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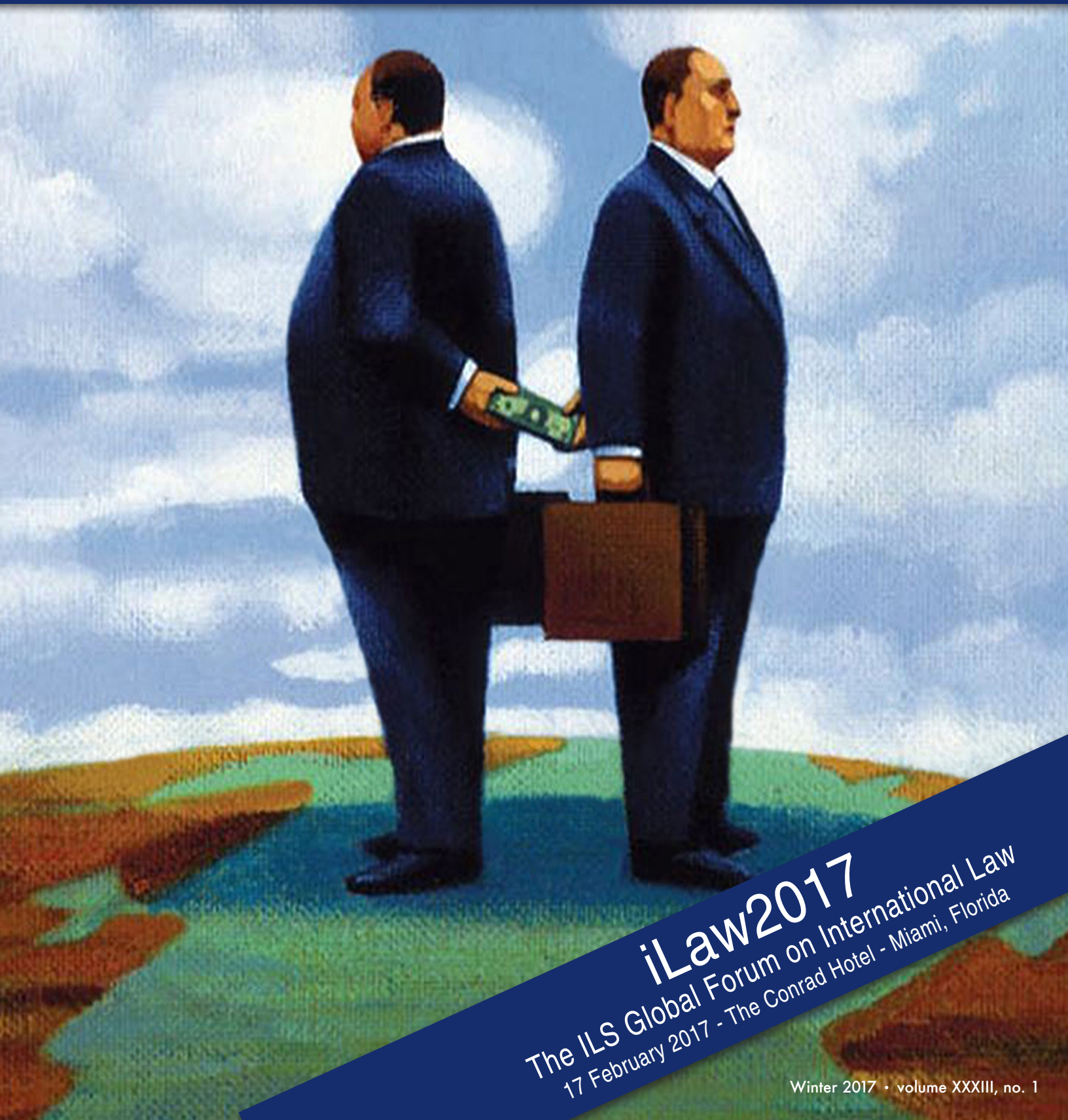
Focus on International Internal Investigations



iLaw2017
The ILS Global Forum on International Law
17 February 2017 - The Conrad Hotel - Miami, Florida

Winter 2017 • volume XXXIII, no. 1

In this issue:

This publication is prepared and published by The Florida Bar.

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Message From the Chair

Celebrating Our Past, Looking to the Future

Celebrating our past as we lead into the future of international law was the theme of our recent retreat, and that is exactly what the International Law Section of The Florida Bar has been doing this year.

A. LINDSAY

At this time of year, for example, we are always celebrating one of the section's great achievements, its annual conference. For over a decade, the conference—formerly known as the ILAT (for International Litigation, Arbitration and Transactions)—has been the mainstay international law conference in Miami. The only problem was that the name ILAT made little sense to those not in the know, and we wanted to attract even greater participation from both New York and Latin America. So, we led into the future through several exciting developments.

First, our conference chair, **Bob Becerra**, organized a contest to rename the conference. **Ana Barton** and **Jackie Villalba** were the winners, and we are extremely pleased to announce that the conference will now be known as **iLaw2017: The ILS Global Forum on International Law**. With this new brand, we know the iLaw will solidify its position as the one *must-attend* annual international law conference in Florida.

Second, and perhaps even more exciting, the iLaw is combining forces with the International Centre for Dispute Resolution. Traditionally, the ICDR held an excellent international arbitration conference every year in Coral Gables. Now, the ICDR conference will join ours to become the iLaw's **ICDR International Arbitration Track**. We have greatly enjoyed working with the ICDR's senior management to make both conferences even better as one, and one that is not only attractive to our Florida international lawyers, but also to lawyers from throughout the Americas.

Third, and in the same vein, we continue to build our relationship with the New York State Bar Association's Section on International Law. Earlier this year, both bar associations signed a memorandum of understanding, and both sections have been actively working together and attending each other's conferences and functions. So far, it has really succeeded, and we look forward to welcoming our New York friends to iLaw2017.

In other news, the International Law Section remains focused on the future through our annual Florida pre-Vis moot competition, this year chaired by **Averil Andrews**, which will take place on 18 February 2017, the day after iLaw2017. Each year the section gives a stipend to each competing team from Florida law schools, and we recently raised that amount to $3,500 per school. In addition, we thank **JAMS** for again graciously hosting the event at its beautiful arbitration center in Miami. The future of international arbitration is in good hands.

I'd also like to thank everyone who attended and contributed to the success of the section retreat we recently held at the beautiful Boca Raton Resort & Club. There again we celebrated our past. In attendance were many of our previous leaders who each helped shape the section, including past chairs **Ed Davis**, **Brock McClane**, **Ed Mullins**, **Richard Lorenzo** and **Peter Quinter**. We especially thank the very first chair of this section, who also happens to be the very first Hispanic president of the ABA, **Steven Zack**, who graciously came "home" to give his fantastic keynote address.

The other highlight of the retreat was the series of short, TED-inspired ILS[talks], which succeeded tremendously in their goals of educating, motivating and inspiring our members. Special thanks to **Marc Hurwitz**, who spoke on international investigations from a former CIA officer's perspective; **Peter Quinter**, who explained the nuances of the Trans Pacific Partnership; **Ed Mullins**, who discussed the new in-house counsel rule and ways to keep our section great; **Alan Miller**, who gave an amazing comparative law presentation on GMOs in food; **Clarissa Rodriguez**, who elegantly detailed the opportunities and threats of Brexit; **Michael Bruno** and **Sean Tevel**, who deftly explained the tax effects of Brexit and lifting the Cuba embargo; and **Jim LeShaw**, who enlightened us with an incredible presentation on his recent circumnavigation of Cuba while on assignment for a yachting magazine. These great ILS[talks] were yet another tangible example of how the ILS *is* leading into the future of international law.

Safe travels,
Al Lindsay
Chair
International Law Section of The Florida Bar

From the Editors . . .

EDITORS JAVIER PERAL, RAFAEL RIBEIRO AND LOLY SOSA

In 2016, we saw numerous governments either toppled or thrown into disarray by corruption scandals. In addition to the impeachment of its former president, Dilma Rousseff, Brazil's "Operation Carwash" has led to the investigation, arrest and conviction of, among others, numerous former and current members of Brazil's executive and legislative branches, arising out of allegations that they received illicit payments from various construction conglomerates. In South Korea, President Park Geun-hye has been impeached and is facing allegations that her confidante extorted monies from corporations in an influence-peddling scheme. Argentina's former president, Cristina Fernández de Kirchner, is the subject of a money-laundering investigation. South Africa's president, Jacob Zuma, is under fire for possible graft involving his son. In China, President Xi Jinping's crackdown on corruption continues with full force, leading to, among other developments, the conviction and imprisonment of several high-profile political figures and the decision to execute individuals who are found guilty of embezzling large sums of money.

These events matter to our readers because our clients do business in countries where there is increased scrutiny of corruption, bribery and anticompetitive conduct. This heightened regulatory environment is a natural consequence of the overall shift in popular opinion and political will regarding corruption—for decades, the payment of bribes to foreign officials was simply seen as the cost of doing business in certain countries. Today, however, multinational companies must revisit their compliance policies, audit their internal controls and, perhaps most importantly, change their mindset and adapt to the new reality of a dwindling acceptance of corruption as a part of doing business internationally.

Conducting internal investigations for our international clients when problems arise is a facet of this new reality, and we hope that you enjoy this edition of *International Law Quarterly: Focus on International Internal Investigations*, with seven articles discussing the latest developments and trends in this ever-growing practice area.

As they say, sometimes defense is the best offense—and in our first feature article, **Richard Montes de Oca** and **Lauren Bengochea** outline the steps that your multinational client should consider when implementing a compliance program.

Once it is decided that an international internal investigation should be initiated, one of your first considerations should be to ensure that communications between you and your client are protected. **Linda Fuerst, Jeremy Devereux** and **Dana Carson** provide us with their insights into the complexities of the attorney-client privilege and attorney work product in cross-border

investigations, and outline steps that should be taken to protect your investigation from being compromised.

If your international internal investigation reveals that company insiders embezzled funds, you may want to pursue civil actions against these wrongdoers. **Edward Davis**, **Arnoldo Lacayo** and **Cristina Vicens Beard** discuss the effectiveness of civil asset recovery actions in corruption cases.

In complex international internal investigations, you likely will need to pair up with forensic accountants and advisors to assist you in sorting through financial data. **Joseph Galanti** and **Michelle Gettinger** outline the role of the forensic advisor in international internal investigations.

Adriana Riviere-Badell, **William F. McGovern**, **Nan Wang** and **Beau D. Barnes** then provide us with a discussion into the complexities of conducting internal investigations in China. **Joseph Mamounas** and **Marcelo Ovejero** follow with a discussion of the emerging anticorruption trends in Latin America, with a focus on Brazil, Argentina and Chile.

Rounding out the Focus on International Internal Investigations portion of the *ILQ* is **Antonio Carlos Rodrigues do Amaral** and **Arthur G. Rodrigues do Amaral's** discussion of the steps that can be taken in the aftermath of corruption scandals such as the ones that have been investigated by Brazil's Operation Car Wash, which has thrown the country into a constitutional crisis and the local economy into turmoil.

We then switch gears to other articles covering interesting developments in international law. **Ava Borrasso** provides us with an in-depth look at the Eleventh Circuit's decision in *Sergeeva v. Tripleton*, which provides new guidance regarding 28 U.S.C. § 1782 actions and access to documents located outside of the United States. **Larry Rifkin** follows with an interesting and timely discussion of developments with the L-1A visa program, which is the most viable non-immigrant visa used to facilitate the transfer of foreign company managerial and executive personnel to the United States.

Finally, we are thankful to our **World Round-Up** contributors for their efforts in keeping us informed of international law developments in Africa, Latin America, North America, Russia and Asia.

We hope you enjoy our winter 2017 *ILQ: Focus on International Internal Investigations*. We will see you again this spring, with an issue focused on the international aspects of data privacy and cybersecurity law.

Sincerely,
Rafael R. Ribeiro – Editor-in-Chief
Javier Peral – Articles Editor
Loly Sosa – Articles Editor

Update: Florida Supreme Court to Consider International Litigation and Arbitration Certification

A new International Litigation and Arbitration certification is pending before the Florida Supreme Court. The certification, which was proposed by The Florida Bar's International Law Section, was unanimously approved by the Bar's Board of Governors at its May 2016 meeting. Supreme Court approval is the last step in the approval process. If approved, the International Litigation and Arbitration certification will become the twenty-seventh certification in the Bar's certification program. Although the program has yet to be approved, those who intend to seek certification should begin planning now. Particular attention should be paid this year to meeting the requirements for CLE credit. Specifically, the proposal before the Supreme Court would require applicants to have fifty CLE credits in international litigation and/or arbitration over the five years preceding application.

Internal Investigation Procedures: International Considerations for Maintaining an Effective Compliance Program

By Richard Montes de Oca and Lauren Bengochea, Miami

Introduction

Companies today operate in an environment of ever-increasing U.S. and foreign laws, regulations and enforcement. Failure to adhere to such laws and regulations may subject these companies and their employees, officers and directors to substantial fines, penalties and consequences, including imprisonment. Accordingly, companies are strongly encouraged, and in certain industries required, to develop compliance programs that will enable them to detect, deter and prevent violations of law and misconduct.

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An effective compliance program consists of various elements, including: (1) ethical culture and governance; (2) risk assessments and due diligence; (3) policies and procedures; (4) training and communication; (5) reporting and investigations; and (6) monitoring and auditing.[1] U.S. regulators have determined that a one-size-fits-all compliance program or a mere "paper program" is ineffective and insufficient.[2] Therefore, it is important to ensure that each of the elements of a compliance program is properly tailored and implemented to the company's particular business and regularly updated to address changes in the organization's governance, operations and applicable regulations.

Conducting effective internal investigations is critical to any compliance program. The adoption of an appropriate internal investigations policy, procedures or protocol (collectively, investigation procedures) enables a company adequately to ensure that a uniform standard or guideline is established upon which the company's management, employees, counsel and consultants can rely and be held accountable for conducting such investigations. It also provides the board of directors, regulators and other stakeholders with certain assurances and an objective measure that investigations are being conducted in compliance with applicable laws and the company's internal policies.

In the context of international investigations, various complex and conflicting issues arise due to the occurrence of activities, alleged misconduct and investigations overseas where different laws may apply. Indeed, a number of foreign laws differ from U.S. law in a variety of ways that affect the way international investigations may be conducted, including the treatment of attorney-client and work product privilege, data privacy protections and the existence of "blocking statutes."[3]

Internal Investigation Procedures, continued

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Consequently, it is very important for companies with foreign operations or business to be mindful of foreign laws when adopting investigation procedures and to provide appropriate flexibility for international investigations.

Investigation Procedures

In order for a company to investigate adequately violations of law or wrongdoing within its organization or business, it should adopt effective investigation procedures. Such procedures should reference: (1) the governing body within the company that has oversight and authority over the overall investigation process and procedures; (2) the applicable reporting mechanisms; (3) the process for assessing the allegations that are to be investigated; (4) the method for identifying and selecting an investigation team; (5) policies for gathering and analyzing evidence, including documents, legal holds and privacy; (6) procedures for witness interviews; and (7) protocols for final investigation reports and recommendations. From the reporting and assessment of an allegation to the drafting of a final report, investigation procedures, particularly when applicable to international investigations, need to be accurate, flexible and practical.

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Proceed With Caution: Privilege Issues in Cross-Border Internal Investigations

By Linda Fuerst, Jeremy Devereux and Dana Carson, Toronto

Internal investigations into potential illegality or other improprieties are a necessary evil. The results of an investigation will assist and inform a corporation's management and board in making important decisions about matters including changes in internal practices and procedures, the need to terminate personnel and the accuracy of prior public disclosures. They permit a corporation to determine whether it or any of its officers, directors and employees have exposure to private litigation or government action and if so, how best to manage the associated legal and reputational risks, including by seeking credit for cooperation.

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Internal investigations may also come with a heavy cost, however, particularly when findings of illegality are made. Facts found and materials prepared during the course of the investigation, including potentially the investigation report, notes made of witness interviews and summaries of investigatory findings, could be subject to production and discovery in subsequent litigation.

Privilege may mitigate the risk of having to disclose information that inculpates the corporation and its officers, directors and employees, provided that appropriate steps are taken during the investigation to safeguard its application. This task is complicated when the investigation involves evidence gathering in multiple jurisdictions. There is no universal law on privilege, and companies operating in a number of jurisdictions may find that they are subject to different privilege protections depending upon the country in which the privilege issue arises.

Most countries have laws protecting attorney-client communications, whether under the banner of privilege, confidentiality or professional secrecy. While there are similarities between the rules, a document or communication that is privileged in one jurisdiction will not necessarily be privileged in another. Evidence gathering actions taken in one jurisdiction could potentially have an impact upon the corporation's legal position in another proceeding.

For that reason, it is important that companies undertaking a multijurisdictional investigation understand which communications and documents are likely to be protected by privilege in each affected jurisdiction, and in what circumstances the privilege applies, in order to best protect their sensitive information. Additionally, corporations should be aware that inappropriate claims of privilege may be viewed unfavourably by the regulators in some jurisdictions.

Privilege Issues, continued

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This article reviews issues relating to the application of privilege in cross-border investigations. We draw primarily upon the laws of privilege in the United States and Canada; however, many of the practical and conceptual considerations will apply to any internal investigation carried out across borders. We do not purport to identify all differences with respect to privilege between jurisdictions, but instead highlight certain areas of risk and potential strategies for mitigating such risks. In all cases, the assertion of privilege during an internal investigation will be highly fact-specific and will depend upon a number of factors, including the laws of the jurisdiction and the form and function of the communication. In this article, we set out a number of considerations, and examples from the applicable laws of various jurisdictions, of which parties undertaking cross-border internal investigations should be mindful when planning and conducting such investigations.

Which Jurisdiction's Privilege Laws Apply?

The threshold question in any multijurisdictional investigation involving evidence gathered from several countries is which law of privilege applies.

Each jurisdiction may apply its own conflict of laws rules to determine whether communications originating in another jurisdiction will be privileged in the home jurisdiction. Information that is granted privilege protection in one jurisdiction may not be granted such protection in another.

In Canada, privilege has traditionally been governed by the law of the domestic forum hearing the dispute (lex fori).[1] This appears to be based upon the classification of attorney-client privilege as a matter of procedure rather than substance. Similarly, under English law, the "English rules of privilege will [generally] determine which documents should be treated as privileged . . . which means, in theory, that a document which is not privileged in its country of origin could be held to be privileged in England (or vice versa)."[2]

In *Aktiebolag v. Andrx Pharmaceuticals, Inc.* (*Aktiebolag*)[3], a patent case, the U.S. District Court (S.D.N.Y.) decided issues of privilege involving "foreign documents" by applying the "touching base" approach, applying a choice of law "contacts" analysis to determine the applicable law of privilege. Communications touching base with the United States would be governed by the U.S. federal discovery rules, while communications related to matters solely involving a foreign country would be governed by the applicable foreign law. Where the allegedly privileged communications took place in a foreign country or involved foreign attorneys or proceedings, the law of the country with the predominant or "most direct and compelling interest" in whether those communications should remain confidential would apply. In *Aktiebolag*, the court applied the laws of Germany, Korea and the United States to determining the application of privilege to different sets of documents in issue.

A conflict of laws analysis can be all the more complex when international bodies are involved. For example, in *Akzo Nobel Chems. Ltd. v. European Commission*

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Civil Asset Recovery – The Underutilized Tool in the Fight Against Grand Corruption

By Edward H. Davis, Jr., Arnoldo B. Lacayo and Cristina Vicens Beard, Miami

While there is certainly room for debate as to the potential impact of the recent U.S. presidential election and the new administration on the enforcement of U.S. anticorruption laws, what is clear is that there is momentum for anticorruption laws to continue to propagate around the globe. Corruption is everywhere, and it comes in different shapes and sizes: from petty corruption, which involves the exchange of small amounts of money in return for minor favors by those seeking preferential treatment; to grand corruption, which pervades the highest levels of national government and leads to the erosion of the rule of law and economic stability; to other iterations of corruption in between, including bribery, embezzlement, theft, fraud, nepotism and extortion. One form of corruption—grand corruption—is especially pernicious.

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Transparency International, the Berlin-based nonprofit with chapters in more than 100 countries, defines grand corruption as "the abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society. It often goes unpunished."[1] Grand corruption is especially detrimental because it prevents or reverses gains in sustainable development, it undermines and distorts sound financial practices, it deepens poverty and inequality and it increases marginalization and exclusion. Most important, grand corruption violates basic human rights.[2] All over the world, examples abound of officials at the highest levels of government stealing, embezzling, laundering money, receiving kickbacks and engaging in other corrupt schemes. In the prototypical cases, government officials use the national coffers as their personal piggy banks to acquire real estate, yachts, art, jewelry, planes and vehicles or, alternatively, use their official posts and authority to exert illicit gain though the receipt of payments from corrupt non-government actors. While these officials illicitly fund their luxurious lifestyles, the rest of the citizenry, particularly in developing countries, is deprived of, or limited in access to, basic needs such as clean water, food, shelter and medical services, among others. This form of corruption,

Civil Asset Recovery, continued

therefore, violates the most basic of human rights.

