

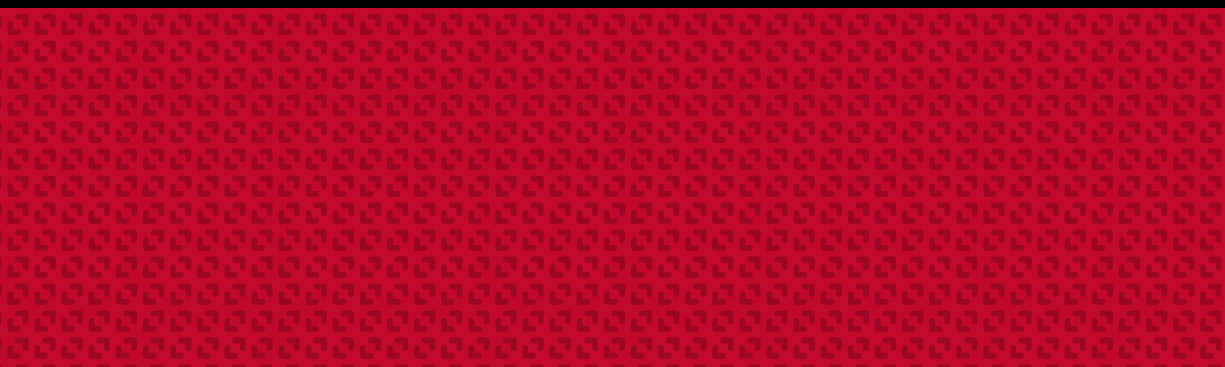
 **LATIN LAWYER**

# **THE GUIDE TO CORPORATE CRISIS MANAGEMENT**

FIFTH EDITION

Editors

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## Publisher's Note

Latin Lawyer and LACCA are delighted to publish *The Guide to Corporate Crisis Management*. Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, the fifth edition of this guide brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all practitioners.

We are delighted to have worked with so many leading individuals to produce *The Guide to Corporate Crisis Management*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Mergers and Acquisitions*, *The Guide to Restructuring* and *The Guide to Corporate Compliance*, and our new tool providing overviews of regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

# Introduction: Effective Crisis Management in Latin America

**Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers<sup>1</sup>**

Around the world, business leaders regularly face crises that can severely disrupt or even threaten their companies' very existence. These crises may arise from an acute threat to the personal safety of employees, the fallout from an industrial or environmental accident, government investigations into compliance failures, financial distress leading to possible insolvency or, as the entire world has experienced in recent years, a pandemic. In Latin America, a region that continues to hold tremendous promise and opportunities for investors and corporations, these situations can present particularly complex and multifaceted challenges for leaders managing a crisis, owing to, among other things, the region's diverse and often shifting political landscapes and operating environments.

The realities of some of these challenges have been at the forefront of many corporate leaders' agendas during the past decade, as companies doing business in Latin America have seen a series of crises topple politicians and wound companies. Perhaps one of the most wide-ranging crises arose from the *Lavo Jato* bribery investigations in Brazil and related investigations, as a result of which several executives have been sentenced to prison and companies have been subject to hundreds of millions of dollars in fines imposed by authorities in countries within and outside the region, including Switzerland and the United States. Far-reaching anti-corruption investigations have extended to unrelated matters in many of the region's other larger economies.

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<sup>1</sup> Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers are partners at Sullivan & Cromwell LLP.

Beyond the area of compliance, the region's leading corporations have faced challenges ranging from environmental and industrial accidents, such as earthquakes, spills or dam failures, which have affected companies in extractive industries and hydroelectric power production, to significant renationalisation or expropriatory actions by governments.

As executives and their counsel who have confronted these events have learned, the legal expertise and other multidisciplinary capabilities needed to address these sorts of events are tremendously varied. But crisis situations tend to share common elements. All are typically unexpected or develop in a manner that may take leaders by surprise; all require critical decision-making and communications with key stakeholders under intense time pressure; and all present the possibility of grave consequences if not managed effectively.

To develop and implement any effective crisis management strategies, responsible boards and senior executives must understand how to navigate the specific local contexts in which these challenges unfold. The covid-19 pandemic taught us that the same crisis can have very different effects depending on the specific local contexts and issues each country was facing before the crisis.

Responsible boards and senior executives must also be prepared to put together, at short notice, the right teams that can best advise them to make critical decisions under intense time pressure, and may especially consider instituting advance crisis preparedness protocols addressing pandemics and other risks.

