decide upon and impose an appropriate sanction from one of the range of sanctions available. The Sanctions Board is not bound by the SDO's recommendation, and sanctions are decided on a case-by-case basis. Consideration is given to the totality of the circumstances and all potential aggravating or mitigating factors.

The current baseline sanction sought by INT under the Sanctioning Guidelines is a minimum three-year debarment with conditional release, with the emphasis being on the need to encourage sanctioned entities to rehabilitate and implement adequate and effective controls, policies and procedures. When conditions are attached to a sanction (whether debarment with conditional release or conditional non-debarment), the case goes to an integrity compliance officer with INT who supervises the respondent's fulfilment of the conditions, and makes a recommendation to the Sanctions Board concerning the respondent's reinstatement following the minimum term of sanction.

Aggravating factors

The following are factors that have been taken into consideration by the Sanctions Board when determining whether aggravation is suitable for the respondent's actions:

- the severity of the misconduct—in particular:
  - repeated pattern of conduct
  - central role in the misconduct
  - management's role in the misconduct
  - involvement of a public official or World Bank staff member
- the complexity of the misconduct—for example:
  - degree of planning
  - diversity of techniques applied
  - level of concealment
  - number of individuals involved, and
  - type of individuals or organisations
- the number of sanctionable practices and past history of misconduct
- interference with the investigation

Mitigating factors

The following factors have been taken into consideration by the Sanctions Board when determining whether mitigation should be afforded to the respondent:

- cooperation in the investigation and/or resolution of the case
- any period of temporary suspension or voluntary restraint
- the passage of time between the misconduct and the World Bank's awareness and investigation (five or six years can pass between the World Bank becoming aware of the alleged fraudulent attention and the initiation of sanctions proceedings)
- general performance under development projects (note that to date, the Sanctions Board has declined to afford mitigating credit to respondents who have submitted that they have long working relationships with the World Bank and have always delivered good value and completed projects)
- voluntary corrective action (eg any internal actions taken against individuals in direct response to the misconduct at the heart of the investigation)
- effective compliance programme—for example:
  - enhanced emphasis on anti-corruption, including through 'tone from the top'
  - code of ethics
  - mandatory staff training
  - enhanced controls for affiliates and subcontractors etc
- substantial change in the management/corporate identity
- internal investigation (particular importance is attached to ensuring the investigation was thoroughly conducted by impartial persons with sufficient independent expertise and experience)

Is there any way for companies to settle during the sanctions process?

Negotiated Resolution Agreement (NRA)

Settlements of criminal charges by national authorities are increasingly common. In the US the Department of Justice (DoJ) and more recently, the Securities and Exchange Commission (SEC) have systematically used plea agreements, deferred prosecution agreements (DPAs), and non-prosecution agreements (NPAs). In 2011 the World Bank caught up by introducing a formal settlement process allowing companies to enter into an NRA. These can be concluded at any time during the sanctions process, up until a final decision on a case by the Sanctions Board (see Article XI). Under current INT policies, respondents must essentially do three things:

- admit wrongdoing
- co-operate fully, and
- introduce an effective compliance programme

In terms of the practicalities, the respondent must be advised of the settlement process and be provided with a standardised 'Term Sheet', which outlines the key terms of an NRA. Furthermore, every NRA must be accompanied by an affidavit signed by the respondent, confirming that the respondent understands the process and the fact that it is not obligated to enter into an NRA, and that it has done so out of own free will. Once INT and the respondent have agreed to a settlement, the signed agreement is passed on to the SDO and the World Bank's Legal Vice-Presidency who must approve it.

If sanctions proceedings have commenced, they are stayed for an initial period of 60 days while the SDO determines if the settlement was entered into freely, and whether the terms of the settlement comport with the World Bank's sanctions procedures and sanctioning guidelines. The contents of the settlement can include a debarment, restitution and/or the adoption of an enhanced compliance program, with oversight provided by an independent monitor appointed by the World Bank.

NRA cases

Following the introduction of this process, an increasing number of companies have recently concluded NRAs with the World Bank. For example in April 2013, SNC-Lavalin Inc and over 100 of its affiliates agreed to a ten-year debarment (which could be reduced to eight years if the companies comply with all of the conditions in the NRA). SNC-Lavalin Group, the Canadian parent, received a conditional non-debarment for ten years (under this sanction, the group faces debarment if they fail to comply with the NRA's terms and conditions). The NRA was negotiated following a World Bank investigation into allegations of bribery schemes involving SNC-Lavalin Inc and officials in Bangladesh, particularly in relation to the Padma Multipurpose Bridge Project. During the INT's investigation, misconduct in relation to a World-Bank financed project 'Rural Electrification and Transmission Project' in Cambodia was also uncovered.