Currently, the most widely used tool to combat grand corruption relies on criminal laws and related tools such as forfeiture. Where the corruption or its aftereffects cross national borders, the same model relies on treaty-based, government-to-government mutual legal assistance. Prosecuting grand corruption cases and recovering the proceeds of corruption through this model is not without its challenges. The World Bank's Stolen Asset Recovery Initiative (StAR Initiative) estimates that in the last twenty years, $20 trillion was stolen through corruption.[3] Of that $20 trillion, only $5 billion is estimated to have been recovered.[4] There is a dearth of reliable statistics as to grand corruption, however, and many sources often cite to different figures, some even more bleak. Even applying a generous 50% margin of error to the StAR Initiative's estimates, and assuming that $10 trillion was stolen and $10 billion recovered in the last twenty years, that model produces a recovery yield of .001%. This means that an official who engages in and benefits from corruption has a 99.999% chance of keeping every single penny he or she stole and every single luxury item bought with the country's patrimony. What else can you do in your life with a 99.999% chance of success? Plainly, the current models used to secure the proceeds of corruption have not worked.

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At the international level, the United Nations Convention Against Corruption (UNCAC) aims to foster international cooperation to prevent and criminalize corruption, and explicitly establishes asset recovery as one of its primary principles. Even though countries are increasingly adopting laws to combat corruption, emulating the United States' enactment of the Foreign Corrupt Practices Act (FCPA) in 1977, these initiatives often fail to address the social cost of corruption. For example, the FCPA focuses on deterring corruption by prohibiting and punishing U.S. companies or citizens that make payments to foreign officials for the purpose of obtaining or retaining business.[5] This approach, however, punishes those who pay bribes without imposing any sanctions on those who demand and receive the bribes. In addition, while this model seeks to foster clean business practices, it does nothing to restitute the government or a government state-owned enterprise that likely grossly overpaid for goods and/or services under a contract or a concession tainted by corruption and may be stuck with subpar infrastructure or services. The World Bank's StAR Initiative conducted a study in which it found that across the globe there is increased use of settlements to enforce foreign bribery laws, and that little of the monetary sanctions collected by the enforcing countries is returned to the countries whose officials have been bribed.[6] Indeed, most of the fines assessed by the United States government for violations of the FCPA go to the U.S. Treasury.[7] In this

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The Role of the Forensic Advisor in International Investigations

By Joseph Galanti and Michelle J. Gettinger, Atlanta

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Open borders and the global economy have resulted in more than just controversial political discourse. The expansion in global business and the growing complexities associated with international business arrangements have created new challenges for lawmakers and regulators, both within the United States and abroad. Policing global business operations is now at the forefront of international relations. The historical disparity in foreign laws and regulations, the intricacies of global business activity and geographic cultural norms in certain regions have made fraud and corruption a universal problem. The global community has responded, with the United States continuously increasing enforcement of the Foreign Corrupt Practices Act (FCPA) and many countries enacting their own versions of the 1977 law. The harmonization of global anticorruption laws; the ever-expanding extraterritoriality of those laws; and eye-popping fines, penalties and reputational damage from violations have kept fraud and corruption in the spotlight. While many corporations and their boards have bolstered their compliance programs, fraud and corruption are still widespread, and the need for experienced counsel and forensic advisors remains stronger than ever.

According to a 2016 study conducted by the Association of Certified Fraud Examiners, involving companies in 114 countries across the globe, corporations lose an estimated 5% of revenues per year as a result of fraud.[1] Participants in the study reported an average loss of $2.7 million per case.[2] The U.S. Department of Justice (DOJ) has initiated a consistently high number of corporate fraud investigations over the past few years, though the number declined slightly from eighty-eight in 2014, to seventy-five in 2015, to sixty-two in 2016 (as of 12 October 2016).[3] Since inception of the FCPA in 1977, the Securities and Exchange Commission (SEC) had only one or two enforcement actions per year until 2001, when a significant growth trend began. There were twenty-three enforcement actions in 2016 (through 17 November).[4]

In response to the harmful consequences of corporate fraud and corruption, regulatory bodies such as the DOJ and the SEC have begun to place larger emphasis on corporate responsibility and have increased efforts

The Role of the Forensic Advisor, continued

to hold companies and their employees accountable for compliance violations. As part of its initiative to curtail corporate misconduct, the DOJ released the Yates Memorandum in September 2015.[5] The Yates Memorandum set forth increased accountability guidance aimed at reducing corporate fraud and corruption, while also providing incentives for self-reporting of corporate misconduct and cooperation with DOJ investigations.[6]

Additionally, recent federal case law, such as *SEC v. Magyar Telekom, PLC*,[7] expanded personal jurisdiction over foreign executives in a FCPA[8] enforcement action. This case evidenced the extended reach and authority of regulatory bodies like the SEC in bringing enforcement actions related to international fraud and corruption.

In a series of articles that detailed trends in FCPA enforcement actions by the DOJ and the SEC in the last decade, published by Miller & Chevalier in 2016, the number of enforcement actions initiated by the DOJ and the SEC neared fifty,[9] and the top ten corporate settlements for FCPA violations ranged between $338 million and $800 million.[10] This rise in enforcement actions and related sanctions has driven companies to invest in compliance in an effort to avoid costly investigations and potential litigation, both from reputational and financial standpoints.

Reliance on external counsel and forensic advisors has grown with the surge in enforcement actions and the enhanced complexity of related investigations. Now that the stakes are higher, companies are no longer relying on internal resources to conduct these investigations and are instead depending on experienced professionals to provide resources, specialized knowledge and an independent perspective. Forensic advisors bring finance, accounting, technology and investigative skills to help gather and present facts to counsel so they can decide if violations may have occurred, resulting in a stronger defense.

Investigation Planning and Preliminary Assessment of Allegations

Due to the increasing complexity of international investigations, it is important to engage counsel and forensic advisors as early in the investigation as possible. Many companies believe a stronger assertion of attorney-client/work product privilege can be made by engaging external counsel (rather than in-house counsel) to lead the investigation. Forensic advisors are

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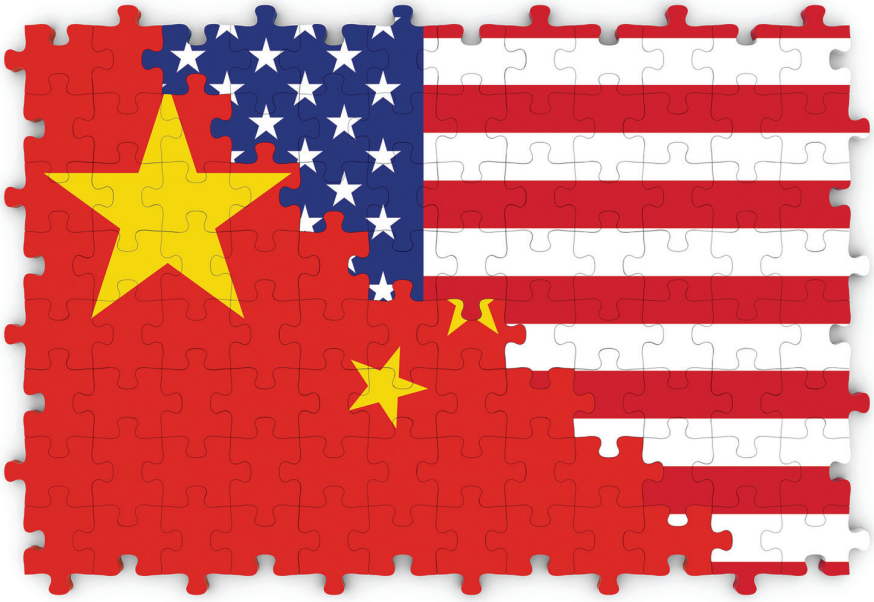
Investigations in the Middle Kingdom: What Florida Lawyers Need to Know About Internal Investigations in the People's Republic of China

By Adriana Riviere-Badell, Miami; William F. McGovern, Hong Kong; Nan Wang, Hong Kong; and Beau D. Barnes, Washington, D.C.

As China's importance in the global economy has increased, so too has its importance to corporations with global ambitions. But this extended reach has also coincided with increased enforcement efforts from both within and outside of Asia. Extraterritorial enforcement efforts by U.S. regulators in China have been particularly noteworthy, especially in the anti-bribery field—financial press reports on new settlements for violations of the U.S. Foreign Corrupt Practices Act in China seemingly occur every week. In light of these enforcement efforts, corporations operating in China are often called upon to identify and manage risks within their business, including through the use of internal investigations.



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But internal investigations in China are unlike those conducted in the United States in almost every respect—including the differing legal framework, data protection regulations, state secret laws and the confidentiality of attorney-client communications. And these stark legal differences are magnified through the lens of cultural and language differences.

The rocky shoals of Chinese law are not for the faint of heart, but the right map can guide investigators through the straits. To conduct an effective internal investigation in China—as in any jurisdiction—preparation is paramount. This article addresses the key considerations for conducting internal investigations in China, including issues regarding state secrets and data privacy laws, varying attorney-client privilege laws and preserving *Upjohn* protections across language and cultural differences.

Don't Take Attorney-Client Privilege for Granted

The first step in any internal investigation is to communicate with the client and triage any potential violations of law, and the existence of attorney-client privilege is critical to these communications. But the concepts of attorney-client privilege and the related attorney work product doctrine—despite their ubiquity in the United States and other jurisdictions—do not apply in China. While China has no U.S.-style attorney-client privilege, the People's Republic of China (PRC) legal system does recognize a limited confidentiality

protection for attorney-client communications. Attorneys have a duty—and may also have a right—to keep confidential information learned during their representation. But attorneys in China can be made to disclose evidence that may threaten "national or public security," which is often defined broadly. The limited privilege also does not exclude attorneys from the obligation to testify or prevent government demands to attorneys to cooperate by producing work product or other information. Attorneys may even be sanctioned for concealing important facts. Given these characteristics, attorney-client privilege in the Chinese context is better understood as a limited set of confidentiality stipulations than a legal doctrine.

The unclear role of in-house counsel in China makes this picture even murkier. China's limited confidentiality protection only applies to licensed attorneys practicing in law firms registered in China or to licensed foreign lawyers working out of the local office of a registered international firm—it does not apply to in-house counsel. Indeed, because a lawyer who goes in-house loses an affiliation with a law firm, in-house counsel in China are by definition not registered attorneys. Because of this nuance, some U.S. courts have held that even U.S. attorney-client privilege rules do not apply to such communications.[1]

This dynamic bears consideration at every step in an investigation, including whether in-house counsel will participate in interviewing witnesses and who outside counsel will brief about their findings at the conclusion of the investigation. Investigators should ensure that any internal investigation is conducted at the explicit direction of legal counsel and that it is clearly established at the outset that the investigation is for the purpose of providing legal advice. As an added protection, however, investigators should limit exposure of privileged documents to Chinese lawyers and in-house counsel in China. Where the confidentiality of attorney-client communications is uncertain, investigators are better safe than sorry.

Know Your Data and Proceed Cautiously

Once the parameters of an internal investigation have been set, the investigators must collect any materials—both paper and electronic files—that may be relevant to the potential wrongdoing. The key early days of any fast-moving investigation are often spent resolving IT-related threshold questions. In China, several regulations make the collection and analysis of documents a delicate task.

Perhaps the most important applicable regulation in China is the State Secrets Law, which prohibits unauthorized individuals and entities from acquiring, possessing, recording, storing or transferring outside of China information deemed to be a "state secret." State secrets are broadly defined to include documents related to areas deemed important to PRC national interests, which include categories familiar to U.S. lawyers with experience in the U.S. export control regime but also include broad and ambiguous categories covering topics such as economic development and a catch-all

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Emerging Anticorruption Trends in Latin America

By Joseph J. Mamounas and Marcelo Ovejero, Miami

Former President Dilma Rousseff of Brazil (a katz/shutterstock.com)

Whether fair or not, Latin America historically has been regarded as a region where corruption is deep and pervasive.[1]

Between 2000 and 2001, various Latin American nations ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), adopted under the auspices of the Organization for Economic Cooperation and Development (OECD). The Anti-Bribery Convention requires its signatories to introduce significant anticorruption measures into their legal systems. In Latin America, however, the situation remained unchanged for many years, and it took almost ten years for significant anticorruption efforts to develop in the region.

The purpose of this article is to provide a brief overview of the most recent anticorruption trends in three Latin American countries that, due to their importance for international business, are—and should be—of great interest to practitioners in anticorruption and internal investigations.

Argentina: A New Anticorruption Law on the Horizon

Argentina is one of five Latin American signatories to the OECD's Anti-Bribery Convention.[2] Generally, the Anti-Bribery Convention obliges Argentina to adopt measures to criminalize, investigate and sanction the bribery of foreign officials committed in its territory and abroad, when Argentine nationals are involved.[3] Although it ratified the Anti-Bribery Convention in April 2001,[4] Argentina remains noncompliant with its obligations.[5]

Efforts to change the current situation, though, began after President Mauricio Macri assumed office in December 2015. Indeed, the Macri administration recently submitted to the Argentine Congress a bill (Argentina Bill) intended to address Argentina's compliance with several articles of the Anti-Bribery Convention.[6] Two aspects of the Argentina Bill are relevant for the purposes of this article.

First, the Argentina Bill creates a criminal liability regime for legal entities involved in foreign bribery,[7] thereby fulfilling Argentina's obligation under the Anti-Bribery Convention to establish the liability of legal persons for the bribery of a foreign public official.[8]

The Argentina Bill holds a legal entity criminally liable for the acts of corruption—including the bribery of foreign

Emerging Anticorruption Trends, continued

officials—of its owners, controlling shareholders, directors, officers, agents and even independent contractors, provided that these acts (1) are directly or indirectly committed on the entity's behalf or to advance its interest; (2) have the potential to benefit the entity; and (3) result from the entity's "inadequate control and supervision," which means not having in place a compliance program prior to the commission of these acts.[9] Under the Argentina Bill, a legal entity is subject to a wide array of sanctions that include fines ranging from 10% to 20% of its gross revenue for the fiscal year immediately preceding the commission of the corrupt acts; suspension of its activities, patents or trademarks; prohibition to receive government contracts or benefits; publication of the sentence; and compulsory dissolution.[10]

President Michel Temer of Brazil (Alf Ribeiro/shutterstock.com)

Perhaps the most salient feature of the Argentina Bill is that the legal entity's criminal liability does not derive from the act of corruption itself, but rather from the entity's failure to implement a compliance program designed to prevent the commission of such an act.[11] Liability for the corrupt act pertains only to the individuals who committed it, and it is wholly independent from the legal entity's liability.[12] This omission-based model is followed in other Anti-Bribery Convention countries (e.g., Chile), and notably differs from the commission-based model of the pioneering U.S. Foreign Corrupt Practices Act of 1977, where the legal entity is criminally liable for the act of corruption itself[13] and the existence of a compliance program only impacts the applicable sanction.[14]

One potential issue that Argentina could face if it finally adopts this criminal liability regime is that the Argentina Bill is remarkably vague in its description of the elements a compliance program must contain to defeat the "inadequate control and supervision" standard. The Argentina Bill merely states that a compliance program is adequate when it is commensurate with the risks of the legal entity's activity, the entity's size and its economic capability.[15] The Argentina Bill also lists various elements that a compliance program "may" contain (e.g., a code of ethics, whistleblower protections and third-party due diligence),[16] but it does not indicate whether the presence or absence of some or all of these elements is determinative for liability purposes. Because the adequacy of a compliance program is the main element of the criminal offense, the Argentina Bill could be constitutionally challenged as being vague, and thus as failing to give notice of the legal entity's conduct's illegality.

Second, the Argentina Bill establishes Argentina's jurisdiction over acts of bribery committed abroad by Argentine nationals and legal entities domiciled in Argentina.[17]

Argentina's Penal Code already makes it a crime to bribe foreign officials in connection with an economic, financial or commercial matter.[18] But currently, the Penal Code applies solely to (1) crimes committed, or having effects, in Argentina; and (2) crimes committed abroad

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Challenges Post-Operation Carwash in Brazil: Leniency Agreements and Internal Investigations

By Antonio Carlos Rodrigues do Amaral, São Paulo and Miami, and Arthur G. Rodrigues do Amaral, São Paulo

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The well-publicized Brazilian Operation Carwash (*Operação Lava-Jato*), which ostensibly began in March 2014, is a broad investigation initiated back in 2009 and prosecution of corruption and money laundering felonies carried out by the Federal Public Prosecutor's Office and the federal police, and judicially by the Brazilian Supreme Court and several federal courts, especially in Curitiba, in the state of Paraná. It involves criminal acts victimizing Petrobras and other government-controlled companies. Several of the wrongdoers are senior officers of such state companies, top executives of major private-sector corporations and high-ranking politicians. According to the Federal Public Prosecutor's Office, the numbers of Operation Carwash in November 2016 speak for themselves: at the federal justice level, there are 52 counts of corruption, money laundering and criminal organization against 245 people; 175 preventive or temporary arrests; 118 convictions, with sentences adding up to more than a millennium; $1 billion in recovered amounts; almost 70 high-ranking politicians under investigation in the Brazilian Supreme Court; $2 billion in bribes paid; tracking of banking operations involving $300 billion; joint investigations with 42 other countries; and 9 out of 10 sentences in the lower courts were confirmed in higher instances.

The unraveling of such a systemic corruption scheme involving some of the largest companies in Brazil was an enormous step taken by the Brazilian authorities. It is hard to fathom a more damaging practice to a country's economy than conquering the markets through bribes. Dismantling the criminal groups in charge of running this large illegal empire and arresting its bosses, most of whom are controlling shareholders, CEOs and high executives of major companies and financial institutions in Brazil, however, may not be the end of the process. Once all is said and done, what will happen to the companies that benefited from bribes?

Classic criminal organizations, such as the mafia, developed their operations using shell companies. This is not the case for most of the corporations involved in Operation Carwash. The construction companies, which are in the epicenter of the corruption scheme, are real companies employing tens of thousands of employees

Leniency Agreements, continued

and generating other hundreds of thousands of indirect jobs all across Brazil. What should their fate be? Should the courts require them to close down? Should they stay open as if nothing happened? Should the controlling shareholders found guilty of corruption be forced to step away from influencing the management or to sell their shares in the company? Should companies be divided and sold?

In recent years, one of the most famous corruption cases in the world involved German multinational Siemens AG, the largest corporate group in Europe and one of the largest in the world, with revenues at around $90 billion per year. An investigation that started in the United States found that between 2001 and 2007, Siemens had paid over $1 billion in bribes in various countries. After two years of investigations involving hundreds of governmental authorities, attorneys and auditors, Siemens faced penalties amounting to over $1.5 billion. The company's upper management was removed and some of its executives arrested, but the possibility of shutting Siemens down and laying off hundreds of thousands of employees was never seriously discussed.

Brazil has yet to further discuss and present fair, efficient and workable solutions to this urgent matter: what to do with the companies involved in Operation Carwash, which were not only beneficiaries but also victims of condemnable practices of corruption by shareholders and executives currently under investigation or prosecuted, with many of them already criminally condemned after confessing their crimes? Solving this pressing problem would also help to establish important public policies affecting the future of private sector companies that could be involved in corruption practices. International experience, such as related to the application and furtherance of FCPA (Foreign Corrupt Practices Act of 1977) regulations, characterizes corruption not as a disease that can be eradicated, but rather as a virus that needs to be fought constantly and vigilantly by public authorities and by corporate compliance officers. While Brazil is not the point of origin of corruption, its citizens suffer deeply from its consequences. Public policies and practices adopted by the United States and other countries could positively contribute to establishing workable solutions to the dilemmas and problems currently faced by the companies that benefited from the Petrobras and similar corruption schemes due to the misconduct of shareholders and top executives.

The Organization for Economic Co-Operation and Development (OECD) estimates that government-related purchases of services and goods all over the world are in excess of $2 trillion per year. Whenever enormous amounts of money are exchanged between public and private sectors, there is room for corruption involving wrongdoers on both sides of the equation. Lack of transparency and competition only foster corrupt behavior. Lack of fair, efficient and workable mechanisms to fight corruption, to cure the harms caused and to rebuild the companies involved, when it is in the public interest, only makes things worse for the society and the economy. To name a few examples in the international arena, it is easy to remember the corruption scandals involving other major corporations such as Lockheed Martin, United Brands, IBM, Rockwell International Corporation and Boeing (as an example of how serious corrupt behavior can be, the last two companies were accused of bribing high-ranking military officials in the Pentagon and illegally obtaining U.S. classified planning documents).

The Brazilian anticorruption law provides for the possibility of companies being judicially prosecuted and assessed penalties such as loss of assets, rights or values that represent the advantage or benefit directly or indirectly obtained from the infraction; suspension or partial prohibition of its activities; compulsory dissolution of the company; and prohibition of receiving loans from public financial institutions for up to five years.

Nevertheless, even without judicial actions based on the Brazilian anticorruption law, construction and other companies already have suffered administrative penalties based on different Brazilian laws that prevent

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The Eleventh Circuit Affirms Extraterritorial Discovery to Assist International Proceeding and Production of Documents Held by Affiliates Abroad

By Ava Borrasso, Miami

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In a case of first impression in the circuit (*Sergeeva*), the Eleventh Circuit affirmed an order granting extraterritorial discovery pursuant to 28 U.S.C. § 1782 to support an asset recovery case.[1] The case is significant because it recognizes that the scope of discovery available to support a foreign proceeding is not limited to information confined within U.S. borders but also reaches information accessible to those subject to the reach of U.S. courts. The opinion, therefore, is significant in the landscape of 28 U.S.C. § 1782 because it expressly recognizes a substantially broadened access to evidence for foreign proceedings.