While advisers with the right experience in the region can help clients anticipate, manage and resolve crises across all their complex dimensions, decision makers must also be able to recognise on their own, often under conditions of stress, many of the multifaceted issues that may arise so that they can make best use of these advisers' skills. This guide is designed to assist professional advisers and key corporate decision makers – board members, chief executives, chief financial officers, general counsel and compliance officers – in effectively planning for and managing crises affecting companies in Latin America. We have gathered contributions from some of the leading practitioners around the world to examine the most important crisis-related issues that have affected businesses in Latin America, and to discuss how crisis managers have effectively confronted those challenges. As lawyers play a central role in helping corporate leaders navigate crises, by limiting liability and mitigating their most far-reaching effects, most of the contributions come from legal practitioners. Because almost all effective crisis responses require a multidisciplinary approach, we have also included insights from global leaders in corporate governance, public relations, international risk management and private sector diplomacy.

We would like to sincerely thank each of our contributors for their time and expertise. Their credentials and accomplishments – which you will find in Appendix 1 – show that these professionals are among the most accomplished in their fields and in providing critical advice to corporate leaders facing potential crises across the region. All contributions to this guide, including those made by the three of us who have had the opportunity to serve as its editors, reflect the authors' own views and not necessarily those of their firms or their clients.

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Part I of this guide explores the critical role of managing communications and stakeholder relations in all crisis response strategies. In any context, a company's leadership must establish effective coordination between those involved in legal problem-solving and public communications. This is the central message conveyed by Paul A Holmes, partner and vice chair at the global communications firm FGS Global, along with FGS managing director Eric M Wachter. The two share the principles and best practices that have helped them successfully partner with corporate counsel around the world to ensure that legal and communications strategies align in a crisis.

The past few years, including the covid-19 pandemic, have highlighted the growing relevance of environmental, social and governance (ESG) matters, which are now critical aspects to be considered in managing stakeholder relations and crisis response strategies. Partners Pablo Jiménez-Zorrilla and Luis Burgueño of Mexican law firm Von Wobeser y Sierra, SC provide a detailed analysis of how ESG procedures are no longer good-to-have tools but rather a mainstream trend that arguably protects and creates value. They also share a guide that companies can use when developing an ESG approach to management.

Shareholder activism, a rising global phenomenon, increasingly poses unique challenges to companies' management that can often turn into a corporate crisis. Sergio J Galvis and Werner F Ahlers of Sullivan & Cromwell LLP analyse this complex issue and the effects that recent ESG-related stakeholder engagement has had on shareholder activism in the United States, and discuss how Latin American companies may draw on crisis management techniques and strategies to be prepared and effectively respond from a position of strength if and when an activist challenge arises.

To close Part I, Jaime Herrera Rodriguez and Oscar Tutasaura Castellanos of Colombian law firm Posse Herrera Ruiz provide an insightful view of how the covid-19 pandemic and the recent wave of cyberattacks affected corporate governance in Colombia and, more specifically, how these crises transformed the duties of local directors and officers.

In Part II, the guide turns to processes that are central to many of the most significant corporate crises: litigations, investigations and other regulatory actions. Sometimes these aspects are the very trigger of a crisis, at other times they are long-lasting consequences that survive the crisis itself. Partners Fernando Dantas Motta Neustein and Thiago Jabor Pinheiro and their colleagues at Brazilian law firm Mattos Filho, Veiga Filho, Marrey Jr e Quiroga explain the different kinds of civil lawsuits that a company may face during a corporate crisis, and provide valuable insight on managing complex civil litigation.

The next chapter focuses on a theme that has dominated headlines and has arguably had the greatest impact on Latin American business and political environments: anti-corruption investigations and enforcement. The phenomenon of the *Lavo Jato* investigations can be seen as both a consequence and an accelerator of some key trends in the enforcement environment in the region. Lessons for practitioners and corporations seeking to mitigate risks in this new environment are presented by four Morrison & Foerster LLP lawyers: James M Koukios, Ruti Smithline, Gerardo Gómez Galvis and Eduardo Schneider. While the anti-corruption risks across the region vary, the authors note that legal regimes are increasingly standardising their laws and increasing cooperation among their enforcement agencies. Familiarity with these trends can help practitioners to design and properly prioritise the implementation of robust, risk-based compliance programmes as the best strategy to avoid a corruption-related crisis.

In Chapter 7, Diego Marván and Héctor Valenzuela of Chevez, Ruiz, Zamarripa y Cia, SC comment on the continuing efforts by Mexico to align its anti-money laundering and counter-terrorist financing regulations with international standards, and the particular challenges with regulating Mexico's diverse group of designated non-financial businesses and professions, such as notaries, real estate agents, casinos, and other professionals and entities.

The last chapter in Part II focuses on an environment in which investigations have proven to be more complex and where multiple authorities in different jurisdictions are increasingly working in coordinated multilateral investigations. Given this trend, Kathleen S McArthur, Aisling O'Shea and Olivia G Chalos of Sullivan & Cromwell LLP explain why it is vital that companies have a coordinated and consistent strategy in moving forward from crises and provide a valuable practical guide for companies who may be facing multilateral investigations.