Another example is the February 2012 NRA with two of Alstom SA's subsidiaries—Alstom Hydro France and Alstom Network Schweiz AG—who received a three-year debarment (which could be reduced to 21 months, if the companies comply with all of the conditions in the NRA), and agreed to pay $9.5m in restitution with a commitment to enhance their compliance program. The NRA was negotiated following a World Bank investigation into allegations of bribery in 2002, whereby €110,000 was paid to an entity controlled by a former senior Zambian government official for consultancy services for a World Bank-financed power-rehabilitation project in Zambia. This example is notable because the World Bank has a ten-year statute of limitation for sanctionable practices (see section 4.01(d)) which means that the World Bank is able to investigate companies in respect of activities under contracts which may have been concluded a long time ago.

A third example is that of Oxford University Press' (OUP) subsidiaries, OUP East Africa Limited and OUP Tanzania, which entered into an NRA with the World Bank in July 2012, under which they were debarred for a period of three years. OUP also received a conditional non-debarment and agreed to pay $500,000. As noted by the World Bank, remedying the harm done by corruption via restitution becomes increasingly important to INT's anti-corruption strategy. The debarment arose out of OUP's decision to self-report to both the World Bank and the UK's Serious Fraud Office (SFO) in respect of improper payments made under World Bank-financed education projects in East Africa. In the UK, following the SFO's investigation, OUP's direct subsidiary—Oxford Publishing Limited—was made subject to a civil recovery order and paid

approximately £1.9m, representing the monies it had received by way of dividend derived from the unlawful conduct of the two African subsidiaries.

Once the NRA is approved, sanctions imposed under it are implemented in the same manner as sanctions under the World Bank's formal process. Moreover, sanctions under an NRA are also subject to 'cross-debarment'. The benefit of entering into an NRA is that it may reduce the time spent, and costs of, contested sanctions proceedings. However, it is not clear that resolutions lead to more favourable outcomes across the board than litigation. Unlike in the FCPA area, companies do litigate sanctions allegations. The Sanctions Board often reduces significantly the sanctions recommended by the SDO based on the SAEs submitted by INT. At this time, the NRA process is too new, and data too limited to conclude that it is a better alternative in all cases—indeed, our experience has been to the contrary. Companies faced with a situation where INT has concluded that sanctionable practices have occurred need to weigh their options carefully, including the collateral consequences.

What can be the knock-on effects of sanctions?

Referrals

Companies should be forewarned that the World Bank may, and often will, disclose information regarding sanctions to its member countries, who may in turn pass on the information to their domestic regulatory and enforcement agencies (eg the DoJ in the US or the SFO in the UK). The World Bank has in the past few years also signed bilateral agreements with:

- the European Anti-Fraud Office
- the SFO
- INTERPOL
- the UNDP Office of Audit and Investigation
- USAID, and
- AUSAID

In this regard, the World Bank made twenty-two referrals in FY14, and twenty-three in FY13, contributing towards the trend of international co-operation and the emergence of multi-jurisdictional cases.

An example of such a referral is the case of Macmillan Publishers Limited. In April 2010, the World Bank debarred Macmillan Publishers for six years, following an investigation into bribery payments made under a trust fund-supported project to print textbooks in South Sudan. The World Bank referred this to the SFO, who led an investigation with cooperation from the City of London Police, which ultimately led to a civil recovery order being made (including a payment of £11.3m in July 2011) in recognition of sums it received through unlawful conduct.

Cross-debarment

Companies should also be aware of the cross-debarment powers found under the April 2010 mutual enforcement agreement, which was signed by the African Development Bank Group (AfDB), the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank (IDB) and the World Bank (collectively 'the sanctioning institutions').

Under this agreement, the sanctioning institutions will recognise debarment decisions made by one another where:

- the decision was based in whole or in part on a sanctionable practice
- the initial debarment decision exceeded one year
- the decision has been made public by the sanctioning institutions, and
- the decision was made within ten years of the date of commission of the sanctionable practice.

Thus, a sanctioned entity will be unable to bid on, or be awarded, a contract financed by the Sanctioning Institutions during the applicable debarment period. Furthermore, although the cross-debarment does not apply to existing contracts (only contracts that entities wish to enter into after the effective date of the debarment), the Sanctioning Institutions may choose not to authorise amendments which would increase the value of those existing contracts with debarred entities.

In FY14, the World Bank honoured fifteen cross-debarments of companies/individuals—eleven from the IDB and four from the AfDB.

What can be the broader implications of a World Bank investigation?