Moreover, the opinion—in interpreting "possession, custody, or control"—highlights that such access to documents beyond U.S. shores pursuant to federal subpoena power extends to information in the hands of affiliated entities under proper circumstances. As such, the significance of *Sergeeva* is two-fold: It resolves the issue, in this circuit, of whether Section 1782 can be applied extraterritorially, and it recognizes that subpoenaed documentary evidence also extends to affiliate entities consistent with the Federal Rules of Civil Procedure (as expressly incorporated into Section 1782).[2]

Background

Following marital dissolution proceedings in Russia, a former wife undertook efforts to discover concealed marital assets in multiple jurisdictions including Cyprus, Latvia, Switzerland, the BVI and the Bahamas. She ultimately sought discovery in the United States through 28 U.S.C. § 1782 to support her claim before a presiding Moscow court adjudicating the division of marital assets. The application sought information from third-party Trident Atlanta and its employee regarding information related to her former husband's beneficial ownership of a Bahamian company.[3]

Extraterritorial Application of 28 U.S.C. § 1782

The court first set forth the prima facie requirements to obtain relief pursuant to 28 U.S.C. § 1782:

> (1) the request must be made "by a foreign or international tribunal," or by "any interested person"; (2) the request

The Eleventh Circuit Affirms Extraterritorial Discovery, continued

> must seek evidence, whether it be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.[4]

After determining that the predicate factors were met, the court addressed the discretionary factors as set forth by the United States Supreme Court (the *Intel* factors): "(a) whether aid is sought to obtain discovery from a participant in the foreign proceeding" (the first factor); (b) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance" (the second factor); (c) whether the applicant is attempting to use § 1782 to "circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States" (the third factor); and (d) whether the discovery requests are "unduly intrusive or burdensome" (the fourth factor).[5]

Trident Atlanta took issue with the third factor arguing that Section 1782 does not apply *extraterritorially*.[6] The court examined Section 1782 and held that it plainly provides for production consistent with the Federal Rules of Civil Procedure. Because Rule 45 (subpoena) calls for broad production of non-privileged documents, including those located outside of the United States, the court determined that the only limitation imposed by the rules related to the "location for the *act of production*," not the location of the underlying documents.[7] Therefore, documents subject to the subpoenaed party's control were subject to production.

While the determination appears rather straightforward, it addresses a conflict in the application of Section 1782 dating back to *Intel.* Essentially, there have been two varying views as to whether Section 1782 entitles an applicant to obtain discovery of documents located outside of the United States (assuming the remaining requirements are met). The predominant view was that Section 1782 did not apply extraterritorially, while the minority view declined to limit its scope to U.S. borders. The prevailing view was generally espoused in dicta and relied on language from legislative history[8] and commentary of the one of the statute's chief drafters.[9] For example, arguing against extraterritorial application, Professor Hans Smit argued that (1) the "evident purpose" of Section 1782 is to obtain evidence in the United States thereby setting up a "harmonious" international scheme where each jurisdiction determines production of evidence within its own borders; (2) application beyond borders would result in haphazard effects where a party unable to obtain foreign evidence in that jurisdiction obtained access due to the fortuitous presence of a party with information located in the United States; (3) extraterritorial application would render U.S. courts clearing houses for litigants from around the world, substantially burdening U.S. courts; and (4) resulting conflicts would inevitably arise between U.S. and foreign courts.[10]

In re Godfrey[11] is representative of this view. Declining to grant a Section 1782 application seeking documents located in Russia, the court cited Professor Smit's commentary and "[t]he bulk of authority in this Circuit, with which this Court agrees, hold[ing] that, for purposes of § 1782(a), a witness cannot be compelled to produce documents located outside of the United States."[12] The court specifically addressed and parted company with the contrary view espoused from the same court.[13]

That contrary view relies on nothing more than the plain language of Section 1782. Prior to *Sergeeva*, the extraterritoriality issue was squarely addressed in *In re Application of Gemeinschcaftspraxis Dr. Med. Schottdorf* (*Schottdorf*) in which the court denied a motion to quash production of documents located in Germany.[14] The court reasoned:

> Section 1782 requires only that the party from whom discovery is sought be "found" here; not that the documents be found here. 28 U.S.C. § 1782(a). For this Court to read an implicit document-locale requirement into § 1782 would be squarely at odds with the Supreme Court's instruction that § 1782 should not be construed

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Evolution of L-1A Visa: How Practitioners Can Adapt to the Changing Landscape

By Larry S. Rifkin, Miami

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The L-1A visa is the most viable non-immigrant visa available to managerial and executive personnel of foreign companies. The purpose of the L-1A visa is to facilitate the transfer of said employees to the United States from foreign companies that have affiliates or related corporations in the United States. Nationals of all countries are eligible, provided the specific qualifications for the visa are satisfied. Over the past ten years, despite the absence of any changes to the laws or regulations governing L-1A applications, the government's interpretation of the requirements for the L-1A intracompany transferee visa category has evolved to the point where receiving a request for evidence is almost expected and practitioners seemingly have to prepare part of their L-1A cases under the E-2 investment visa guidelines (which are more stringent). This article will examine the statutory requirements for the L-1A visa, how U.S. Citizenship and Immigration Services (USCIS) has altered the legal framework for analysis of these cases and how practitioners can cope and adapt to the changing landscape.

Definitions and Regulations

The Immigration and Nationality Act (INA) defines an L-1 non-immigrant intracompany transferee as

> an alien who, within three years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.[1]

This "same employer," "subsidiary" or "affiliate" must, at a minimum, be conducting business as an employer in the United States throughout the duration of the beneficiary's stay in L-1A status. Depending on whether the beneficiary will be transferred to an established U.S. entity (in operation for longer than one year) or is coming to open a new branch/office (in operation for less than one year), the documentary requirements under USCIS regulations for an L-1A intracompany transferee vary.

Companies Conducting Business for More Than One Year

If the managerial or executive personnel is transferring to a company that has been conducting business in the United States for more than one year, the regulations

Evolution of L-1A Visa, continued

require the following for L-1A petitions:

1. Evidence that the petitioner and the organization that employed or will employ the alien are qualifying organizations;
2. Evidence that the alien will be employed in an executive or managerial capacity, including a detailed description of the services to be performed;
3. Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition; and
4. Evidence that the alien's prior year of employment abroad was in a position that was managerial or executive and that the alien's prior education, training and employment qualify him/her to perform the intended services in the United States; however, the work in the United States need not be the same work the alien performed abroad.[2]

In the past, practitioners normally complied with the above-referenced requirements by submitting the following documents from both companies: stock certificates, minutes of shareholder meetings and corporate articles to establish the affiliate or subsidiary relationship; a letter from the petitioning company (which may be either the U.S. or the foreign entity) detailing the services to be performed to comply with the second requirement; evidence of the applicant's payroll records from the foreign entity to establish one year of continuous full-time employment; and a letter from the foreign entity confirming the applicant's experience and managerial and executive duties to comply with the fourth requirement. These documents were previously sufficient for an approval of the L-1A petition. Today, USCIS is often requiring much more documentation.

Companies Conducting Business for Less Than One Year or "New Offices"

If the U.S. company has been conducting business for less than one year, it is considered a "new office,"

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WORLD ROUNDUP

AFRICA

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The International Criminal Court may face an African exodus.

Within a single month, three African states have withdrawn from the International Criminal Court (ICC). On 18 October 2016, Burundi became the first African state to withdraw from the ICC when its president signed a bill into law that called for the state's withdrawal. South Africa submitted a formal Instrument of Withdrawal dated 19 October 2016, and Gambia withdrew from the ICC only a few days later, on 25 October 2016, making it the third African state to withdraw from the court within a single month.

The ICC has long been criticized as unfairly targeting African leaders and overlooking atrocities that take place in other parts of the world. The ICC has 124 members, 34 of them African states. Nine out of ten situations currently under investigation involve African states, and all thirty-two individuals who have been indicted by the court are African. Moreover, many of the world's major powers—including the United States, China and Russia—are not members of the court or subject to its jurisdiction. The ICC has denied all allegations of bias, pointing to the fact that it does not select most of its investigations because the majority of investigations are conducted at the request of the U.N. Security Council or the country where the alleged crime occurred.

Burundi's government officials, explaining the withdrawal from the ICC, referred to the court as a "western tool to target African governments." Burundi's president, however, is under ICC investigation for allegedly orchestrating the torture and killing of political opponents. Therefore, Burundi's withdrawal was shrugged off by many as a political leader's attempt to avoid justice. Burundi's withdrawal will not halt the current investigation because the withdrawal is not effective until one year from the date of notification, and member states are obligated to cooperate with criminal investigations that commence before the date of withdrawal.

South Africa's withdrawal came after it received criticism for its failure to arrest President Omar al-Bashir of Sudan during his recent trip to South Africa for an African Union summit. The ICC issued a warrant for al-Bashir's arrest related to charges for war crimes, crimes against humanity and genocide stemming from the conflict in the Darfur region of western Sudan. South Africa, in its Instrument of Withdrawal, stated that "its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Criminal Court of obligations contained in the Rome Statute of the International Criminal Court. . . ." Specifically, South Africa's Department of Justice stated that the portion of the Rome Statute that compels South Africa to arrest persons who may enjoy diplomatic immunity hinders South Africa when it is actively involved in promoting peace, stability and dialogue in those countries. South Africa, under the leadership of Nelson Mandela, was a strong supporter of the ICC and one of its founding members. Critics of South Africa's departure view the decision as a stain on Mandela's legacy.

Gambia's information minister, Sheriff Bojang, while explaining Gambia's withdrawal in a television announcement, stated that the ICC is used for the persecution of Africa and its leaders while ignoring crimes that are committed by the West. Bojang criticized the ICC's decision not to investigate Tony Blair, the former prime minister of Great Britain, for human rights violations in Iraq. Gambia has also been unsuccessful in urging the ICC to punish the European Union for the deaths of thousands of African refugees and migrants that were trying to reach European soil. The ICC's chief prosecutor, Fatou Bensouda, is Gambia's former justice minister, making Gambia's exit especially ironic.

Many fear that the announced withdrawals of Burundi, South Africa and Gambia may result in the ICC experiencing a mass exodus of African states. Namibia, Kenya and Uganda are very critical of the court and have already expressed a desire to withdraw. Africa's future involvement in the ICC is uncertain; however, many African states, including Côte d'Ivoire, Nigeria, Senegal, Sierra Leone, Malawi, Tanzania, Zambia and Botswana, have publicly affirmed their commitment to the court.

Nigeria considers stricter antiterrorism laws.

On 15 November 2016, Nigeria's House of Representatives passed through second reading a bill that would strengthen Nigeria's antiterrorism laws. The bill seeks to consolidate the Terrorism Prevention Act of 2011 and the Terrorism Prevention Amendment

Act of 2013. This bill will broaden the definition of terrorism to include any deliberate act of malice that would cause damage to a country, its government or its economy, or to international organizations. The use of biological chemical weapons, pipeline vandalism and kidnapping would also be classified as acts of terrorism. In April 2014, Boko Haram, an Islamic extremist group, received worldwide attention when the group kidnapped more than 200 schoolgirls in northern Nigeria. The worldwide campaign for their release, which included the social media hashtag #BringBackOurGirls, resulted in widespread criticism of the Nigerian government for its failure to rescue the girls and eliminate Boko Haram.

Proponents of the bill argue that it addresses issues that were not contemplated in the previous antiterrorism laws, and it will allow Nigeria to defeat Boko Haram and play a larger role in the international fight against terrorism. For example, the proposed bill criminalizes international terrorism, conspiracy to commit terrorism, funding terrorists and dealing with charity organizations that are linked to terrorist groups. Facilitating the escape of a terrorist suspect will be a crime punishable by life imprisonment. Mohammed Monguno, the bill's co-sponsor, said that the bill will "encourage investment and deter any person whether within or outside Nigeria who intends to carry out any terrorist activity in Nigeria." The bill is now awaiting review by the House Committee on National Security and Intelligence.

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ASIA

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CHINA

China adopts new cyber security law.

China has adopted new cyber security measures "to counter growing threats such as hacking and terrorism." The Cyber Security Law of the P.R.C. is set to become effective in June 2017. Among the contentious provisions in the final draft of the law are the requirements for "critical information infrastructure operators" to store personal information and important business data in China, to provide unspecified "technical support" to security agencies and to pass national security reviews. The new law appears to mandate that important network equipment and software receive government certifications. Critics are concerned that specific pieces of intellectual property or technical features will need to be divulged, which could potentially be passed on to Chinese companies by the cybersecurity regulators. More than forty international business and technology organizations have expressed "deep concerns" over the law and have lobbied for amendments. Zhao Zeliang, director of the Cyberspace Administration of China's cyber security coordination bureau, stated at a recent press conference that every article in the law is in accordance with the rules of international trade and that China would not close the door on foreign companies.

China passes film industry promotion law.

The twenty-fourth session of the Standing Committee of the 12th National People's Congress of the People's Republic of China passed the Film Industry Promotion Law on 7 November 2016. The law applies to the creation, filming, distribution and screening of films and other such activities within the People's Republic of China. The law is intended to "facilitate the healthy and prosperous development of the film industry, to carry forward the Socialist core values, to regulate the order of the film market, and to enrich the spiritual and cultural lives of the people and of the masses." The law prohibits content that stirs up opposition to the law or the constitution; harms national unity, sovereignty or territorial integrity; exposes national secrets; harms Chinese security, dignity, honor or interests; or spreads terrorism or extremism. It also forbids subjects that "defame the people's excellent cultural traditions," incite ethnic hatred or discrimination or destroy ethnic unity. The new law will become effective on 1 March 2017.

SOUTH KOREA

South Korea takes steps to regulate Bitcoin.

The South Korean Financial Services Commission (FSC) recently established a task force to implement a regulatory framework for Bitcoin companies and users. It is anticipated that the regulations will be introduced by the first quarter of 2017. In response to the emergence of Bitcoin use and digital currencies trading in South Korea, the proposed regulations are intended to follow similar regulations promulgated in the United States and Japan. Currently the Ministry of Science, ICT and Future Planning, which oversees the registration of Bitcoin operators in South Korea, does not provide financial regulatory guidelines.

SINGAPORE

Singapore proposes changes to copyright law.

The Ministry of Law and the Intellectual Property Office of Singapore (IPOS) announced that they are reviewing Singapore's Copyright Act to ensure that the rights granted are reasonable, clear and capable of being efficiently transacted. The proposed changes are set out in the Public Consultation on Proposed Changes to Singapore's Copyright Regime paper published on 23 August 2016. Some of the proposed changes include:

- Establishes a voluntary copyright registry system in Singapore;
- Permits use of copyrighted works for the purpose of data analysis;
- Permits the making and giving of copies of non-patent literature (NPL) by and between the IPOS, its patent examiners and other third-party experts engaged by the IPOS, and the distribution of copies of NPL by the IPOS to applicants and other IP offices upon request, for search and examination and other patent office functions;
- Permits circumvention of technological protection measures by libraries and archives engaging in preservation activities to preserve abandoned software, for educational uses and in limited instances to fix security issues and for investigation;
- Permits use of orphan works; and
- Limits duration of copyright protection for literary, musical, dramatic works, engravings and photographs to seventy years after the death of the creator, regardless of when and if the work is published.

INDIA

India passes law to regulate real estate transactions.

The government of India enacted the 2016 Real Estate (Regulation and Development) Act on 1 May 2016. The new law is intended to ensure transparency, accountability, standardization and consistency by regulating the sale of real estate and timely completion of projects. The regulation generally regulates promoters and introduces a system of checks and balances by requiring registration of both residential and commercial projects exceeding 500 square meters and/or 8 units with the Real Estate Regulatory Authority (RERA). Further, the law mandates complete disclosure of critical information by the promoter such as brief details of the promoter's past five projects, the promoter's title to property, encumbrances, construction approvals/permissions and timelines for completion of project(s). The RERA then determines the time period within which the project's registration remains valid. Such information disclosed by the promoter will be published on a website to be maintained by the RERA. The law prohibits the promoter from modifying, altering or adding to the plans or specifications for a project(s) without previously obtaining the consent of at least two-thirds of the total unit buyers in the project(s).

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NORTH AMERICA

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U.S. Supreme Court defines extraterritorial reach of RICO.

If a predicate offense can apply extraterritorially, the criminal prong of the Racketeer Influenced and Corrupt Organizations Act (RICO) can as well—adding an arrow to the quiver of federal prosecutors to target alleged criminal conduct internationally in the U.S. federal courts.

In *RJR Nabisco, Inc. v. European Community*, the U.S. Supreme Court first analyzed its prior jurisprudence regarding extraterritorial application of federal statutes. Pursuant to *Morrison v. National Australia Bank Ltd.* and *Kiobel v. Royal Dutch Petroluem Co.*, a court must first determine whether the presumption against applying a statute extraterritoriality has been rebutted, or whether the "statute gives a clear, affirmative indication that it applies extraterritorially." If the statute is silent on this point, the court must analyze whether the conduct relevant to the statute's "focus" occurred in the United States or outside its borders.

As to RICO, the Supreme Court held that because a number of RICO predicate offenses (such as money laundering) apply to misconduct abroad, then RICO itself also can apply internationally. In typical fashion, however, the high court hedged, warning that "[a]lthough a number of RICO predicates have

extraterritorial effect, many do not [and the] inclusion of some extraterritorial predicates does not mean that all RICO predicates extend to foreign conduct." Consequently, the type of predicate offense is crucial to the analysis of extending RICO abroad. The Court further clarified that the federal government can pursue RICO charges against foreign enterprises that "significantly" engage or affect "commerce directly involving the United States."

Rejecting the case at bar brought by the European Community and twenty-six of its member states—which relied on RICO's private right of action to allege that RJR Nabisco participated in a global money-laundering scheme in which drug traffickers smuggled narcotics into Europe and used the proceeds to pay for large shipments of RJR cigarettes into Europe—the Court further held that the statute's private right of action instead "requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injury." The stated rationale behind this limitation was to preclude any resultant "international friction" without further direction from Congress.

Ultimately, this RICO clarification will result in more foreign enterprises that maintain no U.S. presence and take no domestic action being hauled into U.S. courts—so long as the RICO enterprise's alleged misconduct touches domestic commerce in a "significant" way, which in itself is not a high bar for predicate offenses such as money laundering.

Fourth Circuit resuscitates Abu Ghraib torture suit against U.S. government contractor.

The Fourth Circuit revived a lawsuit brought by four Iraqi men claiming they were tortured by interrogators employed by U.S. contractor CACI Premier Technology, Inc., at Abu Ghraib prison, holding that the defense contractor's ties to the U.S. government do not serve as an automatic bar to the lawsuit.

Significantly, the Fourth Circuit held that the political question doctrine, which prevents courts from questioning military decisions, did not apply because CACI's alleged misconduct will not be shielded by that doctrine if it is illegal, whether or not it occurred under the military's control. In this regard, the court reasoned: "[W]hen a military contractor acts contrary to settled international law or applicable criminal law, the separation of powers rationale underlying the political question doctrine does not shield the contractor's actions from judicial review."

The Fourth Circuit further pronounced that the military cannot direct a contractor to engage in unlawful activity to effectively shield that contractor from liability: "[W]hen a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine."

Ultimately, the Fourth Circuit has reaffirmed that torture is illegal under both domestic and international law—essentially ruling that the political question doctrine will not automatically provide safe haven for those that engage in such egregious misconduct.

Congress overrides President Obama's veto of the Justice Against Sponsors of Terrorism Act (JASTA).

Overriding Obama for the first time and in his final year in office, Congress overwhelmingly voted to override the president's veto of JASTA in order to authorize families of the victims of the 11 September 2001 terrorist attacks to pursue lawsuits against foreign sovereigns. The vast popularity of this measure with voters made overriding the veto almost certain, despite harsh criticism from the Obama administration, and a bit of a hangover response from congressional leaders. In response, Obama criticized Congress, asserting that "JASTA departs from longstanding standards and practice under our Foreign Sovereign Immunities Act and threatens to strip all foreign governments of immunity from judicial process in the United States based solely upon allegations by private litigants" and that it "would upset longstanding international principles regarding sovereign immunity [that] could have serious implications for U.S. national interests." Even House Speaker Paul Ryan and Senate Majority Leader Mitch McConnell conceded after the veto that the bill could have unintended consequences—including leaving U.S. soldiers open to retaliation from foreign governments.

Congress wrote a bill authorizing Americans to sue foreign countries for sponsoring terrorist acts. In theory, this aim sounds legitimate to allow 9/11 victims redress, but could nonetheless have dire consequences for the United States abroad. Namely, JASTA could establish reciprocal legal precedent through which the United States may be similarly sued. Reciprocity is typically the touchstone of international relations, and enactment of JASTA could encourage foreign countries to exercise jurisdiction over the United States as well as individual members of the U.S. armed forces, as noted by the congressional leaders after the veto. It could even result in foreign litigants suing the United States for training members of an armed group that inflicted collateral damage on civilians. Collection of these judgments against the United States would be rather easy—assets of the U.S. government located in the country where the suit was brought would be subject to attachment, with potentially serious financial consequences for the United States.

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RUSSIA

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Constitutional Court of Russia will review the Russian Federation's obligation to repay €1.86 billion award to Yukos shareholders.

On 15 December 2016, the Russian Constitutional Court heard the Ministry of Justice's request to acknowledge that judgments by the European Court of Human Rights (ECHR) in the case of *OAO Neftyanaya Kompaniya Yukos v. Russia* are non-executable.

In 2014, the ECHR awarded €1.86 billion in compensation to former Yukos shareholders for the violation by Russia of their right to protection of property under Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In 2011, the court found that the assessment of the tax penalties for the year 2000 and the doubling of the penalties in 2001 were unlawful and in breach of Article 1 of Protocol No. 1. The ECHR held that the enforcement proceedings against Yukos by the domestic authorities failed to strike a fair balance between the legitimate aim of those proceedings and the measures employed, in breach of the cited Convention provisions.