Part III explores some of the tactics and tools that corporations can use when facing existential crises of potential financial insolvency. Taking a broader view of tools that may be available to corporate managers irrespective of the specific jurisdiction in the region, Andrew G Dieterich, James L Bromley and Fabio Weinberg Crocco of Sullivan & Cromwell LLP explain how debtors based in



Latin American jurisdictions can benefit from the extraterritorial reach of the US Bankruptcy Code, specifically how Chapters 11 and 15 of the Code can help debtors to actively manage international restructurings. For a complementary response focusing on related but distinct tools, partners Tim Graulich, James Florack and Angela Libby and counsel Joshua Sturm, at Davis Polk & Wardwell LLP, go over the different strategies available to distressed companies to address solvency challenges, from traditional M&A solutions and negotiations with creditors to the monetisation of non-traditional pockets of value, debt buy-backs and liability management transactions.

Finally, Part IV explores the ways that each corporate crisis is affected by the unique political and economic risk environment in which it develops. Contributors share their experiences of advising clients on the difficult decisions they must make when confronted with the dire consequences of political risk, instability or violence, including the need to exit a jurisdiction where the political situation has created an untenable operating environment.

Jack Devine, the founding partner and president of the crisis management firm The Arkin Group LLC, and Amanda Mattingly, a security fellow with the Truman National Security Project, have drawn from their years of experience in intelligence and risk management in Latin America to share strategies to effectively confront some of the security challenges faced by corporations that choose to continue pursuing economic opportunities in environments with heightened risks of violent crime. Partners Mariela I Melhem, Esteban Valansi and Siro P Astolfi of Mitrani Caballero provide an overview of the different crises affecting Argentina and the crisis management tools that can be used by key corporate decision makers doing business in the country when dealing with extremely challenging circumstances.

We have collected the knowledge and advice of leading practitioners across a variety of disciplines, jurisdictions, practice areas and perspectives, precisely because the types of crises that can arise in Latin America are tremendously diverse and do not lend themselves to a single 'one size fits all' approach to preparedness and effective response. At the same time, this survey of crises provides some common lessons that should benefit all corporate leaders.

Although, by their nature, crises are unpredictable, executives must try to identify in advance where and how they might unfold and develop a familiarity with those political and legal contexts. This first step can provide the basis for conducting 'tabletop' exercises or reviews of how other institutions have dealt with similar crises. These exercises should include key questions such as: how does the company survive the first week of a possible crisis? How does the company manage relations with key stakeholders? What are the key risks from mistakes in dealing with government agencies?

Crisis management plans that emerge from these exercises vary but should start by defining the crisis and involving key decision makers early. Companies need to determine the oversight and management roles of top executives and key advisers, and how they will coordinate among themselves. A theme that recurs throughout this guide is the importance of defining the right teams of both internal resources and external experts, and establishing effective coordination between those teams. It is also critical to define the proper oversight role of the board. Companies need protocols for when and how to involve their board and for defining its proper role in monitoring and oversight. In addition, once the company and its advisers have identified the areas of concern, the board's composition may have to be evaluated to determine whether it includes the necessary expertise. The covid-19 pandemic and its implications provided an interesting test case of the breadth of issues, from stakeholder health and safety to remote working considerations and continuity plans, that should be considered in these board exercises.

Once a crisis is identified and a team is assembled, it is critical to maintain flexibility to respond properly to new information and to recognise and address reactions of key stakeholders. Adequately managing and reacting to the flow of information in a crisis is one of the most important functions of crisis management. A qualified crisis communications team ideally maintains a close partnership among investigators, legal counsel, public and government relations, and other advisers. The company's leaders must empower this team to gather facts, contacts and timelines in an appropriate manner and as quickly as possible, and communicate with external stakeholders, including the relevant government agencies, employees, customers and the general public. Throughout this process, understanding cultural differences, as well as the relevant political and legal context, is key, and requires close consultation with the right advisers at every step.

The chapters that follow provide a practical and valuable guide for decision makers and their advisers as they develop their crisis preparedness plans for businesses in Latin America. While each company will confront its own unique set of multifaceted risks and challenges, these chapters will help business leaders and their advisers to best position themselves to withstand an unexpected crisis when it hits and emerge from it strongly.

We again thank our many illustrious contributors for their insightful and practical contributions to this guide and, more broadly, to the rapidly evolving discipline of crisis management. We would also like to express our sincere appreciation for the significant efforts of many of our colleagues at Sullivan & Cromwell LLP, without whom this guide would not have been possible, particularly Renata Mascarenhas, Laura Ducati Dabronzo and Veronica Blum.