Companies should be aware that their debarment from multilateral development bank (MDB) contracts could also be raised in other non-MDB procurement processes. Increasingly, bilateral lenders such as the Department for International Development are taking World Bank sanctions into account in their own eligibility assessments. Some national authorities have a policy of suspending firms that are under investigation by the World Bank. Also, when bidding for other contracts, whether for public or private clients, the company may have to explain the reason for past debarments or ongoing investigations.

Companies should also take note of the EU Public Procurement Directive 2014/24/EU, which entered into force on 17 April 2014, and are implemented in the UK by the Public Contracts Regulations 2015, SI 2015/102. Under the latter, a contracting authority must exclude any bidder if they have been convicted of bribery and corruption, fraud, money laundering and other listed offences, and non-payment of taxes or social security contributions. Bidders can be subject to discretionary exclusion if the contracting authority 'can demonstrate by appropriate means' that a bidder is 'guilty of grave professional misconduct, which renders its integrity questionable'. There is no definition of what constitutes 'appropriate means' or 'grave professional misconduct'—however, debarments issued by the World Bank or other MDBs could potentially be classified as such misconduct. If this were to occur, companies who are debarred by the World Bank run the risk of being excluded from European procurement contracts.

These mandatory and discretionary grounds for exclusion are however subject to the 'self-cleaning' provisions. Under these, the bidder can be allowed to continue the procurement process by providing evidence that it has taken measures to 'demonstrate its reliability'. Again no definition has been provided, but this will no doubt encompass issues such as investigating matters thoroughly, co-operating with the authorities, removing bad-apples and introducing compliance measures for the future—similar to the US concept of 'present responsibility' in spite of past bad conduct.

The Public Procurement Directive also provides for the adoption of an approved list of contractors for work, which is likely to exclude contractors who have previously failed to meet certain standards. In addition, the intention is for there to be an increased reliance on national databases, which can be used to verify the information bidders will submit in the self-certification documentation for the qualification process. Such national databases are also likely to capture information about prior debarments imposed on companies by financial institutions and national authorities.

What should companies be doing to remain vigilant?

The World Bank has ratcheted up its enforcement credentials by increasing the tools at its disposal, and aggressively pursuing infringements, while also referring matters to regulatory and criminal enforcement agencies. As the potential consequences, such as debarment and cross-debarment for lengthy periods of time are significant, companies need to proactively ensure that they have the necessary systems and controls in place. As highlighted above, navigating one's way through the World Bank's sanction process requires a thorough understanding of this labyrinthine and niche area of law.

It is imperative that companies involved in development projects are fully cognisant of who precisely is involved in financing the project, as any involvement by the World Bank or another MDB risks these entities having the power to intervene.

If the World Bank or another MDB is involved, then they will likely have audit rights under their respective guidelines. An audit by the World Bank often signals that they have initiated an investigation, and should be approached as a potential enforcement proceeding rather than a routine inspection. Companies should also ensure that their policies and procedures, including record keeping, are sufficiently robust to deal with any such inspection.

Any company that wants to proactively avoid an investigation also needs to ensure that its policies and procedures, including internal controls, are developed and implemented with the World Bank's specific standards in mind. Although these are similar to other compliance standards, there are unique elements, as reflected in the World Bank Group Integrity Compliance Guidelines. Areas of particular focus for preventive measures will include controls to prevent misstatements

in tender documentation, such as CVs and manufacturers' authorisations, and the use of third parties and agents which can present fraud and corruption risks respectively.

Finally, should a company become entangled in a World Bank inquiry, it is essential that it grasps the nettle at an early stage. Important questions such as whether to co-operate, to what extent, and the implications for proceedings, and contracts, in other jurisdictions all need to be dealt with. The risks and rewards of entering settlement discussions need be carefully assessed—the requirement to admit some wrongdoing can be a very real barrier to settling, but speed and certainty of resolution can be advantageous, particularly if misconduct is isolated to a division of the company, or subsidiary, as opposed to the parent entity. The increased focus on regulatory co-operation between national and international agencies means this is something that companies cannot ignore.

Patrick Rappo *is a partner in Steptoe's London office and is a member of the FCPA and anti-corruption group.*

Lucinda A Low *is a partner in Steptoe's Washington office, where she is a member of the firm's management committee and head of the regulatory, enforcement, and public policy department.*

Brigida Benitez, *IS a partner in Steptoe's Washington office, focuses on complex litigation, global anti-corruption matters, and internal investigations.*

Helen Aldridge *is an associate in Steptoe's London office, where she advises clients on international arbitration and regulatory compliance matters.*

Interviewed by Jo Edwards.

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