In its petition to the Constitutional Court, the Ministry of Justice argued that the obligation of the Russian Federation to repay Yukos shareholders under the decision of the ECHR is not enforceable because the ECHR interpretation of the Convention on Human Rights contradicts the Constitution "in the light of the legal position of the Constitutional Court."

The Ministry of Justice pointed out that the ECHR considered "unreasonable" the action against Yukos for tax violations because it was taken after the three-year statute of limitations for the tax liability. But the ministry argues that, on 14 July 2005, the Constitutional Court, having considered the complaint of Yukos, held that if the taxpayer obstructs execution of the tax enforcement, the statute of limitation begins to run not when the offense was committed, but when authorities became aware of the offense. Since Yukos was accused of "deliberate action on tax evasion" and fined according to the law, the Constitutional Court has already confirmed the legitimacy of the state action.

The Ministry of Justice further objected to another aspect of the ECHR decision: ECHR found that the bailiff's fee charged to the company in the amount of 7% of its tax liability was disproportionately high and made a serious impact on the liquidation of the company. In its ruling of July 2011, however, the Constitutional Court indicated that the fee of 7% of the levied funds should be considered a lawful coercive measure for the failure to comply with the legitimate demands of the state.

The Ministry of Justice also disagreed with granting the right to compensation to all Yukos shareholders at the time of its bankruptcy because not all of them participated in the proceedings and did not state their claims. These failures, according to the ministry, violate basic principles of justice and equality before the court, which are proclaimed by the Constitution.

The Ministry of Justice presented its arguments to the Constitutional Court in December.

According to Valery Zorkin, chairman of the Constitutional Court, the decision of the court will be announced in a closed meeting session at a later date.

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SOUTH AMERICA

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Brazilian federal prosecutors propose "Ten measures against corruption."

In 2014, members of the Brazilian Federal Public Prosecutor's Office (MPF) began developing proposals for legislative amendments to combat corruption and impunity. The proposals were developed by prosecutors and based on their experiences with Operation Car Wash and other law enforcement operations recently carried out in Brazil.

The MPF launched a nationwide campaign in 2015 named "Ten measures against corruption" and set about collecting signatures from citizens who support the campaign. The objective was to obtain at least 1.5 million signatures, the number required to present such proposals to the National Congress as a law project arising from popular initiative.

In March 2016, the campaign, which aims at transparency, prevention, efficiency and effectiveness, reached two million signatures. With this mark, the MPF forwarded the measure to the National Congress, and on 29 March 2016, parliamentarians of the commission responsible for anticorruption measures (*Frente Mista de Combate à Corrupção*) presented Law Project No. 4.850/2016 to the House of Representatives. This law project establishes twenty measures against corruption and other crimes that aim to embezzle public funds, as well as measures against the illicit enrichment of public employees. The project makes amendments to the penal code and to anticorruption laws.

Law Project No. 4.850/2016 contemplates proposals made by the MPF such as: (1) prevention of corruption, transparency and protection of information sources; (2) criminalization of illicit enrichment of public employees; (3) increase in penalties for heinous crimes of corruption involving large amounts of money; (4) efficiency of appeals of criminal procedures; (5) promptness in legal proceedings against administrative misconduct; (6) reform of the system of statutes of limitation; (7) adjustments of criminal nullifications; (8) liability of political parties and criminalization of slush funds; (9) preventive detection to assure that diverted money is returned; and (10) repatriation of the proceeds of crimes.

The project's approval now will be subject to legislative proceedings: a vote by the House of Representatives and then approval by the Senate. In July 2016, the House of Representatives convened a special commission to prepare a report regarding the project. After analyzing the report, the deputies of the House of Representatives partially approved the project on 30 November 2016. The deputies maintained only four of the ten measures proposed by the MPF and affirmed by more than two million citizens in a nationwide vote. Additionally, the deputies modified the four measures they approved.

Besides making modifications to the remaining measures, the deputies also included provisions that were not part of the original MPF proposal. The most important addition relates to the punishment of judges and members of the MPF for abuse of authority. This is likely to hold back actions that have been taken under Operation Car Wash. Millions of citizens have expressed their discontent with the House of Representatives' decision to revise the project, which culminated with public protests that were held in more than 200 cities across Brazil on 4 December 2016. Meanwhile, the project has been delivered to the Senate for its analysis. Once the Senate approves it, Law Project No. 4.850/2016 will be enrolled into law and enforced in Brazilian territory.

Latin America enjoys historic moment: new ceasefire agreement signed by Colombia's government and FARC after initial loss in public referendum.

After more than fifty years of armed conflicts in Colombia that not only claimed thousands of lives but also brought about social and economic stagnation, especially in the rural countryside, Columbia's government and the Revolutionary Armed Forces of Colombia (FARC) have a new peace agreement.

Background

A first ceasefire agreement was the result of four years of intense negotiations that took place in Havana, Cuba, and was signed on 26 September 2016 by President Juan Manuel Santos of Colombia and by the leader of FARC, Rodrigo Londoño. Colombia had tried unsatisfactorily to reach peace agreements with FARC since 1983.

This agreement included: (1) FARC's abandonment and submission of all armaments to the United Nations; (2) political participation of former guerrillas with the guarantee of ten seats in the Congress (social movements shall adhere to democratic rules, using political, nonviolent methods); (3) development of an agricultural plan in order to provide lands and services to former guerrillas; (4) a bilateral and definitive ceasefire; (5) noninvolvement of FARC in crimes such as kidnapping, extortion and children's recruitment; (6) elimination of the relationship between FARC and drug traffickers; (7) FARC's support to combat drug trafficking; (8) victims' compensation; (9) establishment of strategies to replace illicit cultivations; and (10) provision of a justice system to punish criminals.

FARC's leader stated that the parties of the agreement had not given up on their ideas. He said they had decided to debate them within the political sphere. Londoño further stated that FARC's purpose is to engage in legal political exercise in peaceful and democratic ways. International communities such as the United Nations supported the agreement. Furthermore, the European Union removed FARC from its list of terrorist organizations.

This first peace agreement, however, was submitted to Colombian voters for approval through a referendum

held on 2 October 2016. Only 40% of the electorate voted, and a majority of voters rejected the agreement. The main reservations of the opposition group were with regard to the articles that would allow amnesty and clemency to former guerrillas and to the articles that would guarantee political participation for FARC, as well as grants to help form a FARC political party. Despite the voters' rejection of the agreement, both Colombia's government and FARC publically reiterated their intentions to maintain the peace between them. Notably, President Santos was awarded the 2016 Nobel Peace Prize in recognition of his efforts in the peace process.

The New Agreement

In November 2016, Colombia's House of Representatives and Senate ratified a new peace agreement signed by the government and FARC, which included some of the opposition group's proposals for the original document. The ratified peace agreement was renegotiated between the parties after the referendum held in October 2016. Apparently, the new peace agreement will not be submitted to another referendum since it has been approved by the Congress.

The results of October's referendum and criticisms of the opposition group show that Colombia continues to live with political uncertainty. This uncertainly could lead to a return of the war that ravaged Colombia for decades.

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Internal Investigation Procedures, from page 9

Governance

As with the overall compliance program, the investigations element of the program should be overseen by a compliance committee. While compliance committees vary depending on the nature of a company's business and industry, members generally consist of senior management representatives from departments that are actively involved in the compliance function, including legal, compliance, human resources, internal audit and information technology. The committee may also include one or more representatives from sales, marketing and/or an operational function. The compliance committee should be responsible for approving and adopting the investigation procedures and designating the appropriate investigation team to conduct the actual investigations for particular cases. The compliance committee should receive investigation reports and recommendations from the investigation team and then determine which investigations, trends and related data are communicated to the company's board of directors and/or its audit committee so there is accountability at the highest governance level of the organization, thereby strengthening the company's "tone at the top."

Reporting; Anti-Retaliation Policy

In an effective compliance program, employees, agents and third parties should have several mechanisms for reporting a potential violation of law, compliance issue or related concern, including contacting a supervisor, human resources, compliance and/or an anonymous and confidential helpline. A successful reporting system requires that the reporting person feels comfortable communicating potential issues using the available reporting mechanism. The key is to make sure employees or other reporting persons do not fear retaliation or retribution for coming forward. If employees fear retaliation or a breach in confidentiality, they will be reluctant to report problems and issues, which can expose the company to future compliance risk. A company can reduce the risk and lack of communication by implementing an anti-retaliation policy, ensuring its compliance with any applicable anti-retaliation laws that prohibit retaliation and outlining the procedure for reporting retaliation. This policy can be incorporated into the employee handbook, code of business conduct and/or adopted as a standalone policy. If a company operates in a foreign country, all policies, communication and

training should be in a language understood by the employees to whom they are directed.

Allegation Assessment

Once an allegation has been reported to the company, it must determine whether to conduct an internal investigation. An investigation should focus on determining whether a violation or misconduct has in fact occurred as well as on identifying potential areas of risk for the company. Generally, an investigation should be conducted in response to the following issues:

- Credible allegations of wrongdoing committed by the company or any of its employees, officers, directors, agents or third parties (collectively, representatives)
- Government investigations or enforcement actions
- Violations of applicable regulations or laws
- Violations of internal company policy
- Lawsuits against the company or one of its representatives
- Reports of criminal conduct

Depending on the nature of the allegation reported, the investigation procedures should outline whether a specific individual/function, department or the compliance committee should assess the allegation and determine whether to conduct an investigation.

Investigation Team

Once a decision to investigate an allegation has been made, the appropriate investigation team should be assembled. The investigation procedures should provide sufficient flexibility to ensure that the investigation team consists of one or more representatives from different departments with appropriate subject matter expertise. For example, if an allegation concerns harassment, discrimination, retaliation or workplace violence, the investigation team should generally involve a member of the human resources department. Similarly, if an allegation concerns fraud or books and records violations, the investigation team should include a member of the internal audit department.

The investigation procedures should also provide that the persons assigned to conduct an investigation must be objective and free from bias or any conflict of interest in the outcome of the matter being investigated. Indeed, such persons may need to sign a certification reflecting the absence of any such conflict prior to conducting the investigation. In addition to internal members of the investigation team, the investigation procedures should authorize the company to retain outside counsel and/or consultants when highly specialized expertise or skills, avoidance of internal conflicts and/or additional resources are required for an investigation, particularly in the international context.

The investigation procedures should also reflect that persons who are regularly engaged in internal investigations on behalf of the company receive periodic training on the investigation procedures and related investigations skills.

Gathering Evidence

As a company's investigation team proceeds with an internal investigation, particularly in the international context, it should identify the key documents, data and other information that must be preserved, gathered and analyzed, as well as the relevant data privacy and attorney-client privilege implications.

Legal Holds - Companies must preserve relevant information when an investigation or a lawsuit is initiated or reasonably anticipated. This duty arises from the common law duty to prevent spoliation of evidence and from several statutes and regulations, including the Sarbanes-Oxley Act of 2002[4] and the Dodd-Frank Act.[5] The duty to preserve electronic and paper records can be triggered by various circumstances, including when:

- A company receives a complaint or is put on notice of a lawsuit against it;
- A company receives a subpoena for information as a third party to an existing lawsuit;
- A formal order of investigation from a government or regulatory body is issued; and
- A company becomes aware or should reasonably become aware of a potential legal claim against it.

To comply with its preservation duty, a company should issue a legal hold, which is a written instruction directing

employees, agents and relevant parties within an organization to preserve and refrain from destroying any potentially relevant records and information, both in paper and electronic format. Failure to issue and maintain a legal hold can result in serious consequences, including court sanctions subjecting companies to: (1) monetary penalties; (2) adverse inference instructions to a jury relating to the information lost or destroyed; (3) the preclusion of evidence to support a company's claim or defense; and (4) a default judgment.

Because of the serious nature of preserving documents, it is important for the investigation procedures to include a cross-reference to the company's legal hold procedure and/or contact so the investigation team is adequately informed about the legal hold process whenever an internal investigation arises.

Data Privacy and Blocking Statutes - Many countries have adopted strict data privacy laws that place considerable restrictions on the retrieval, use and transfer of documents and data containing personal information. For example, countries including Argentina, Canada, Costa Rica, the European Economic Area, Hong Kong, Israel, Japan, Korea, Mexico, the Philippines, South Africa, Switzerland and Uruguay have adopted a compilation of data protection laws that prohibit exporting employee data without first building certain data export channels.[6]

Further, in a number of countries, blocking statutes have been enacted to restrict or prevent the production of documents or evidence that will be used in a proceeding outside of the country in which such statutes were adopted. In some circumstances, the restrictions imposed by these laws may be overcome by requesting production under a treaty[7] or an international agreement.[8]

Accordingly, it is important for investigation teams to understand and observe these restrictions at the beginning of an international investigation before they retrieve and transfer any protected data from foreign countries to the United States. Further, the investigation procedures should highlight these important restrictions and cross-reference the company's applicable data privacy policy and contact because a violation of data protection laws can itself trigger a violation of law and serious consequences.

Preserving Evidence - Any document or information that pertains to an issue under investigation may have the potential to become evidence in a future administrative proceeding or lawsuit. Therefore, the investigation procedures should address important points concerning the preservation and handling of such documents and information, including:

- Documents and information should never be modified, deleted or destroyed, even if it could hurt the company's position.
- All original documents and information should remain in their original physical or electronic folders unless instructed otherwise by legal counsel.
- Any document or information pertaining to an ongoing investigation should be provided only in consultation with legal counsel.
- Copies of all documents in an investigation should be maintained even if the original exists.
- All documents, physical evidence, as well as any notes made in reviewing them should be properly secured.

Attorney-Client Privilege - Other important considerations that should be reflected in the investigation procedures and in each internal investigation conducted by a company are the attorney-client privilege and work product protections. To preserve a claim of privilege over the company's investigative process in assessing critical facts, it is common practice in the United States for investigations to be managed through legal counsel. A company's attorney-client and work product privileges protect counsel's strategies and mental impressions, as well as facts gathered in anticipation of litigation.[9] In certain foreign jurisdictions, however, the attorney-client privilege is often narrower than in the United States, or nonexistent.[10] For example, European Union member states recognize a rudimentary in-house counsel privilege, but there is no European-wide doctrine that confers a privilege on in-house counsel.[11]

Internal Investigation Procedures, continued

Before engaging in an international investigation, the investigation team should determine whether the foreign jurisdictions in which they are conducting such investigation recognize attorney-client privilege or work product protections similar to those in the United States.[12] Further, incorporating this important determination into the investigation procedures will help guide the investigation team in establishing the appropriate tone, process and documentation of the investigation. It may also drive a company's decision to retain outside counsel to lead an investigation.

Interviewing Witnesses

One of the more challenging and time-consuming aspects of an internal investigation is conducting witness interviews. As part of the investigation procedures, companies should address the importance for the investigation team to develop a list of employees or pertinent witnesses to be interviewed as well as a standard script, including model questions, for witness interviews. The investigation procedures may also include a standard form letter to be sent to employees regarding interviews for the suspected misconduct.

For international investigations, it is important to note that some countries' laws, treaties and/or international agreements may require the presence of an employee's counsel in some cases and may prohibit the investigation tactics used in the United States. Accordingly, the investigation procedures should caution the investigation team to consult with legal counsel regarding the foregoing prior to engaging in international investigations to ensure compliance with such laws.

At the outset of the interview, the investigator should explain to the witness the reason for the interview and the role of the investigator. The witness should be advised that the company expects all employees to cooperate and that no one will be penalized for telling the truth. Interviews should be properly and promptly documented, including the specific dates, times, places and full names of the witnesses and other persons present at the interviews. The investigation procedures should address the importance of all investigations being conducted confidentially, and all memos, notes and other documents pertaining to the investigation should be marked "Confidential."

Final Report and Recommendations

After gathering all of the relevant evidence, the investigation team should prepare a final report to present to management, the board of directors and/or the compliance or other governing committee in accordance with the investigation procedures. The report should summarize the investigation and findings. The investigation procedures should provide the flexibility for such report to be delivered in writing or orally, depending on the nature of the case and considerations of attorney-client privilege. The report should provide a basis on which management or the appropriate committee can decide whether a violation of the law or of company policy has taken place and what actions, if any, need to be taken. As part of the investigation procedures, a company should consider creating a standard form for recording the findings of an internal investigation. This is especially helpful when the company is investigating common issues or violations that may arise again in the future. Generally, the final report should include:

- Summary of the issues
- Applicable law or policy
- Relevant facts to the investigation
- Investigative strategy used
- Scope of the investigation
- Analysis of documentation, evidence and witness interviews
- Findings of the investigation
- Any recommendations and corrective action

Disciplinary and Corrective Action; Disclosure

Following issuance of the final report, management should decide which employees, if any, should be disciplined for any proven allegations. Such discipline may include demotion, suspension or termination. In addition, management, the board or the appropriate committee should decide what corrective actions will be

taken. An allegation that is substantiated should result in a corrective action plan, which may include new or revised company policies, stronger internal controls, specific compliance training, etc. If at the conclusion of the investigation the company determines that a violation of local, state or federal law or regulation has occurred, it must consider whether it is required to disclose or wishes to disclose voluntarily such violation to the appropriate governmental authority and/or in a public filing, as required. Voluntary disclosure may provide certain benefits, including cooperation credit and other incentives, as in the case of the U.S. Department of Justice's Foreign Corrupt Practices Act Pilot Program.[13] Nevertheless, the decision surrounding disclosure is fact-specific and requires considerable thought, analysis and legal counsel. Accordingly, the disclosure aspects of any misconduct uncovered during the course of an internal investigation are generally deemed to be beyond the scope of the investigation procedures.

Conclusion

Conducting effective internal investigations is critical to maintaining an effective compliance program. Adopting investigation procedures establishes consistency, legality and accountability for an important and complex internal process. Companies operating internationally need to ensure that their investigation procedures are flexible enough to address conflicts between foreign and U.S. laws and regulations, including privacy laws, blocking statutes and privilege restrictions. Although establishing and maintaining effective investigative procedures require time, commitment and resources, doing so will: (1) reduce the risk of violating the law during investigations; (2) provide important guidance for internal investigators; and (3) strengthen the integrity of the investigation process and results.

Note: The investigation procedures described in this article are not exhaustive, and a company, especially one operating in foreign jurisdictions, should consult legal counsel with expertise in the applicable jurisdiction and subject matter.

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Endnotes

1 Organizational Guidelines, United States Sentencing Commission, http://www.ussc.gov/guidelines/organizational-guidelines.

2 Criminal Division and Enforcement Division, FCPA: a resource guide to the U.S. Foreign Corrupt Practices Act FCPA: a resource guide to the U.S. Foreign Corrupt Practices Act.

3 *See* Blank Rome LLP, 4 Key Issues When Conducting Cross-Border Investigations | Blank Rome LLP, https://www.blankrome.com/index.cfm?contentID=37&itemID=3472 (December 2014).

4 Pub. L. No. 107-204, 116 Stat. 745.

5 Dodd-Frank Wall Street Reform and Consumer Protection Act, Dodd-Frank Wall Street Reform and Consumer Protection Act (2010).

6 *See* E. Herrington & T. McCann, *Privilege Pitfalls: Companies Must Be Careful to Preserve Right During Internal Probes,* Corporate Counsel (July 2014 at pg. 35).

7 *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

8 *See* Blank Rome LLP, 4 Key Issues When Conducting Cross-Border Investigations | Blank Rome LLP, https://www.blankrome.com/index.cfm?contentID=37&itemID=3472 (December 2014).

9 *See Hickman v. Taylor*; Fed. R. Civ. P. 26 et seq.

10 Akzo-Nobel, ECJ case-550/07P (14/9/10).

11 *Id.*

12 *See* E. Herrington & T. McCann, *Privilege Pitfalls: Companies Must Be Careful to Preserve Right During Internal Probes,* Corporate Counsel (July 2014 at pg. 35).

13 Criminal Division Launches New FCPA Pilot Program, OPA | Department of Justice, https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

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SECTION SCENE

International Law Section Retreat

30 September – 2 October 2016
Boca Raton Resort & Club • Boca Raton, Florida

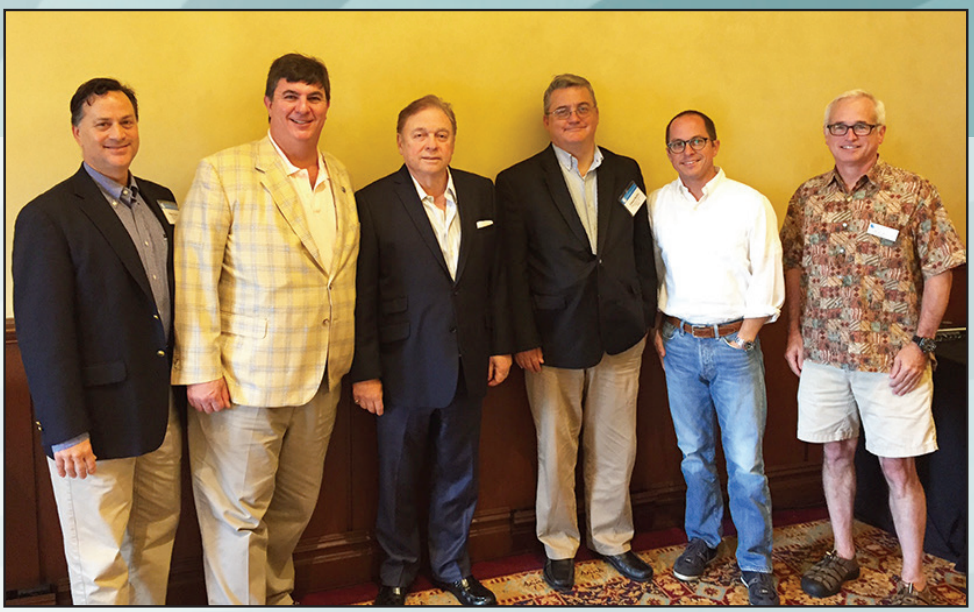
Al Lindsay kicks off the ILS Retreat before a full house.

