The Guide to Corporate Crisis Management

Second Edition

Editors
Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers

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For further information please contact Natalie.Clarke@lbresearch.com

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Publisher's Note

Latin Lawyer is delighted to publish *The Guide to Corporate Crisis Management*.

Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of over 40 leading practitioners from a variety of disciplines, it provides guidance that will benefit all practitioners when an unexpected crisis hits.

Corruption investigations, expropriation, industrial accidents: corporate crises take many forms, but each can be equally dangerous for companies in Latin America. Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region.

We are delighted to have worked with so many leading firms and 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 our *Guide to Infrastructure and Energy Investment* and jurisdictional references.

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.

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Roundtable: Lava Jato and Its Impact on Investigations in Latin America

In September 2018, Latin Lawyer brought together an expert panel of lawyers, consultants and academics to discuss the far-reaching effects that *Lava Jato* and other investigations have had on practice and on commercial life in the region. This roundtable was moderated by Breon Peace of Cleary Gottlieb Steen & Hamilton LLP and features contributions from Geert Aalbers of Control Risks; Isabel Franco, then of KLA-Koury Lopes Advogados;[1] Augusto Loli of Rebaza, Alcázar & De Las Casas; Pierpaolo Cruz Bottini of Bottini & Tamasauskas Advogados; and Sergio Galvis of Sullivan & Cromwell LLP; along with Clare Bolton of Latin Lawyer. The following is an edited transcript.

Breon Peace: Are investigations like *Lava Jato* the 'new normal'? What are the enforcement trends in Brazil and other countries in Latin America?

Geert Aalbers: Since *Lava Jato* started in early 2014, anti-corruption enforcement efforts have intensified across Latin America, including in Colombia, Panama, Guatemala and most recently in Argentina. And in Brazil, these efforts have spread beyond *Lava Jato*, with major probes such as Zealots, Greenfield and Resonance exposing corruption in the administrative tax body, public banks and pension funds and public healthcare sector in Rio, respectively. In this sense, we are looking at a 'new normal'. Not all countries in Latin America, however, will be as effective on the enforcement front as Brazil has been. The capacity to enforce

1 This roundtable was conducted in September 2018. Please note Isabel Franco has since joined Azevedo Sette Advogados.

depends on a number of variables, including the degree of independence of the judiciary and public prosecutors' offices; the specific expertise of public authorities to investigate corruption; the existence of effective plea bargain and leniency frameworks; and critically, in a year of elections, continued public support and social pressure for anti-corruption enforcement.

Pierpaolo Bottini: In Brazil, it is difficult to say if *Lava Jato* is the 'new normal'. These operations are composed of multiple factors, and we cannot generalise them. In some aspects, such as the evolution of plea bargains, we can feel the effect: other judges are using the same investigatory method in other places in Brazil. On the other hand, some of the strategies of *Lava Jato* are being questioned in the Supreme Court; the use of plea bargains for penalties was not foreseen in law; and executing penalties after conviction has been confirmed only by second degree courts, not by the Superior or Supreme Courts. I think we must wait until those questions are resolved to reach a conclusion.

Isabel Franco: Geert, what kind of difference do you and your firm see in the work you do in Argentina and Chile, for example, as against what you do in Brazil?

Aalbers: Most of the work we have conducted recently in Argentina and Chile has been either internal investigations into fraud or corruption allegations, or enhanced due diligence and compliance risk assessments ahead of acquisitions. There has been a significant uptick in our clients' concerns around corruption risk, particularly in Argentina, but we have yet to see the types of full-blown regulatory investigations such as many of those conducted in Brazil, which involve external counsel, a forensic investigations firm, an independent investigations committee and, often, an auditing firm in its capacity as the shadow investigator. This may change as the probe into the Argentina's 'notebooks' scandal deepens. We have also seen a notable uptick in requests for political and regulatory risk assessments throughout Latin America.

Franco: Would you then say that Brazil is years ahead of other Latin American countries? I say that because, even in discussions in Europe, I have the impression that Brazil loses only to the United States in terms of advancing compliance everywhere. It is as if a tsunami has passed by Brazil. Companies of all sizes are dedicating more attention to this subject: compliance due diligence has increased significantly in merger and acquisition transactions and – at least, here in São Paulo – the expansion of 'know your client' diligence is phenomenal.