The ILS[talks] session, consisting of six ten-minute ILS[talks] designed to educate, inspire and motivate ILS members, is well attended.

ILS members and their families enjoy the Saturday night dinner at the ILS Retreat.

Al Lindsay presents the spring 2016 *ILQ Special Cuba Edition* to Stephen Zack.

SECTION SCENE



ILS Chair Al Lindsay welcomes the first ILS chair, Stephen Zack, and past chairs Edward Mullins, Brock McClane, Richard Lorenzo and Peter Quinter.

Al Lindsay speaks to attendees during the lunch session.

Stephen Zack discusses his wealth of experience in international law and reports on the progress the ILS has made since he was the section's first chair.

Ed Mullins presents during the ILS[talks] session.

International Law Section Holiday Party

8 December 2016

Home of Al and Mayra Lindsay

Loly Sosa and Marie Baez-Lorenzo enjoy the festivities.

Eddie Palmer, Gary Davidson and Luis Konski catch up over drinks and hors d'oeuvres.

Ana Barton and Cristina Vicens Beard discuss upcoming ILS events.

Our gracious hosts: ILS Chair Al Lindsay and Mayor Mayra Peña Lindsay of Key Biscayne

Privilege Issues, from page 11

(*Akzo Nobel*),[4] the European Court of Justice (ECJ) held that the law of a supranational jurisdiction, the European Union, superseded the laws of each of the relevant national jurisdictions. The interpretation and application of legal professional privilege in a uniform manner across the European Union was "essential for the purposes of investigations conducted by the [European] Commission in antitrust proceedings."[5]

Even if a document is privileged in the jurisdiction where it was created, there is a risk that it could lose that protection in the jurisdiction to which it is sent. Interjurisdictional transfers of documents and information can lead to the "unintentional waiver of privilege or communications being made under an assumption that privilege operates when in fact it does not."[6] For these reasons, at the outset of the investigation and prior to the transmission of information between countries, it is important that the individuals directing the investigation make best efforts to determine in which jurisdictions relevant information may reside and undertake an analysis of the laws of privilege applicable in each.

What Privilege Protections Are Available?

As part of that analysis, the individuals directing the investigation must consider which specific claims of privilege are recognized and available in each jurisdiction. For example, there is no such thing as a general "investigation privilege" in the United States, Canada or England. Not all documents prepared and communications exchanged during the course of an investigation will necessarily benefit from privilege protection.

Instead, there are two main types of privilege under American, Canadian and English law that may serve to protect communications arising in the context of investigations. Broadly, these privileges protect: (1) communications between lawyer and client (attorney-client privilege); and (2) documents prepared in anticipation of litigation (litigation or work product privilege). Unlike the purpose of the attorney-client privilege, which exists to protect the attorney-client relationship, work product or litigation privilege exists to promote the adversary system by safeguarding the fruits of an attorney's preparation for anticipated litigation. There are strict rules that vary by jurisdiction for when each of these types of privilege apply. In this article we focus primarily upon attorney-client privilege.

Attorney-Client Privilege

What types of communications are privileged?

In assessing the availability of a particular type of privilege, the first step is to determine the types of communications that are protected.

Not all communications with a lawyer will be protected by attorney-client privilege (in Canada, *solicitor-client* or *legal professional* privilege).[7] In North America, attorney-client privilege generally only applies to confidential communications with legal counsel engaged for the purpose of providing legal advice.

Canadian courts have held that reports produced by an investigating lawyer will be privileged if the lawyer's retainer included providing advice concerning the legal implications of the facts gathered as part of his or her investigation.[8] Attorney-client privilege will not attach to an investigative report if counsel was only asked to investigate a complaint: "if that is all she was asked to do then, regardless of the fact that she is a lawyer, she would not have been providing legal advice and would have been acting as an investigator, not as a lawyer."[9]

The United States Supreme Court has similarly recognized the importance of the purpose for which information is communicated during an internal investigation in determining the application of attorney-client privilege: "[P]rivilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."[10] On that basis, communications by employees of a corporation with counsel who is engaged in investigating factual matters for the purpose of

providing the corporation with legal advice about those matters will be protected by attorney-client privilege.

In England, the crux of the inquiry is the dominant purpose of the communication between a lawyer and his or her client. A document that is not communicated to a lawyer specifically to solicit legal advice may not be privileged.[11] Attorney-client privilege only attaches to legal advice, including "advice as to what should prudently and sensibly be done in the particular situation."[12]

In France, the concept of legal privilege does not exist in the same form as in common law jurisdictions; however, a lawyer's legal advice to a client will generally be protected from disclosure through the concept of professional secrecy.[13] In turn, Brazil adopts a broad approach to privilege that "protects all documents pertaining to the attorney-client relationship [and] extends to documents located on the client's premises."[14]

Attorney-client privilege does not exist under Chinese law. Although Chinese lawyers are bound by certain obligations to protect the confidentiality of their clients' information, Article 70 of the PRC Civil Procedure Law provides that anyone with knowledge of facts relevant to a dispute must testify in court. Lawyers are not exempted from this rule.[15]

Ultimately, it is recommended that the scope of any retainer of external counsel relating to an internal investigation should include the provision of legal advice in order for the investigating organization to preserve the ability to assert privilege. The analysis of whether privilege will apply to communications for the purpose of finding facts necessary for the giving of legal advice may be complicated by differing definitions across jurisdictions of what constitutes a communication for the purpose of legal advice. Where competing definitions apply, the prudent investigating entity should assume the application of the more stringent test.

Who is a lawyer for the purpose of privilege?

Which individuals are considered to be "lawyers" for the purposes of applying attorney-client privilege varies by jurisdiction. Apart from local external counsel, who are widely accepted to be lawyers for the purpose of attorney-client privilege, two other types of lawyers are often involved in cross-border investigations: foreign counsel and in-house (or corporate) counsel.

In many instances, cross-border investigations will involve counsel providing advice in foreign jurisdictions. The ECJ requires that a lawyer be qualified in a member state in order for attorney-client privilege to apply to his or her communications with a client. Under U.S. law, "legal advice privilege will apply to advice from foreign lawyers, provided they are admitted to practice in their country."[16] Canada's approach is the same.[17] In Brazil, however, privilege is afforded only to those individuals who are licensed to practice law in Brazil and are registered with the Brazilian Bar Association.[18]

Many internal investigations also involve the participation of in-house counsel employed by the business. The application of privilege to the communications of in-house counsel is complex, particularly given the interplay of their roles in both the business and legal affairs of a company.[19] For example, in-house counsel are typically asked to advise management and employees about legal issues, to draft contracts and to perform routine legal services while also frequently holding executive positions and providing business advice. In determining whether privilege attaches to any given communication, the nature of the relationship, the subject matter of the advice and the circumstances in which it was sought and rendered will be key.[20]

As a starting point, both Canada and the United States typically recognize attorney-client privilege with respect to communications to and from in-house lawyers, so long as the other criteria for privilege are met. Generally, "[attorney]-client communications by corporate employees with in-house counsel enjoy the privilege," but "no [attorney]-client privilege attaches to advice on purely business matters even where it is provided by a lawyer."[21]

The Supreme Court of Canada has held that the nature of the advice given is determinative: "if an in-house lawyer

is conveying advice that would be characterized as privileged, the fact that he or she is 'in-house' does not remove the privilege, or change its nature."[22]

American courts have confirmed that documents prepared by in-house counsel for the predominant purpose of the provision of legal advice will be protected by privilege.[23] While there is a general presumption that a lawyer working in a legal department of a corporation is giving legal advice, and an opposite presumption for a lawyer working on the business side, the lawyer's position within the organization is not necessarily dispositive of the issue.[24]

Some other jurisdictions do not recognize privilege protection for communications with counsel employed by the corporation. For example, in-house counsel involved in investigations in the European Union have effectively been stripped of privilege protection. In *Akzo Nobel*, the ECJ held that "[i]t follows, both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer."[25] *Akzo Nobel* does not, however, extend to invalidate the privilege that applies in domestic member state proceedings.[26]

Other European Union member states, including France and Italy, also do not recognize any privilege attaching to communications with in-house counsel even when legal advice is involved. In France, outside counsel have "professional privilege" similar to attorney-client privilege, but in-house counsel only have confidentiality obligations based on the employer-employee relationship because they are precluded from being members of the bar.[27] Similarly, in Italy, in-house counsel are prevented from being members of the bar, "so they do not enjoy any protection of legal privilege."[28]

Accordingly, in countries that do not recognize privilege protection for in-house counsel, engaging external counsel to direct the investigation will be vitally important to minimize the risk of unwanted disclosure of communications relating to and arising during the investigation.[29] Use of external counsel is also beneficial in that it may increase the credibility of the investigation by reducing the perception of conflict between the interests of a company's management and the interests of its employees.[30]

To whom does the privilege belong?

Ownership of privilege also may vary depending on the nature of the privilege, and between jurisdictions. In North America, it is well-settled that attorney-client privilege belongs only to the client, not the lawyer. When the client is a corporation, only the corporation and not any of its individual officers, directors or employees have the authority to waive it. Subject to very limited exceptions, lawyers can only disclose privileged information with the client's express permission.[31]

In Canada, the recent decisions involving criminal charges brought against former Nortel Networks Corporation executives demonstrate the consequences of this principle both for individuals who provide information during an internal investigation and for their attorneys.[32] Prior to the commencement of the criminal trial and following Nortel's waiver of privilege over information generated during its internal investigation, the Ontario Superior Court of Justice ruled that the prosecutors were at liberty to subpoena the Canadian lawyers who had represented the executives when they were interviewed during an internal investigation by Nortel to testify about their recollection of what their clients had answered during those interviews. While the lawyers' advice to their clients remained privileged, the information given by the executives to the third-party examiners was not. Notwithstanding Nortel's waiver of privilege, the U.S. lawyers who had conducted the investigation refused to produce their notes of those interviews and to attend court in Canada, and no formal record of the interviews had been prepared. Ultimately, despite the court's recognition that the lawyers for the executives had participated in the interviews for the purpose of giving legal advice to their clients, the court compelled their testimony about the factual information disclosed by their clients during their interviews, recognizing, however, that such an order "should only be resorted to and permitted where there are extraordinary

circumstances that preclude any other option."[33] Notes made by the lawyers during their clients' interviews were determined to be protected from disclosure by litigation privilege, but were to be used by the lawyers to refresh their memory for the purpose of their testimony.

What about communications with third parties?

Many internal investigations involve the participation of forensic accountants or subject matter experts. In planning the investigation, it is important to consider whether the work of those experts and their communications with instructing legal counsel will also be protected under the umbrella of privilege.

In Canada, while litigation privilege is broad enough to protect communications between an attorney and a third party for the dominant purpose of litigation, at least one appellate court has indicated that attorney-client "privilege ought to extend only to third party communications that are in furtherance of a function which is essential to the existence or operation of the relationship between the [lawyer] and the client."[34] Privilege will therefore be tied "to the third party's authority to obtain legal services or to act on legal advice on behalf of the client."[35] If the third party does not stand in the place of the lawyer or the client for the purpose of obtaining legal advice, it is unlikely that privilege will attach to communications with the third party.

In North America, it appears that communications with employees for the purpose of gathering evidence during an internal investigation will be protected. In *Upjohn Co. v. United States*, the United States Supreme Court held that privilege applied to communications with any employee providing information necessary for the corporation to obtain legal advice.[36] In that case, the corporation used an employee questionnaire to investigate allegations that its foreign subsidiaries had made suspect payments to government officials in other countries. The court held that such communications were privileged because: (1) the information in question was not otherwise available to senior management and was required to obtain legal advice; (2) the communications related to matters that fell within the scope of the employees' duties; (3) the employees were aware that the information they provided was to allow the corporation to obtain legal advice; (4) the questionnaire included a statement regarding the legal implications of the investigation; and (5) the communications were treated as highly confidential.[37]

In Canada, courts have accepted a similar agency theory that affords protection to information provided to legal counsel by employees. As described by an Ontario court: "Canadian courts have extended a broad protection of communications among a corporation's employees, and have accepted that any employee can be engaged by the corporation to pass on information to [an attorney], for the purpose of receiving legal advice."[38]

Waiver

Waiver may occur voluntarily, when a client expressly waives privilege by intentionally disclosing privileged communications to a third party, or inadvertently. Guarding against inadvertent waiver is an important consideration in any investigation.

While some courts have recognized the ability to waive privilege selectively by volunteering information to a government body for a specific purpose while preserving it for all other purposes,[39] others have not.[40]

Whether waiver has occurred is a highly fact-specific inquiry. For example, in *Ratliff v. Davis, Polk & Wardwell*, the United States Court of Appeals for the Second Circuit determined that privilege was waived when a

client authorized its law firm to deliver documents to the Securities and Exchange Commission, despite their having been originally sent to the law firm for the purposes of obtaining legal advice.[41] Privilege has also been found to have been waived over documents provided to regulatory agencies despite having been provided on the express basis that their submission did not constitute a waiver of privilege.[42]

Distribution of privileged documents to non-lawyers within an organization also may cause privilege to be waived. In *Wrench LLC v. Taco Bell Corp.*, the court stated that "while corporate executives may share legal advice with lower-level corporate employees without waiving the privilege, the privilege extends only to those employees with a 'need to know,' including those employees with general policymaking authority and those with specific authority for the subject matter of the legal advice."[43]

Applying the "need to know" principle, privilege will be lost "only when the communications are relayed to those who do not need the information to carry out their work or make effective decisions on the part of the company."[44] While no equivalent rule exists in Canada, the broad circulation of legal advice may similarly result in waiver of privilege because confidentiality is essential to establishing privilege.[45]

In certain circumstances, it may be advantageous for an organization to waive privilege that would otherwise apply to certain of its communications in order to qualify for "credit for cooperation" with regulators, which may narrow the scope of allegations or result in a reduction of potential sanctions. Conversely, inappropriate claims of privilege may be viewed unfavourably by regulatory bodies. In recent years, there have been a number of pronouncements from both the Serious Fraud Office and the Financial Conduct Authority in the United Kingdom denouncing improper claims to privilege and indicating that such claims may not receive cooperation credit.

In all cases, the value in obtaining such credit must be weighed against the risks associated with a waiver of privilege over the results of an internal investigation.

Waiver of privilege may result in the regulator learning of wrongdoing of which it may otherwise have remained unaware. Prejudicial information may also find its way into the hands of potential civil claimants in other jurisdictions. The decision to waive privilege therefore involves a complex balance between cooperating with authorities and behaving transparently, and an organization's exercise of a fundamental right in conducting an investigation into its internal affairs.

Conclusion

Privilege issues in cross-border internal investigations can be complex. Companies operating in numerous jurisdictions should endeavour to determine which laws of privilege will apply at the outset of the investigation in an effort to know which communications and documents are likely to be protected by privilege at which stage of an investigation, and which are not, in order to best protect their sensitive information. Given the variance in the application and scope of privilege across jurisdictions, reliance on privilege to prevent disclosure in an investigation must be done cautiously and deliberately.

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way, the existing paradigm ignores the real victims of grand corruption, the citizenry of the nations where the bribery and corrupt business practices have already been deployed for financial and business gain. Additionally, the investigations, criminal charges, fines and settlements take years to develop. During that delay, the beneficiary of the corruption uses and hides the illicit gains while the populous of the affected nation continues to suffer.

We must reexamine the way we punish those who participate in grand corruption, and we must seek to impose sanctions on both parties to the corrupt act. In 2010, the U.S. federal government unveiled a new effort to fight grand corruption by focusing its efforts on those who take the bribes and steal national funds. To this end, the Kleptocracy[8] Asset Recovery Initiative was formed with the goal of recovering assets stolen by foreign officials and laundered or secreted in the United States.[9] According to recent press coverage, since its inception, the Kleptocracy Asset Recovery Unit has brought twenty-five cases against twenty foreign officials seeking seizure and disgorgement of approximately US$1.5 billion.[10] As described above, these cases are reliant on the mutual legal assistance paradigm and forfeiture. By its own estimate the Kleptocracy Asset Recovery Unit has recovered roughly $120 million—or 8%—out of the targeted $1.5 billion.[11]

The solution cannot be to do away with the current models based on mutual legal assistance, criminal penalties and forfeiture. A better alternative is to complement the criminal prosecution of grand corruption cases with civil asset recovery strategies, which would allow the damaged victim—in these cases a government or government instrumentality—to bring claims that would otherwise not be available in the criminal realm, including third-party claims against aider and abettors and others who participate in the corruption or knowingly assist the corrupt actors. In other words, civil asset recovery allows the plaintiff to trace the stolen funds or any other assets purchased with those proceeds of corruption as well as to file actions against third parties that might have facilitated or been the recipient of those stolen corruption proceeds.

There are now guides, books and compendia focused solely on civil asset recovery. In this regard, asset recovery has "arrived," and as described in this article, the recoveries still only represent a tiny fraction of monies derived from grand corruption. This is, in part, a result of four main challenges that would-be civil plaintiffs continue to face when contemplating civil claims based on grand corruption: (1) a lack of cooperation between the private and public sectors; (2) a lack of an effective damages model; (3) a lack of funding for litigating corruption cases; and (4) a lack of standing to bring the claims. Each challenge is explored in turn.[12]

Lack of Cooperation Between Private and Public Sectors. As previously mentioned, the government-to-government model for fighting corruption is not the only solution because, for example, it does not allow victims of fraud or corruption to trace the proceeds of corruption and bring claims against third parties. Many times, third-party claims are the victim government's or state-owned enterprise's best chance for a large recovery of assets and value. Therefore, there is a need to "marry the resources" of the private and public sectors and to break down walls of mistrust, suspicion, rivalry and resistance that often exist between the two. Failure to overcome this challenge leads to only one thing—the bad guys win.

Lack of Working Damages Model. A major challenge in corruption cases is the quantification of corruption-related damages. The quantum of damages in a particular action will depend on the underlying facts, the remedy sought and the type of victim asserting the claims. For example, corruption affecting a country's infrastructure may result in damages to the public, including inadequate or dangerous infrastructure, displacement of people, damage to the environment, reduced public expenditure (because of depleted public funds as a result of the corruption) and reduced foreign investment (due to loss of confidence as a result of the perceived pervasiveness of corruption). In turn, the members of the public may suffer additional

losses, including, but not limited to: (1) loss of quality of life, as lack of proper infrastructure may result in inadequate water, power, housing, education, etc.; (2) loss of earnings, given that inadequate water, power, housing and education may result in a loss of qualified workforce and, thus, reduction in employment and trade, perpetuating the poverty cycle in many countries; and (3) increased taxation because taxation is often necessary to make up for the shortfall of depleted funds.[13] In these cases, quantifying the damages wrought by corrupt actors is a tremendous challenge.

In the United States, depending on the underlying facts, a plaintiff may recover not only the stolen assets or proceeds of corruption, but also exemplary or punitive damages. Being able to seek punitive, exemplary or moral damages not only serves as a deterrent to corrupt government officials, but also aids in making the victim as whole as the circumstances allow. Punitive damages, however, are not available in many countries.[14] As such, it is worth exploring the possibility of moving toward a presumed damages model that would enable and even incentivize countries to bring corrupt actors to justice.

Finding Litigation Funding. Corruption cases often face a critical shortage of funding. Many times, this is because corrupt actors have stolen so much from the government coffers that there is little left in them to fund critical services, let alone corruption investigations and cases. Further, because the global recovery record is so dismal, there is a sentiment that commencing a corruption case is oftentimes a futile example of "throwing good money after bad."

Fortunately, we are in an era where litigation funders are beginning to fund asset recovery cases focused on grand corruption. If litigation funders can become comfortable with the risks and rewards in the corruption-related asset-recovery space, then real (albeit somewhat expensive) money will be available to fund these cases, especially if the plaintiff is such that the political risks associated with regime change can be minimized. In the end, the corrupt actors hire the best counsel and experts that money can buy. Indeed, they have the resources to do it because of their illicit acts and gains.

The Standing Conundrum. Although many in the corruption and asset-recovery practice have been attempting to develop solutions to the aforementioned challenges, the standing conundrum remains the most challenging obstacle to bringing civil corruption actions. Often, those that have the right, or standing, to bring these cases—civil or criminal—are government actors that either cannot or will not bring them. Many times, the offices of these government actors are controlled by the corrupt actors or their co-conspirators. For that reason, regime changes often bring about the necessary political will and serve as a catalyst for the incoming government to bring charges of corruption against the previous administration and, it is hoped, civil asset-recovery cases, too.

The legal community needs to find new ways of bringing corruption cases. If countries that have been victims of corruption had statutes allowing for private prosecution, corrupt government officials and their cronies would have much to fear. Statutes or court decisions that allow for private prosecutions in corruption cases are rare, however. Recently, France recognized a non-governmental organization's standing in a corruption case.[15] Other possibilities to overcome the standing conundrum may include: (1) treating corruption claims like corporate derivative actions; (2) modified False Claims Act or qui tam claims; (3) using criminal claims akin to those brought by private actors in certain civil law jurisdictions; and (4) basing claims on violations of human rights laws.

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In short, corrupt government actors act with impunity in many jurisdictions around the world and engage in acts of grand corruption that devastate their societies. Grand corruption not only deprives countries and their citizens of funds and assets, but it also undermines development, erodes democracy and violates basic human rights. Right now there are few real consequences for this despicable behavior. Fighting corruption might not be easy, but for the sake of future generations, it is essential that the legal community be courageous and overcome the size and complexity of the task ahead.

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12 Arguably the lack of reliable statistics is a fifth major challenge area. Simply, if there are no reliable statistics, there is no way to understand the magnitude of the problem. As a result, it is hard to tailor appropriate solutions to the corruption problem. Currently, the World Bank's StAR Initiative is working to remediate the problem and provide reliable statistics. Anyone can access StAR's database at http://star.worldbank.org/corruption-cases. Nonetheless, the challenge remains, particularly as to statistics at the nation-state level downward to smaller units of government. If anything, the system that exists today with rankings such as Transparency International's Corruption Perception Index, while invaluable in bringing the issue to light, may act as a disincentive to accurate gathering and reporting of corruption-related losses to governments out of fear that such information gathering and dissemination will hurt the country in attracting investment.

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now often involved in initial conversations with company management and whistleblowers in order to assist in conducting preliminary assessments of the allegations to be investigated. For example, an experienced forensic advisor may assist in making a preliminary determination about the nature of the allegations, including: (1) determining the type of wrongdoing, such as manipulation of accounting records, misappropriation of assets or bribery and kickbacks; (2) identifying key personnel that are suspected of being involved in the activity under investigation; and (3) outlining potential methods for executing the scheme.

In defining the type of wrongdoing under investigation, corporate misconduct generally falls into two broad categories: (1) fraud; and (2) bribery and corruption. Investigating fraud allegations usually involves gaining an understanding of a company's accounting policies and procedures and testing accounting systems and processes to determine whether those policies and procedures were followed by company personnel in conducting business transactions. For example, a fraud investigation conducted on a U.S. company often requires a determination as to whether accounting transactions were made in accordance with generally accepted accounting principles (GAAP). On the other hand, investigating bribery and corruption usually involves gaining an understanding of a company's compliance program and testing business relationships and transactions to determine whether they comply with applicable laws and regulations. For example, a bribery and corruption investigation requires an evaluation as to whether business dealings with foreign government officials comply with the FCPA.

Because the overall approach to each of these types of investigations can vary greatly, an initial assessment of the allegations is essential in determining the overall scope and timing of the investigation. Using advanced knowledge of various types of wrongdoing and investigation techniques, a forensic advisor can be leveraged to provide guidance on specific areas of focus for the investigation, as well as a proposed timing and budget for each phase of the investigation.

In addition to the general approach, identifying immediate concerns that must be considered and addressed at the onset of the investigation is important in maintaining the integrity of the investigation. An experienced forensic advisor can assist in scoping and prioritizing tasks, and can work with the company to plan the investigation accordingly. For example, if a forensic advisor determines that there is a severe weakness in internal controls or a substantial risk of destruction of critical data or documentation, he or she may advise the company to take preemptive measures to remove or

supervise key personnel and to secure important items such as laptops, USB drives, network data and hard-copy files.

Assembling a Multinational Team

Depending on the nature of the allegations and the proposed timing and budget of the investigation, a forensic advisor may assist in determining whether it is more effective and efficient to deploy one team for the entire investigation or several teams that will work simultaneously, but separately, in local areas related to the investigation to carry out investigation objectives. In considering the scope of the investigation and the global regions potentially included in the allegations, companies should consider utilizing the assistance of local office personnel in conducting an international investigation. One of the biggest challenges in conducting cross-border investigations is ensuring that local laws and regulations are followed. Several countries have enacted strict laws and regulations regarding personal and data privacy. For example, the European Union developed Directive 95/46/EC, which limits the collection and use of personal data outside of the EU.[11] Laws and regulations like Directive 95/46/EC can be a significant hurdle in an investigation or a dispute involving a U.S. company with foreign subsidiaries.

In situations like these, a forensic advisor can work with the company, legal counsel and local offices or personnel to understand and plan an investigation that adheres to local laws and regulations. Often, forensic advisory firms, especially larger ones, have a global presence with local offices and personnel in many countries. Local forensic resources and experienced advisors often have knowledge of the local market, vendors, customs and cultural norms that can significantly enhance the team. For example, an offer to "get a cup of coffee" in Brazil can often signify payment of a bribe, and moon cakes in China are often given as gifts accompanied by cash, luxury goods or other bribes. Such terms and transactions can be searched and analyzed in email and other data by forensic advisors and experienced counsel who know what to look for.

When utilizing a multinational team, local personnel can also assist with coordinating logistics, such as travel to and around local areas, to ensure safety or deployment of team members to locations where key personnel are located. Local personnel can also assist with securing company assets when this is an immediate concern or preserving key data and documents in situations where these items may be located abroad.

Use of Information Technology

With the increased reliance on information technology (IT) to facilitate global operations, another important aspect of conducting international investigations is data preservation, collection and analysis. A forensic advisor brings specialized knowledge of key financial data, types of systems in which that data may be stored and techniques that may be used to obtain that data. An experienced forensic advisor can assist with understanding company IT systems and variations in accounting systems and with accessing critical data such as email servers, employee laptops and mobile devices in a forensically sound manner.

After data has been retrieved, forensic technology professionals can help to organize and analyze data, especially for large-scale data productions. For example, forensic technology professionals are able to organize data using advanced programs, such as Relativity, to house documents like emails, correspondence, spreadsheets, company policies and procedures, and financial data. Using Relativity, forensic technology professionals are able to run keyword searches and other queries to identify relevant documents and to reduce document review efforts. Forensic technology professionals are also able to use advanced software programs like Monarch to extract data from .pdf image files and import that data into more user-friendly formats for indexing and analysis, such as text, Word and Excel. Forensic technology professionals also use visual analytic programs like Tableau to analyze data, often identifying trends and outliers not evident through other means. In addition, Tableau can be used to present findings in a simplified and compelling format to stakeholders.

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Additionally, forensic technology professionals are experienced in using powerful software such as SQL Server, which can be used to analyze large amounts of financial data, like general ledger records, by running complex queries. Another very important tool in the forensic advisor's toolbox is predictive data analytics. Predictive analytics software can help hone in on relevant data in large data sets by using unique data characteristics, patterns of activity and advanced algorithms. For example, if a forensic advisor identified several hundred corrupt payments within a small data set that were frequently described in the disbursements ledger with the terms *help fee* or *facilitation fee*, predictive analytics could be used to identify additional similar transactions over a larger data set of millions of transactions. Predictive analytic software lets the data define itself, characterizing transactions by certain text string keywords (e.g., help fee), date ranges, payees, payers, amounts and other data attributes. In the example above, the additional transactions identified with predictive analytics would still require review to assess propriety; however, the reduced level of effort required to review *spotlighted* transactions rather than *all* transactions can result in significant investigative cost savings. In addition, as more and more corrupt payments are identified and analytics are rerun, the accuracy of the software in identifying additional corrupt payments for review increases during this iterative process. The DOJ has approved the use of predictive analytics on past large-scale corruption investigations, and forensic advisors can assist with developing reasonable, cost-effective solutions that are acceptable to regulators.

Conducting Interviews

The use of a forensic advisor can also be particularly important in conducting interviews, especially if the investigation involves analysis of complex financial data or fraud schemes. Forensic advisors are not only knowledgeable about accounting policies and procedures, but also about identifying accounting irregularities, uncovering weaknesses in internal controls and analyzing complex data in various formats.

With this specialized knowledge, a forensic advisor may provide strategic guidance on which personnel to interview, specific questions related to the interviewee's responsibilities and any deviations in those responsibilities, examples of accounting or other financial irregularities that fall under the purview of the interviewee and particular documents that may relate to the interviewee's role in the scheme. For example, a forensic advisor with a background in accounting or finance is usually in the best position to develop specific interview questions related to the structure of accounting systems, the process for booking entries to the general ledger and the internal controls that should be in place.

A forensic advisor may also assist in facilitating interviews by enlisting a local team member who understands native culture and customs as part of the interview team. While many foreign business professionals speak English, it may be more effective to conduct interviews in an interviewee's native language. This generally ensures that the interviewee is comfortable and minimizes the risk of information errors due to language barriers or interpretation issues. Forensic advisory practices, especially at larger firms, typically employ individuals with diverse skill sets and backgrounds and often include team members who speak multiple languages, allowing for a diverse pool of resources.

Engagement of a Forensic Advisor and Establishing Roles

Depending on the scope and objectives of an investigation, the role of a forensic advisor can vary and be tailored to the specific needs of the investigation. Often, this depends on who engages the forensic advisor and the purpose for which he or she is engaged. Forensic advisors are primarily engaged by: (1) a regulatory authority; (2) a company; or (3) outside counsel. Once a forensic advisor is engaged, the forensic advisor's role can range from assisting with one phase of the investigation to leading the entire investigation with limited guidance or involvement of the engaging party.

A forensic advisor can be engaged directly by a regulatory body, such as the SEC, to investigate a company's adherence to securities laws. For example, a forensic advisor can assist the SEC in investigating purchases and sales of a public company's securities by its directors and officers to ensure that the directors and officers are not engaging in insider trading. A forensic advisor can also be engaged by the DOJ to conduct an investigation of a company's compliance with a specific regulation. For example, the DOJ can engage a forensic advisor to assist with assessing an international bank's compliance with anti-money laundering (AML) regulations by testing the accuracy of the bank's AML software in identifying suspicious transactions and reviewing the bank's filing of suspicious activity reports.

On the other hand, a forensic advisor can be engaged by a company's board of directors, audit committee, compliance department or management to conduct an internal investigation, either in conjunction with a regulatory authority's investigation, or as a proactive measure, which is becoming commonplace. As part of an internal investigation, a forensic advisor can conduct an asset or transaction tracing analysis, document or email review, data imaging and organization, employee interviews or due diligence on related parties. For example, a forensic advisor can be engaged by the board of directors or an audit committee to investigate whistleblower allegations that company personnel are misappropriating assets through the use of fictitious vendors and payments. In this scenario, a forensic advisor would perform vendor due diligence and an asset tracing analysis to determine which vendors are fictitious and which employees are benefiting from

the scheme. A forensic advisor can be engaged by the compliance group or management to conduct a risk assessment related to bribery of foreign officials in order to procure business by interviewing company employees and analyzing employee expenses related to conducting business abroad.

A forensic advisor can also be engaged by a company to provide guidance on proper accounting for specific transactions involving global companies that are subject to GAAP and international financial reporting standards (IFRS). An increasing challenge with global operations is the variation in accounting standards used by companies. In 2002, the Financial Accounting Standards Board, the regulatory accounting body for U.S.-based companies, and the International Accounting Standards Board, the regulatory accounting body for foreign-based companies, agreed to converge U.S. and international accounting standards.[12] But, because of the complexities of combining the two sets of standards, the transition has yet to be completed.

As a result, discrepancies in accounting guidance related to foreign operations continue to be an area of concern for many global companies because of the increased potential for fraudulent financial reporting. For example, a parent company headquartered in the United States will be governed by U.S. GAAP while a foreign subsidiary may be governed by IFRS. The company's subsidiary will thus prepare its financial statements pursuant to IFRS, and its U.S.-based parent will prepare its financial statements pursuant to GAAP. In this case, the assistance of an experienced forensic advisor may be critical in conducting an international investigation because it will involve interpretation and analysis of foreign financial statements and reconciling them to U.S. reporting requirements.

Depending on the nature of the investigation, a forensic advisor can be engaged by multiple parties working together to conduct an investigation. For example, a regulatory authority like the DOJ can launch an investigation, based on whistleblower allegations, into a company's compliance with the Office of Foreign Assets Control (OFAC) or counter terrorist financing regulations, both aimed at prohibiting the financing of terrorism through international trade relations. A forensic advisor can be engaged by the DOJ or by the company and outside counsel as an anticipatory measure to conduct an independent investigation into the allegations prior to charges being filed. In a situation like this, a forensic advisor may conduct a transaction tracing analysis focused on trading activity with designated high-risk countries to determine whether a company has engaged in business relations with foreign individuals or entities on the OFAC restricted list.

The Evolving Role of the Forensic Advisor

In response to the burden of litigation, the severity of sanctions for violation of laws and regulations and the potential damage to a corporation's reputation, companies have shifted toward proactive rather than remedial measures related to compliance. Companies are realizing that it is far more effective to invest time and money on the front end to implement proactive measures that deter wrongdoing rather than employing costly reactive measures on the back end. Thus, the reliance on forensic advisors has expanded from solely investigating allegations of misconduct to assisting with development of a strong internal compliance program to mitigate risk.

With the propensity toward proactive measures to comply with laws and regulations, companies are engaging forensic advisors to assist in building and implementing programs to deter fraud and corruption. For example, forensic advisors are often engaged to conduct risk assessments to determine gaps in company policies and procedures, red flags in foreign business activities, weaknesses in internal controls and issues with personnel management. Once a risk assessment is conducted, forensic advisors work with the company to develop and implement policies and procedures and to establish education initiatives to address the identified areas for improvement.

Conclusion

The role of the forensic advisor will continue to evolve in response to societal demands for corporate responsibility

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and the evolution of developing countries. As higher expectations are placed on corporations, especially those with global operations, regulatory enforcement actions and internal investigations will become more prevalent, and reliance on experienced financial advisors will become even more crucial to ensure effectiveness of the investigative process.

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category for other matters classified as secret by the PRC government. Importantly, Hong Kong is treated as a foreign country for purposes of the State Secrets Law, so state secrets data sent to Hong Kong is considered an export under the law. This factor looms large for the many international law firms with an office in Hong Kong but not mainland China.

The export of information that is classified as a state secret before it has been reviewed and cleared of sensitive information can violate the State Secrets Law and subject the company and its attorneys to severe administrative law and/or criminal sanctions. In 2012, for example, Chinese regulators classified accounting data on local Chinese firms as a state secret, rendering it illegal to export such data abroad, even when such companies were listed on foreign stock exchanges. This classification ensnared the Chinese affiliates of the "Big Four" accounting firms, which had been required by the U.S. Securities and Exchange Commission (SEC) to provide audit materials for U.S.-listed companies but were prohibited by Chinese regulators from exporting these "state secrets." The dispute was only resolved when the SEC entered into a memorandum of understanding with its Chinese counterparts, which allowed limited information to be exported after screening by Chinese regulators.

While the State Secrets Law has seldom been publicly enforced, recent history cautions that the consequences of violations can be severe and that investigators should be mindful of the expansive definition of state secrets. In 2010, for example, two foreign nationals in separate cases were given lengthy prison sentences for the illegal export of "state secrets" related to the location of oil and gas resources in China and the government's purchases of iron ore. These convictions occurred under the previous iteration of the State Secrets Law, but the conduct leading to the convictions would squarely apply to the current version of the law.

To ensure they stay on the right side of the State Secrets Law, investigators should consider conducting the entire document collection and review process in China to allow for documents to be reviewed and cleared of any secrecy concerns before they are shared outside China. Engaging a reputable PRC-registered firm can ensure that documents with potential state secrets are properly excluded from export or are redacted before they are exported. This two-step process can be time-consuming for a multinational corporation, but it ensures compliance with local law and, more importantly, that the investigation into potential wrongdoing does not itself cause further legal trouble for the client.

Other Chinese laws are also relevant to handling sensitive data in the PRC, even if it is not exported. Regulations on data privacy impose duties of privacy on various actors, including government and commercial organizations. PRC criminal laws prohibit the unlawful disclosure to unauthorized third parties of personal data collected in the financial, telecommunications, transportation, education or medical sectors, despite not clearly defining the concepts of personal data or unlawful disclosure. And the consequences of running afoul of these laws can also be severe. In one well-known example, a British corporate investigator who was part of an internal investigation into GlaxoSmithKline PLC was prosecuted and convicted of illegally collecting private information, leading to a fine and a sentence of two and a half years in prison.

Accordingly, before the investigative team begins gathering documents, especially those not yet in readily accessible sources (such as employee emails on the work server and personal Internet-use records), investigators should consider how to access such records legally. In an internal investigation requiring a deep dive into employee files and email, investigators should be aware that the personal data of employees and customers may be present even in unexpected places.

These risks should be analyzed in advance, especially in light of the increasingly sprawling and redundant server networks of international law firms, cloud storage providers and document review platforms. Simply put, investigators should "know your data"—your documents may not be located where you think they are, and they may not contain the information you assume they do. Because of the often-undefined contours of Chinese laws

governing state secrets and data privacy, and the severe consequences of noncompliance, outside foreign counsel should work with experienced and trusted local counsel to ensure that a well-intentioned internal investigation does not inadvertently exacerbate the client's legal situation.

Interview Witnesses to Get the Right Information and Protect the Client

Interviews are a crucial part of any internal investigation, but can be challenging in a cross-border investigation. Language barriers and cultural misunderstandings can cause interviews to be useless at best and counterproductive at worst. Indeed, the worst case scenario is that the highly confidential nature of an interview in an internal investigation is disclosed by an employee who does not fully understand the need to keep the interview confidential. To mitigate the risk of such disclosures, outside counsel and company personnel should explain at the outset of an interview that cooperation and confidentiality are important, fashioning an *Upjohn* warning tailored to that employee. In our experience, an effective combination is to conduct interviews with a team, pairing a local attorney who is a Chinese native speaker with an experienced investigator trained in U.S. law. This allows local counsel to focus on nuances in a witness's testimony and spot any potential issues in Chinese law while U.S. counsel can steer the interview toward areas relevant to potential liability.

But even the *Upjohn* warning, a familiar part of any corporate internal investigation in the United States, presents challenges in the Chinese context. U.S. counsel are familiar with the *Upjohn* warning, which warns an employee that the investigating lawyers represent the company and that the company, not the employee, controls the privilege. But if a U.S. company and its counsel seek to interview a Chinese national working for a subsidiary in the PRC, what embedded risks and strategic considerations should be carefully considered from the outset? Blind reliance on a standard U.S.-style *Upjohn* warning is often not enough to protect the company from subsequent claims by the employee based on local law.

Because U.S.-style attorney-client privilege does not apply in China, local employees in China are unlikely

to fully appreciate the standard *Upjohn* recitation. The result is that employees who are terminated based on information they shared in an internal investigation interview may challenge that termination in court by arguing that they did not receive fair notice of the implications of the interview. To combat this, it is crucial to ensure that the attorney-client privilege clause in the *Upjohn* warning is clearly explained with the proper context to the employee who is receiving the warning.

Moreover, it is important to properly document the *Upjohn* warning for future reference. Chinese laws on employee discipline and termination differ sharply from U.S. analogs. Labor tribunals that hear employment complaints and suits are widely perceived to be pro-employee, and written evidence carries far more weight than oral testimony. Companies should collect sufficient evidence—the authenticity of which is forensically sound—during an investigation to mitigate the risk that an employee terminated for conduct identified during an investigation later would have grounds for a wrongful termination suit.

When an employee speaks only the local language, there are additional challenges to delivering an effective *Upjohn* warning. To avoid this, the *Upjohn* warning should be translated into the local language by a native speaker on the legal team (not a simple interpreter who likely will not understand the full context of the interview) and confirm that the written script satisfactorily establishes the nuance of legal concepts. The Chinese *Upjohn* warning should be read at the beginning of the interview, and the documentation of the *Upjohn* warning should appropriately reflect that the employee understands its contents. The script should be initialed by the employee and attached to the memo memorializing the interview.

Get Smart on the Local Context

Even beyond the legal issues described above, before beginning any investigation in China, a prudent investigator should be sure to develop at least a minimal working knowledge of the investigation's context in Chinese society. The investigator's credibility with Chinese regulators, local client representatives and even third-party vendors can be won or lost in a first impression, with potentially serious implications through the course of the investigation.

In investigations of possible FCPA (Foreign Corrupt Practices Act of 1977) violations, for example, the eccentricities of the Chinese economy and government pose unique challenges. In China, state-owned enterprises comprise a substantial portion of all economic activity, meaning that a vast pool of individuals are considered "foreign officials" to whom corrupt payments are prohibited by U.S. law (and any data on a state-owned enterprise is, in turn, more likely to be considered a "state secret"). Because of the pervasive influence of the Chinese Communist Party, many individuals who would not otherwise be "foreign officials" will still be covered under the ambit of the FCPA. And any anticorruption investigation will occur against the backdrop of the recent crackdown on domestic corruption by the government of President Xi Jinping, which has led to the arrest of more than 100 senior officials and reverberated throughout the Chinese economy.

Because many investigations in China are linked to prominent state-owned enterprises and can implicate core interests of the Chinese government, recent geopolitical tensions between China and the United States will loom large. Where an investigation appears neutral at first glance, but may appear to Chinese regulators as a zero-sum game with foreign competitors, the PRC government may assert itself in unexpected ways.

Therefore, foreign investigators should be sure to know which way the proverbial wind is likely to be blowing across any internal investigation in China. Even better, foreign investigators should partner with counsel who have experience in China and the necessary language and cultural skills to hit the ground running.

Conclusion

Entire books can be written on conducting a corporate internal investigation in China, and it can take an entire

legal career to understand the nuances of just a single area of Chinese law. But the core ideas and primary pitfalls of conducting an internal investigation in China should be remembered and revisited as an investigation unfolds and becomes more complex. Based on our experience conducting internal investigations in China, the early planning and adoption of a disciplined, pragmatic approach to resolving these potential issues will go a long way toward maintaining the integrity of an internal investigation and avoiding costly consequences.

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Endnote

1 *See, e.g.*, *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 495-96 (S.D.N.Y. 2013).

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by Argentine officials.[19] In other words, Argentina's Penal Code does not apply to crimes committed abroad by Argentine nationals who are not Argentine officials, i.e., the class of Argentine nationals that—for obvious reasons—could be expected to be more often involved in foreign bribery. At present, therefore, Argentina has jurisdiction to prosecute the bribery of foreign officials when it takes place within its territorial limits, but not when it occurs abroad, except for the rare case where the bribe is offered or paid by an Argentine official.

President Mauricio Macri of Argentina (Manvmedia/shutterstock.com)

The Argentina Bill's jurisdictional proposal not only would cure this peculiar deficiency in Argentine law, but also would make Argentina compliant with its obligation under the Anti-Bribery Convention to exercise jurisdiction to prosecute its nationals for offenses committed abroad.[20]

Brazil: Anticorruption Plea Agreements in Limbo

Brazil's Law No. 12846, more commonly known as the Clean Companies Act (CCA), is considered to be one of the toughest anticorruption regimes in the world, as it imposes strict administrative or civil liability on legal entities for acts of corruption committed in their interest or benefit.[21] To date, however, there has been almost no enforcement of the CCA.[22]

Part of the reason for this dearth of enforcement has to do with the CCA's leniency program. Conceived as a key investigative tool under the CCA, the leniency program basically allows legal entities that violated the CCA to enter into a plea agreement with the Brazilian authorities by offering their cooperation to investigate the violation, in exchange for avoiding possible sanctions and mitigating other ones.[23] In practice, though, application of the CCA's leniency program has met substantial opposition.

The major issue with this program is that it authorizes the executive branch of the government—through its Transparency Ministry—to execute plea agreements with legal entities liable for acts of corruption without the intervention or control of any other public institutions.[24] The exclusion of other public institutions encompasses the Federal Public Prosecutor's Office, which operates independently from the other three branches of government and has the specific mission of investigating and prosecuting criminal and civil wrongdoing against the state,[25] including corruption cases.

As expected, federal prosecutors in Brazil strongly have opposed such unsupervised plea agreements between the government and legal entities that the Federal Public Prosecutor's Office is investigating for corruption.[26] Among other things, the federal prosecutors have pointed out that these agreements have been negotiated by executive branch officials working under the authority of politicians who themselves were believed to be involved in the acts of corruption that motivated the negotiations![27]

The objections of the Federal Public Prosecutor's Office to the CCA's leniency program have had a tremendous impact in the context of the renowned *Operação Lava Jato* (Operation Car Wash). Operation Car Wash is the name given to a federal criminal investigation that has uncovered massive acts of corruption in contracts between the Brazilian state-owned company Petrobras and multiple companies in the private sector. Dozens of high-profile politicians and businessmen have been detained or implicated in the investigation.

In early 2016, the government of former President Dilma Rousseff commenced leniency program negotiations with several companies involved in the Petrobras corruption scandal. The exclusion of the Operation Car Wash prosecutors from these negotiations was so heavily criticized that when President Michel Temer replaced Rousseff after her removal from office via impeachment, the government decided to suspend the negotiations.[28] In May 2016, the Transparency Ministry, responsible for the negotiations, explained that the government would wait for the Brazilian Congress to pass a new law for the CCA's leniency program.[29]

Only a few months later, in July 2016, though, the government resumed plea-agreement discussions with the Operation Car Wash companies without waiting for the enactment of new legislation.[30] Interestingly, this time the government conditioned the execution of the plea agreements on the approval of the Federal Public Prosecutor's Office, among other public institutions.[31] As explained above, there is no such requirement in the current CCA—the government can by itself enter into plea agreements,[32] but in this case evidently believed it prudent not to act unilaterally.

Unfortunately, the government's de facto regime for plea agreements did not contribute to further progress in the Operation Car Wash negotiations. When the government was about to finalize the first plea agreement under the CCA's leniency program in September 2016, the Federal Public Prosecutor's Office objected on the ground that the legal entity involved in the agreement was receiving excessive benefits.[33] Moreover, in October 2016, the head of the Transparency Ministry announced that all plea-agreement discussions pertaining to Operation Car Wash had been halted to allow the federal prosecutors to conclude their investigation.[34]

The bottom line is that plea agreements under the CCA's leniency program, i.e., Brazil's main tool in its combat of corporate corruption, are in limbo.

Chile: Enhanced Standards for Anticorruption Compliance Programs

A reputed international anticorruption practitioner observes that, while most international companies have compliance programs in place, it is often the case that these programs are not vigorously enforced within the company, and as result, the robustness of these programs is not sufficiently tested.[35] In Chile, this issue and its legal implications are at the heart of an ongoing, high-profile matter arising under Chile's criminal statute for legal entities.

In Chile, Law No. 20393 follows an omission-based model for the anticorruption liability of legal entities.[36] As explained before, a legal entity is criminally liable under this model not for the corrupt act itself, but for its failure to implement a compliance program designed to prevent the commission of such an act.[37] Thus, a compliance program and its adequacy are central to criminal liability under Chile's corporate anticorruption statute.

In this regard, a distinctive feature of the Chilean system is that a legal entity may have its compliance program certified by entities authorized and regulated by Chile's insurance regulator.[38] The legal effect of this certification—as well as the legal consequences that an entity issuing an improper certification would suffer—remains unclear.[39] No tribunal has yet ruled on this question, and while some maintain that a certification excuses a legal entity from criminal liability,[40] the Public Prosecutor's Office is of the opinion that a certification merely heightens the state's burden of proof.[41]

The meaning and scope of Law 20393's provisions on the adequacy and certification of a compliance program

are currently being explored in the criminal investigation of Corpesca S.A. (Corpesca). The largest fishing company in Chile, Corpesca is under investigation for alleged violations of Law No. 20393 stemming from the bribery, by Corpesca officials, of Chilean legislators responsible for passing a new statute for the fishing industry.

In a recent arraignment hearing, Corpesca denied the charges against it, and stressed the fact that, prior to the commission of the bribery, it had in place a compliance program that was certified by a prestigious external auditor.[42] The Chilean prosecutors acting in the case countered that Corpesca's program basically was a façade adopted to feign compliance with Law 20393.[43] Specifically, the prosecutors alleged that (1) key Corpesca personnel, including its general manager, were not even aware of the program's existence; (2) employment agreements within the company were not modified to incorporate basic aspects of the program; (3) Corpesca conducted no compliance training for its personnel; and (4) the company's compliance officer was not given the autonomy and resources needed to carry out his mission.[44]

Essentially, the position of the Public Prosecutor's Office is that the existence of a certified compliance program alone is not sufficient to avoid criminal liability under Law 20393—rather, effective implementation of the compliance program is required.[45] While this position does not constitute the law in Chile, it does provide clear guidance on how the statute will be enforced in future cases, and ultimately, on the standards to which companies subject to Chilean jurisdiction will be held until—and if—a court takes a different position on this matter.

The recent anticorruption developments in Argentina, Brazil and Chile show that a more robust anticorruption culture is taking hold in Latin America, with concrete consequences in the legal and economic ends of the spectrum. There is no question that Latin American nations still must implement significant structural adjustments to their legal systems, but the anticorruption environment in the region is changing rapidly. As anticorruption efforts remain a focus of governments and prosecutors globally, further developments should be expected in Latin America, which underscores the need for practitioners to stay abreast of future anticorruption trends in the region.

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2 Law No. 25319 art. 1, 6 Oct. 2000, 29506 B.O. 9 (Arg.).

3 *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions arts. 1, 4, 17 Oct. 1997, 37 I.L.M. 1 [hereinafter Anti-Bribery Convention].

4 *See* Organization for Economic Cooperation and Development, *Ratification Status as of 21 May 2014*, OECD, http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last visited 18 Nov. 2016).

5 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Argentina*, OECD 5 (11 Dec. 2014), http://www.oecd.org/daf/anti-bribery/Argentina-Phase-3-Report-ENG.pdf. The OECD Working Group on Bribery conducts on-site visits to the signatory countries "to monitor and promote the full implementation of th[e] Convention." Anti-Bribery Convention, *supra* note 3, art. 12.

6 Poder Ejecutivo Nacional, *Mensaje No. 127*, Argentina.gob.ar (20 Oct. 2016), https://www.argentina.gob.ar/sites/default/files/oa-responsabilidad_penal_personas_juridicas_-_proyecto_pen.pdf [hereinafter Argentina Bill].

7 *Id.* art. 1.

Emerging Anticorruption Trends, continued

8 Anti-Bribery Convention, *supra* note 3, art. 2.

9 Argentina Bill, *supra* note 6, art. 3.

10 *Id.* art. 16.

11 *Id.* at 7 ("In its Article 3, [the bill] proposes to hold legal entities liable for a defect in its internal organization").

12 *See id.* art. 8.

13 15 U.S.C. §§ 78dd1, 78dd2, 78dd3 (2016).

14 *See* U.S. Sentencing Guidelines Manual § 8C2.5(f) (U.S. Sentencing Comm'n 2016).

15 Argentina Bill, *supra* note 6, art. 30.

16 *Id.* art. 31. On this point, the Argentina Bill differs from the laws of other countries using a similar omission-based model for liability of legal entities, such as Chile, whose legislation lists elements that an entity's compliance program "must" contain to avoid liability. *See* Law No. 20393 art. 4, 25 Noviembre 2009, Diario Oficial [D.O.] (Chile) [hereinafter Law No. 20393].

17 Argentina Bill, *supra* note 6, art. 35.

18 Código Penal [Cód. Pen.] [Criminal Code] art. 258 bis (Arg.).

19 *Id.* art. 1.

20 Anti-Bribery Convention, *supra* note 3, art. 4.2.

21 Lei No. 12.846 art. 2, de 1 de Agosto de 2013, Diario Oficial da União [D.O.U.] de 2.8.2013 (Braz.) [hereinafter CCA].

22 *See* Shin J. Kim et al., *Brazil*, *in* Anti-Corruption Regulation 31, 33 (Homer E. Moyer Jr. ed., 2016) ("There have been no conclusive decisions yet on investigations or enforcement proceedings involving foreign bribery in Brazil").

23 CCA, *supra* note 21, art. 16.

24 *Id*.

25 *See* Constituição Federal [C.F.] [Constitution] art. 129 (Braz.).

26 *See* Procuraduria-Geral da República, *Medida Provisória que Trata de Acordos de Leniência é Inconstitucional, Diz PGR*, MPF (26 Apr. 2016, 3:07 PM), http://www.mpf.mp.br/pgr/noticias-pgr/medida-provisoria-que-trata-de-acordos-de-leniencia-e-inconstitucional-diz-pgr.

27 *Id.*

28 Leandro Colon, *Temer Congela Novos Acordos com Citadas na Operação Lava Jato*, Folha de S. Paulo (17 May 2016, 2:00 AM), http://www1.folha.uol.com.br/poder/2016/05/1771923-temer-congela-novos-acordos-com-citadas-na-operacao-lava-jato.shtml.

29 *Id*.

30 As a matter of fact, to this day, the Brazilian Congress has not yet passed new legislation on the CCA's leniency program. *See Projetos de lei Sobre Acordo de Leniência Estão Parados no Congresso*, MPD.org.br, http://mpd.org.br/projetos-de-lei-sobre-acordo-de-leniencia-estao-parados-no-congresso/ (last visited 18 Nov. 2016).

31 *See* Gustavo Uribe & Aguirre Talento, *Governo Temer Prepara Acordo de Leniência com Empresas na Lava Jato*, Folha de S. Paulo (9 Jul. 2016, 2:00 AM), http://www1.folha.uol.com.br/poder/2016/07/1789986-governo-temer-prepara-acordo-de-leniencia-com-empresas-na-lava-jato.shtml; Vinicius Sassine, *Acordos de Leniência com Empreiteiras Investigadas na Lava-Jato Estão Emperrados*, O Globo (19 Sep. 2016, 5:24 PM), http://oglobo.globo.com/brasil/acordos-de-leniencia-com-empreiteiras-investigadas-na-lava-jato-estao-emperrados-20136330.

32 *See supra* p. 4.

33 Sassine, *supra* note 31.

34 Anthony Boadle, *Acordos de Leniência Estão em Suspenso Devido a Pactos de Delação, diz Ministro Jardim*, Reuters Brasil (5 Oct. 2016, 6:04 PM), http://br.reuters.com/article/topNews/idBRKCN1252K2.

35 Juan P. Morillo, *Trends in International White Collar Crime Enforcement*, Int'l White Collar Enforcement, March 2013, at 1, 7.

36 *See* Law No. 20393, *supra* note 16, art. 3.

37 *See supra* p. 2. *See also* Fiscal Nacional del Ministerio Público, *Instrucción General que Imparte Criterios de Actuación Para la Investigación y Persecución Penal de las Personas Jurídicas*, Fiscalia 7, http://www.fiscaliadechile.cl/Fiscalia/instructivos/index.do (last visited 18 Nov. 2016) [hereinafter *Instrucción General*] ("[T]he company's liability does not derive directly from the crime committed by one of its executives or agents, but it is rather a consequence of the noncompliance of the company's direction and supervision duties").

38 Law No. 20393, *supra* note 16, art. 4(4)(b).

39 *See* OECD Working Group on Bribery, *Chile: Follow-up to the Phase 3 Report & Recommendations*, OECD 4 (31 May 2016), http://www.oecd.org/daf/anti-bribery/CHILE-Phase-3-Written-Follow-Up-Report-ENG.pdf ("[M]ore precise clarification of the legal effect of certification would be beneficial").

40 *See* Matteson Ellis, *Anti-Corruption Laws in Chile: Three Things Companies Should Know*, FCPAméricas (19 Dec. 2013), http://fcpamericas.com/english/anti-corruption-compliance/anti-corruption-laws-chile-companies/.

41 *Instrucción General*, *supra* note 37, at 9-10.

42 *See* Matías Balmaceda, *Modelos de Prevención de Papel*, Capital Online (27 Oct. 2016), http://www.capital.cl/capital-legal/2016/10/27/171009-modelos-de-prevencion-de-papel.

43 *See id*.

44 *See id*.

45 *Instrucción General*, *supra* note 37, at 7, 10.

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contracting with public-sector entities and government-controlled companies (i.e., debarment from government contracts). Private-sector entities involved with the corruption scheme unveiled by Operation Carwash were set aside in a sort of economic limbo, restricted from accessing credit lines or prohibited from providing services or selling goods to the Brazilian public sector (the construction companies' main client).

One must conclude that if the company benefited from corruption, then the government must recover the illegal benefits and penalize the executives. If the shareholders are to blame, they must be forced to sell their shares. If corruption is so entangled in the company's culture that it becomes impossible to dissociate one from another, the government must require it to close down. Regardless of the crimes, however, the Brazilian government cannot be irresponsible and compromise the future welfare of hundreds of thousands of families that directly or indirectly depend on the products produced by the companies and/or rely on their jobs to survive. Employing a leniency agreement may be the best way to proceed, as was done with Siemens and many other companies in the United States and other jurisdictions.

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Leniency agreements are not intended to be a way of illegitimately favoring companies involved in corruption; a leniency agreement cannot be seen as a pardon for the wrongdoings or a gesture of kindness. Economic benefits received in connection with the payment of bribes must be returned to the public treasury. Based on the most legitimate public interest, which shall be the main motivator for the leniency agreements, it is a tool for the government to force companies to comply with strict corporate governance standards. This means making them abide by transparency commitments made with the public, clients and suppliers. Public authorities must strive to enter into leniency agreements not to help corrupt shareholders or executives (who should be rigorously investigated and prosecuted) but to rebuild companies and to protect their employees, suppliers, consumers (mostly the public sector itself) and ultimately the society. In the end, for companies that can be redressed to an honest path, and whenever it is in the public interest, it is fundamental to have an adequate body of laws and coordination among the various authorities involved in corruption investigations to enable leniency agreements.

Among the various obligations to which companies should be required to submit when negotiating leniency agreements, we emphasize:

Confession, cessation and collaboration: There shall be full confession of the offenses committed, their complete cessation and effective collaboration, at the expense of the beneficiary company, with the investigations of the public authorities, identifying the individuals directly responsible for the illicit act(s) according to the

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seriousness of the conduct (actions or omissions) so they can be further prosecuted.

Internal investigation, economic appraisal of crimes and compliance program (corporate self-cleaning): Interested companies should promote an effective internal investigation aimed at concrete and objective results, with an independent and multidisciplinary team of corporate investigators (lawyers, auditors, forensic and technological investigation experts, etc.) identifying the wrongdoings and providing an accurate economic assessment of the crimes committed and the benefits received. It should also lead to the development and implementation of an effective compliance program (and not just a "paper program") to be monitored periodically by independent experts and establishing means for prevention of corruption and management of higher risk areas.

The advantages of specialized internal investigations are many, such as the possibility of identifying other unethical activities within the company, as well as internal controls deficiencies that must be mitigated. Once an investigation starts, it is common for other problems to come to light (many of which were not on the company's radar). A good internal investigation will not only allow a company to identify and deter specific instances of corruption but also to pinpoint the areas of its internal reporting process that need to be upgraded in order to avoid future misconduct by its personnel.

The simple act of requiring an internal investigation would by itself be a hefty penalty to the company, as depending on the size of its operations, investigation costs can easily surpass the $100 million mark—not to mention saving a similar amount of the public coffers.

It is also worth noting the distinction between a leniency agreement carried out under the Brazilian antitrust law and those aimed to cure problems in the anticorruption field. The Brazilian antitrust law provides that individuals who are involved in economic crimes (i.e., crimes against competition) may also enjoy the legal benefits of a leniency agreement. This is because, among other reasons, natural persons who report a cartel may point to the wrongdoings of other companies and those responsible for practices harmful to the market. Without the collaboration of individuals, the public authorities would find it difficult or even impossible to reach other offenders involved in cartel practices. On the other hand, in the case of a leniency agreement under the anticorruption legislation (a matter still to be regulated further by the Brazilian Parliament), the company itself and its executives or shareholders are the individuals responsible for the malfeasance. It does not seem appropriate in the context of corruption, where the leniency agreement is a corporate act of the punished company, to allow an extension of the company's leniency agreement benefits to the individuals directly involved in the crimes. In this case, the direct perpetrators of acts of corruption shall be removed from the company at least until their full criminal rehabilitation, pursuant to the Brazilian Criminal Code.

In addition, it is currently necessary to harmonize several Brazilian laws that deal with the issue of administrative misconduct and debarment from government contracts, creating a legal regime of its own. The Brazilian Parliament also needs to pass comprehensive legislation about leniency agreements, compliance and internal corporate investigations (to promote self-cleaning corporate instruments) to cure past malfeasances and to build a steady path for the future of private-sector companies involved with corruption.

Another important issue to be solved by the Brazilian Parliament when implementing a fair, efficient and workable legal framework for leniency agreements and corporate self-cleaning mechanisms is that in Brazil no specific government authority has full power to negotiate a broad leniency agreement covering corruption felonies (many times also connected to economic crimes such as cartel formation). For instance, at the federal level, government agencies include the following: the Transparency Ministry (*Ministério da Transparência* or CGU) that is responsible for opposing and preventing corruption, especially in the public sector; the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* or CADE)

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that is responsible for antitrust violations; the General Attorney's Office (*Advocacia Geral da União* or AGU), responsible for public contracts and public tenders rules and controls; the Federal Court of Accounts (*Tribunal de Contas da União* or TCU), responsible for overseeing the use of public funds and determining if a company is authorized to contract with the public sector; the Federal Public Prosecutor's Office (*Ministério Público Federal* or MPF), with broad constitutional and legal competence and the duty to bring criminal charges and try criminal cases; the Securities Commission (*Comissão de Valores Mobiliários* or CVM), which oversees the capital markets, among others; and the Brazilian National Social and Economic Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social* or BNDES), which has the main responsibility for granting long-term loans to the private sector. (BNDES has already suspended credit lines to the construction companies involved in Operation Carwash.) Government-controlled companies (Petrobras, Eletrobras, etc.) and other regulatory agencies may also have legal authority to intervene in some aspects of this matter. The judiciary should also be involved when ratifying leniency agreements. When negotiating a leniency agreement in the anticorruption field, several (if not all, depending on the circumstances) of these authorities will need to be heard and involved, which makes the process complex and risky, not to mention extremely burdensome and inefficient for the companies and the public sector as well.

There are companies within Operation Carwash that started discussing the possibility of a leniency agreement with the CGU (the government body with legal competence to deal with leniency agreements, in accordance with the present anticorruption law), but they were told to go to the Public Prosecutor's Office. Other companies have entered into leniency agreements with the Public Prosecutor's Office, but these are questionable without approvals from the CGU and possibly from the TCU or CADE. Some went first to CADE, but they are not fully covered because of the application of other Brazilian laws besides those under the competence of antitrust authorities (e.g., the anticorruption legislation). In November 2016, the press reported that one of the largest Brazilian construction companies (Odebrecht) is negotiating a joint leniency agreement with public authorities in Brazil, the United States and Switzerland. This will pose further complications due to the lack of consistent legislation and a well-defined path to resolution of such matters in Brazil.

There is a clear need to conciliate the applicable legislation to leniency agreements and corporate self-cleaning mechanisms, which involve extensive and resourceful independent internal investigations. An alternative solution would be for the Brazilian government to create a public body responsible for coordinating the various public authorities connected to the negotiation and execution of a leniency agreement to remedy corruption crimes, such as a "National Council for Corporate Integrity" or a similar agency. All federal authorities with competence to protect the public interest

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Leniency Agreements, continued

involving anticorruption measures (CGU, AGU, TCU, MPF, CADE, CVM, etc.) would take part in it. Furthermore, the constitutional and legal competences of the respective public authorities would be fully respected and enforced.

In this sense, those companies interested in leniency agreements would have a common representative assisting in the coordination and integration of the various government entities involved. This is certainly a right of citizens and companies operating or located in Brazil, considering the need to deal with a wide and varied range of issues and before distinct authorities whose legal competence often overlaps with one another. The government should provide a "single counter" for private-sector companies to submit their leniency agreement proposals.

A national council or similar agency could also be responsible for disseminating the culture and education in ethics and corporate integrity, corporate governance and the formulation of related public policies, involving multilateral, academic, business, unions and NGO entities, both domestic and international.

In sum, there is a vast number of public agents, complex measures and tasks whose coordination and support are essential for the legitimate preservation of the public interest, given the seriousness of corruption crimes, the extent of the harm caused to the Brazilian nation and the need to negotiate and execute leniency agreements. The continuity of companies caught in corruption must be made feasible when it is in the public interest. The use of leniency agreements would also accomplish the legitimate aspirations of the Brazilian society to impose adequate sanctions on those responsible for serious offenses and the necessary reparation for damages caused by corporate crimes.

The proposed national council or similar body would thus represent an innovation in terms of public policies: a governmental authority focused on anticorruption issues in the private corporate sphere, aiming to reconcile the legitimate interests of the government, the society and the business underlying these challenges. It would also aim at the continuity of the existence of large corporations with the implementation of fair, efficient and workable leniency agreements, thus contributing to the improvement of the business environment at the domestic and international levels, the increase of confidence in Brazilian institutions and the perception that the federal government is also, in this perspective, firmly focused on a positive agenda, pacification of conflicts, and improvement and modernization of government-business-society practices and relations. Besides punishing the corrupt, such an innovation would build a solid foundation for the success of the honest.

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> to include requirements that are not plainly provided for in the text of the statute.[15]

Described aptly as that "lone dissenting voice that others have declined to follow,"[16] the court declined to "supplant the policy expressed by Congress in the plain words of the statute" with legislative history or commentary.[17] Instead, the court concluded, "such considerations should be weighed on a case-by-case basis along with the other discretionary factors."[18]

In *Sergeeva,* the Eleventh Circuit Court of Appeals echoed the analysis set forth in *Schottdorf.* Arguing against the production of documents outside of the United States, Trident Atlanta relied on commentary and legislative history, as well as the presumption that U.S. law generally does not apply extraterritorially. The court, however, declined "to adopt such a provincial view given that the statutory text authorizes production of documents 'in accordance with the Federal Rules of Civil Procedure.'"[19] Further, because those rules place no limit on the location of documents or electronically stored information, only on the location *of production*, the court required Trident Atlanta to produce documents within its possession, custody or control noting any other restriction would run afoul of "the discretion Congress afforded federal courts to allow discovery under § 1782 'in accordance with the Federal Rules of Civil Procedure.'"[20]

"Possession, Custody, or Control" Extends to Affiliates Located Abroad

Next, Trident Atlanta argued that it lacked control over non-U.S. affiliates in order to obtain the subpoenaed information.[21] The court first recognized that the only limits on Federal Rule of Civil Procedure 45 concern privilege or unduly burdensome material—neither of which was at issue.[22] Rejecting Trident Atlanta's argument that it lacked the legal right to the documents, the court followed precedent holding that *control* for purposes of discovery meant "the legal right to obtain the documents requested upon demand" and "may be established where affiliated corporate entities—who claim to be providers of complimentary [sic] and international financial services—have actually shared responsive information and documents in the normal course of their business dealings."[23]

The court then determined that Trident Atlanta had the requisite control. As part of a group of companies with Trident Bahamas that operated as an international financial planner with production and liaison companies that cross-referred client requests, the court reasoned that the entities were otherwise incapable of performing "their intended functions for Trident Group clients" without the ability to exchange such information.[24] The court held that the legal right to obtain information from an affiliated or related business entity with access to the information was sufficient.[25]

Sergeeva relied, in part, on *Costa v. Kerzner Int'l Resorts, Inc.*,[26] which addressed document production in the hands of an affiliate. There, the defendants objected to production of documents held by their Bahamian affiliates and argued they did not have control over production and plaintiffs should be required to seek the information through the Hague Convention on Taking Evidence Abroad.[27] The court addressed the "possession, custody, or control" aspect of Fed. R. Civ. P. 34.[28] Noting that the requirement is broadly construed, the court held that *control* "does not require that a party have legal ownership or actual physical possession of the documents at issue; indeed, documents have been considered to be under a party's control (for discovery purposes) when that party has the 'right, authority, or practical ability to obtain the materials sought on demand.'"[29]

The court then applied the following analysis:[30]

> In determining whether a party has control over documents and information in the possession of nonparty affiliates, the Court must look to: (1) the corporate structure of the party and the nonparties; (2) the nonparties' connection to the transaction at issue in the litigation; and (3) the degree to which the nonparties benefit from the outcome of the litigation.

Production was compelled because the defendants and affiliates were part of a unified corporate structure and wholly owned by a single entity and had operational

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and financial interactions directly related to the transactions at issue, and the parent and subsidiary entities had a direct financial interest in the outcome of the case.[31] The court also rejected the argument that plaintiffs be required to exhaust their efforts through the Hague Convention.[32]

By contrast, in *SeaRock v. Stripling,* the court held that a ship owner lacked control over unrelated third parties who had invoiced him for work performed on a sunken ship.[33] *See also*, *In re Application of Passport Special Opportunities Master Fund, LP,* 2016 WL 844833 (S.D.N.Y. Mar. 1, 2016) (denial of application pursuant to 28 U.S.C. § 1782 where movant failed to meet its burden to demonstrate that UK and Delaware Deloitte entities had requisite control over Deloitte affiliates in Pakistan despite change in corporate structure when it was not demonstrated that new conglomerate agreement provided authority or practical ability to obtain documents); *Wiand v. Wells Fargo Bank, NA*, No. 8: 12-CV-557-T-27EAJ (M.D. Fla. Dec. 13, 2013) (bank was not required to produce documents in possession of nonparty affiliates where agency relationship was not established and requisite control was absent).[34] In short, the determination of whether the requisite "control" exists is fact determinative.

Conclusion

Sergeeva is significant on two counts. It expressly applies Section 1782 *extraterritorially* and requires production of documents held by affiliates consistent with the Federal Rules of Civil Procedure. The access granted by *Sergeeva* to documentary evidence beyond U.S. borders under the control of a party located in the United States for use by parties involved in foreign proceedings is potentially invaluable. The decision is straightforward, predicated on the plain meaning of the statute and the Federal Rules of Civil Procedure, and cements the Eleventh Circuit's role, under proper circumstances, as a key venue to obtain access to evidence to support international legal proceedings.

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Endnotes

1 *Sergeeva v. Tripleton Int'l Ltd. et al.*, 834 F.3d 1194 (11th Cir. 2016).

2 28 U.S.C. § 1782 provides in pertinent part: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, *in accordance with the Federal Rules of Civil Procedure* . . ." (emphasis added).

3 *Sergeeva*, 834 F.3d at 1196.

4 *Id.* at 1198-99 *citing Consorcio Ecuatoriano de Telecomunicaniones S.A. v. JAS Forwarding (USA), Inc.*, 747 F. 3d 1262, 1269 (11th Cir. 2014) (quoting *In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007).

5 *Id.* at 1199 *citing, Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 264-65 (2004).

6 *Id.*

7 *Id.* at 1200.

8 *See* Tyler B. Robinson, *The Extraterritorial Reach of 28 U.S.C. § 1782 in Aid of Foreign and International Litigation and Arbitration*, 22 The Am. Review of Int'l Arbitration 135 (2011). Robinson's excellent article specifically sets forth in detail the pros and cons with respect to extraterritorial treatment of 28 USC § 1782. His conclusion that the matter rests within judicial discretion is much in line with the rationale set forth in *Sergeeva* and *Schottdorf* discussed *infra*. Robinson cites the following legislative history relied on by the then prevailing view: S. REP. NO. 88-1580 (1964) reprinted in 1964 U.S.C.C.A.N. 3782, 3788 ("The proposed revision of section 1782, . . . clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence *in the United States*") (emphasis added). *Id.* at 138, 139 n.12.

9 *See, e.g.*, Hans Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 Syracuse J. Int'l L. & Com. 1 (1998). Noting that the statute itself "*does not provide explicitly that § 1782 has no extraterritorial effect*," Professor Smit nonetheless concluded that Section 1782 should not be used to obtain documents beyond U.S. shores. *Id.* at 12 n.52 (emphasis added).

10 *Id.* at 11-12.

11 526 F. Supp. 417 (S.D.N.Y. 2007).

12 *Id.* at 423 *citing In re Microsoft,* 428 F. Supp. 2d 188 (S.D.N.Y. 2006)*; In re Nieri*, 2000 WL 60214 (S.D.N.Y. 2000); *In re Sarrio*, 119 F.3d 143 (2d Cir. 1997) (dicta).

13 *Schottdorf* discussed *infra.*

14 2006 WL 3844464 (S.D.N.Y. 2006) (J. Jones).

15 *Id.* at *5.

16 Robinson, *supra* note 8, at 141.

17 *Schottdorf*, at *9 n.13.

18 *Id.*

19 *Sergeeva*, 834 F.3d at 1200.

20 *Id.*

21 *Id.* at 1200-01.

22 *Id.* n.5.

23 *Id.* at 1201.

24 *Id.*

25 *Id.* The court also affirmed a monetary contempt sanction in excess of US$230,000 imposed by the district court on Trident Atlanta for failing to establish a good-faith attempt to comply with the subpoena. *Id.* at 1202.

26 277 F.R.D. 468, 470-71 (S.D. Fla. 2011)

27 *Id.* at 470.

28 Both Rule 34 and Rule 45 requirements for production call for documents in the "possession, custody, or control" of the party to whom the request or subpoena is directed. Fed. R. Civ. P. 34(a)(1) & (c); 45(a)(1)(A)(iii).

29 *Costa*, 277 F.R.D. at 471 (citations omitted).

30 *Id.*

31 *Id.* at 472-73.

32 *Id.* at 473.

33 736 F.2d 650, 653-54 (11th Cir. 1984) ("Under Fed. R. Civ. P. 34, control is the test with regard to the production of documents. Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand.")

34 The court looked to *Costa* to analyze the control issue between Wells Fargo and its nonparty Wachovia affiliates. While the documents requested did impact the affiliates and a connection between the nonparties and Wells Fargo was present, the court determined that the receiver had failed to demonstrate the affiliates had an interest in the outcome of the litigation or sufficient commonality in the corporate structure or operations to warrant production. Notably, although the nonparties and Wells Fargo had a common parent, the relationship was not closely held but related to different subsidiaries at different levels before reaching a common remote publicly traded parent. The court, therefore, declined to find that Wells Fargo had the requisite control over the affiliates to produce the documents.

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and there are additional documentary/evidentiary requirements that the petitioner must submit.[3] These are:

A. Sufficient physical premises to house the new office have been secured;

B. The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

C. The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.[4]

In the past, practitioners complied with these requirements by submitting a lease agreement; payroll records from the foreign company along with the foreign organizational chart; letters from the U.S. and foreign

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entity confirming past and prospective managerial and executive employment; and a business plan detailing the scope, organizational structure and financial goals for the U.S. entity.

Rise of the Request for Evidence

Statistics

Applicants for L-1A classification must submit their petitions at one of two USCIS service centers depending on geographic location: Vermont Service Center or California Service Center. An applicant or petitioner seeking immigration benefits from USCIS must establish eligibility for such benefits.[5] Ordinarily, in visa petition proceedings, the petitioner is required to demonstrate eligibility for the benefit sought under a "preponderance of the evidence" standard.[6] Thus, if the petitioner submits relevant, probative and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the standard of proof.[7] A request for evidence (RFE) is a notice issued by USCIS requesting initial or additional evidence to establish the eligibility of an applicant or petitioner who is seeking immigration benefits.[8] Currently, USCIS must issue an RFE when evidence is missing from an application or petition.[9]

The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman) is dedicated to improving the quality of citizenship and immigration services delivered to the public by providing individual case assistance as well as making recommendations to improve the administration of immigration benefits by USCIS.[10] As early as 2010, the USCIS Ombudsman expressed the concern, in the L-1A context, that there was a "general lack of trust in the RFE process due to what appear to be inconsistent practices and philosophies among service centers, as well as overly broad and duplicative requests for information by USCIS."[11] The RFE also used to be the exception in the adjudication of L-1A cases. For example, in the 2006 Fiscal Year (FY), the Vermont Service Center had an RFE rate of 8.5%, and the California Service Center had an RFE rate of 18.7%.[12] Today, unfortunately, RFEs are much more common.

Another issue is the discrepancy in RFE rates between the two service centers. For the 2015 FY, the USCIS Ombudsman Annual Report indicated that the California Service Center's L-1A RFE rate had increased to 55%, its highest level in ten years, and the Vermont Service Center's RFE rate was 29%.[13] The report specifically questions: "In the absence of any changes to the laws or regulations governing L-1As, or any evidence of a disparate application of policy, it is unclear why L-1A RFE rates differ so significantly between USCIS service centers."[14] The Ombudsman stated that it will "continue to monitor and engage USCIS on issues pertaining to the quality and frequency of issuance of RFEs, and call for more transparency regarding RFE rates, enhanced training on the preponderance of the evidence standard, and supervisory review to ensure appropriateness of issuance."[15]

The aforementioned statistics are clear evidence that the RFE has become much more prevalent in the L-1A adjudication process than ever before. The USCIS Ombudsman has no answer as to why in the past ten years the RFE rate in the L-1A context has risen at the California Service Center from 18.7% to 55% and from 8.5% to nearly 30% at the Vermont Service Center (hitting an all-time high of 44% two years ago).[16] In the 2014 Annual Report, the USCIS Ombudsman stated that "unduly burdensome RFEs consumes [sic] both USCIS and employer resources as well as delays final action on otherwise approvable filings."[17] What is most disturbing is that this increase in RFE rates occurred despite the fact that there have been no changes to the L-1A laws or the regulations during the aforementioned ten-year period. The solution may be that additional training and quality assurance is needed to ensure USCIS adjudicators are aware of and adhering to current USCIS guidance and policy. They also need to receive proper training about the "preponderance of evidence" standard and the prospective nature of "new office" cases. Also, special attention is required to prevent USCIS adjudicators from issuing unduly burdensome requests for evidence that ignore the evidence that petitioners have already presented with their initial filing.

Template Requests for Evidence

Another issue present for practitioners is that it appears that even when USCIS issues a request for evidence, it issues a standardized "cookie cutter" RFE that fails to consider the merits of each individual application and its specific documents, and is "overly broad and duplicative," a concern expressed by the Ombudsman in the 2010 Annual Report.[18] On 5 January 2012, the USCIS Office of Public Engagement published a draft template for requests for evidence in the L-1A context for new offices.[19] The template lists the documents USCIS will accept to establish each statutory and regulatory requirement.

For example, in the case of a new office, as previously mentioned, USCIS regulations require evidence that sufficient physical premises have been secured to house the new office. Previously, practitioners were able to comply with this regulatory requirement by submitting only a lease agreement for the office/warehouse space. The USCIS standardized RFE for new offices now requests a "complete copy of the U.S. entity's lease, signed and dated by both the lessor and the lessee, indicating the square footage of the premises; a statement defining the U.S. worksite as a sales office, representative agency, distributorship, etc.; a letter from the owner or property management company confirming the property owner allows a sublease to the U.S. entity (if applicable); a copy of the contract between the owner and the lessee allowing sub-lease of the space, if applicable; color photos of the U.S. entity's premises; and copies of escrow documents or evidence of title, if the U.S. premises are owned or being purchased."[20]

For proof of the ownership and control of the U.S. entity in L-1A cases, practitioners were previously able to comply with this requirement by submitting only the corporate articles and share certificates of the relevant entities. Now, the USCIS standardized RFE requires: the most recent Securities and Exchange Commission Form 10-K; the most recent annual report, which lists all affiliates, subsidiaries and branch offices, and percentage of ownership; meeting minutes, which list the stock shareholders and the number and percentage of shares owned; Articles of Incorporation, which have been date-stamped and "endorsed-filed" by the appropriate state official; stock certificates, which have been issued to the present date, clearly indicating the name of each shareholder; a stock ledger, which shows all stock certificates issued to the present date, including total shares of stock sold, and names of shareholders; proof of stock purchase or capital contribution, such as wire transfer receipts, bank statements, cancelled checks or deposit receipts; most recent federal income tax returns, which demonstrate a qualifying relationship to the foreign entity; and other documents.[21]

For evidence regarding the foreign entity's financial ability to remunerate the beneficiary and commence doing business in the United States, practitioners previously submitted the foreign entity's financial documents and the U.S. entity's bank statements. Now, USCIS requests in the standardized RFE: proof of capital contribution to the U.S. entity, such as initial wire transfers, cancelled checks, deposit receipts; bank statements originating in the United States detailing monetary amounts for the capital contribution; documents to show the foreign entity has paid for services to commence business at the U.S. location, such as utilities, payroll, legal and accounting fees, lease agreement, etc.; and other documents.[22]

Wire transfer receipts, bank statements, cancelled checks, deposit receipts and documents detailing expenditure of funds are among the documentary evidence requirements for an E-2 investor visa, not an L-1A visa![23] In light of increasing RFE rates at both USCIS service centers, practitioners must now document their L-1A cases as if they were preparing E-2 investor visas, especially with regard to new office cases.

Tips for Practitioners in Light of the Evolution of the L-1A

Attorneys representing L-1A petitioners must now prepare their cases with the standardized request for evidence in mind as their guide and try to submit preemptively as much of the evidence requested as possible, even when it is cumbersome for the petitioner to provide, is duplicative and results in application packages consisting of several hundred pages.

Evolution of L-1A Visa, continued

Attorneys should focus on the organizational charts, both for the foreign entity and the U.S. entity, submitted with the initial filing. It is not enough simply to list the names and titles of each company's personnel, as in the past. Now, USCIS will almost always issue a request for evidence if the attorney fails to include each employee's name, job title, his/her summary of duties, education level and salary. Remember that one of the prongs to establishing an applicant's "managerial capacity" is "how the beneficiary supervised and controlled the work of other supervisory, professional, or managerial employees at the foreign company."[24] Thus, practitioners should include evidence with the organizational charts that the applicant's direct subordinates have or will have bachelor's degrees related to the performance of their professional duties, if applicable, to bolster their cases.

Another almost automatic reason for a request for evidence from USCIS is if the petitioner's letter fails to describe the beneficiary's typical executive or managerial duties with the percentage of time spent on each. Attorneys should try to be as detailed as possible with regard to the duties since vague or general job descriptions are often referenced in RFEs and denials. With regard to the duties, practitioners should submit in addition to the petitioner's letter the following documents, as applicable to each case: contracts negotiated/signed by the applicant while in his/her executive/managerial position, company memoranda or employee evaluation reports he/she may have written or signed, meeting minutes where the applicant appeared in his/her official position and any other documentary evidence to establish the executive or managerial nature of the position. Expert opinions confirming the executive or managerial nature of the position can also be useful to submit with the initial L-1A filing, if the attorney believes USCIS will question the applicant's job duties.

Finally, practitioners, in their cover letters submitted with the initial filing, should educate USCIS adjudicators on the proper legal standards for L-1A petitions and on the "preponderance of evidence" standard. By preparing cases with the standardized RFE in mind and submitting as much documentation listed therein as possible (within limits), practitioners will be able to handle the changing landscape within the L-1A context and may help curb the increase in RFE rates at USCIS service centers. Fewer requests for evidence and more direct approvals of L-1A visa petitions can only result in happier clients.

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Endnotes

1 INA § 214.2(l)(1)(ii)(A)

2 8 C.F.R. §§ 214.2(l)(3)(i-iv)

3 8 C.F.R. § 214.2(l)(1)(ii)(F)

4 8 C.F.R. § 214.2(l)(v)

5 8 C.F.R. § 103.2(b)(1)

6 *See Matter of Pazandeh*, 19 I&N Dec. 884, 887 (BIA 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (stating that the preponderance of evidence standard applies except where a different standard is specified by law).

7 *Matter of E-M-,* 20 I&N Dec. 77, 79-80 (Comm'r 1989); *See also U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place).

8 8 C.F.R. § 103.2(b)(8)

9 *Id*.

10 https://www.dhs.gov/topic/cis-ombudsman.

11 Ombudsman Annual Report 2010, p. 36.

12 Ombudsman Annual Report 2014, p. 22.

13 Ombudsman Annual Report 2016, p. 59.

14 *Id*.

15 *Id*. at 60.

16 *Id.*

17 Ombudsman Annual Report 2014, p. 23.

18 Ombudsman Annual Report 2010, p. 36

19 USCIS RFE Template "I-129 L-1 Intracompany Transferees: L-1A Manager or Executive." https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Draft%20Request%20for%20Evidence%20RFE%20Template%20for%20Comment/i-129_L_1_intracompany_transfer_L_1A_newoffice.pdf.

20 *Id*. at 2.

21 *Id*. at 3.

22 *Id*. at 7.

23 https://it.usembassy.gov/visas/niv/e/e2/. See the instruction sheet for E-2 visa applicants applying at the U.S. Consulate in Rome, Italy: "Evidence of investment is required, e.g., cancelled checks, copies of debits from bank accounts, wire transfers, and matching invoices."

24 INA § 101(a)(44)(A)

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