Aalbers: Yes, I agree that Brazil is leading the anti-corruption movement in Latin America. It also serves as an example for many countries outside of Latin America. On the pre-transactional due diligence front, we have seen an interesting phenomenon as well: whereas the reputational and compliance elements of due diligence were mostly conducted at the back end of the process, and in some cases almost as a formal box-ticking exercise, we are increasingly seeing clients lead with some form of preliminary reputational and compliance risk checks prior to embarking with full-blown legal and financial due diligence.

Franco: Undoubtedly, the effects of *Lava Jato* are evident not only in the market but also in the culture of the companies. There has been a positive evolution in the way of doing business and also in the internal conduct of companies. As a result, we have been asked more and more to help implement compliance and corporate governance programmes, training, risk analysis, background checks of suppliers and service providers, as well as internal investigations with legal implications in multiple jurisdictions. In addition, we now see a surprising appreciation in Brazil of the position of chief compliance officer. Thanks to these changes in the M&A market, I think we will continue to see this positive trend of compliance.

Sergio Galvis: One of the most interesting and challenging issues arising in cross-border M&A transactions is how to undertake effective and thoughtful due diligence on compliance with legal matters – especially compliance with anti-corruption laws across the relevant jurisdictions. Several years ago, the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) issued a helpful resource guide for market participants navigating this challenging area. One of the great insights of the guide is that the due diligence process should be driven by a risk-based analysis that focuses on the particular facts and circumstances at play. This is very healthy given that the alternative – a 'one size fits all' approach – would have resulted in parties underinvesting or overinvesting in the due diligence process, depending on the specifics of the situation at play.

Augusto Loli: In Peru, the *Lava Jato* scandal has not arrived at a favourable moment to serve in the fight against corruption. There is currently conflict between the executive and legislative branches of our government, as well as between the legislature and the National Prosecutor's Office, and this has created an environment in which it is almost impossible to have a united front from all branches of government against corruption. Moreover, if we add corruption allegations that have recently emerged against members of both branches, the outlook is not very hopeful.

Given that context, one could be led to believe that it is increasingly difficult to pursue companies involved in corruption scandals in Peru. However, this is not necessarily the case. The *Lava Jato* case has led to the investigation of what has been called the 'Construction Club', an association of over 30 companies that currently operate in Peru and have allegedly been involved in corrupt practices. This has hit several business groups hard and has created uncertainty about their future.

This makes me feel a degree of healthy envy when I hear my colleagues comment on the situation that's taking place in Brazil.

Peace: One of the interesting challenges for companies and individuals involved in the corruption enforcement efforts in Brazil is the number of authorities with jurisdiction to enforce the Clean Company Act. In the United States, there are two bodies with enforcement authority under the Foreign Corrupt Practices Act, the DOJ and the SEC, which coordinate with each other. How do you advise clients on dealing with multiple authorities on investigations in Brazil? Can you get the authorities to coordinate and ultimately achieve global peace for clients in resolving investigations?

Bottini: That's a difficult question. We were involved in the first leniency agreements with all those agencies. It took a lot of work because some responsibilities are fluid and confused between the agencies, but it is possible if you organise a well-structured plan of work.

Aalbers: Pierpaolo's point is particularly important based on some of the investigations in which we have supported external counsel in working for clients seeking resolution. While it is always important to retain specialised counsel when negotiating with governments, this is especially critical in Brazil given the combination of multiple enforcers at different levels of government; a considerable lack of clarity surrounding their respective mandates related to negotiating settlements; and the fact that the public prosecutors, unlike in the United States, do not have prosecutorial discretion. This creates an unprecedented level of complexity for companies seeking settlements, and seeking a successful and coordinated resolution requires a deep understanding of the legal and political dynamics behind these government agencies and a well-thought-out plan on when and in which order to approach these agencies. The fact that many of the matters under investigation in Brazil are of interest to US and other international enforcers only adds to the complexity and underscores the need to retain expert legal teams in each location.

Peace: I agree. It is challenging to do, but important to strategise to deal with the client's potential problem in a coordinated manner with authorities in Brazil and in other jurisdictions, such as the United States, so as to position the client to resolve all issues at once, if at all possible. Over the past few years, we have seen the US DOJ work with authorities in Brazil and other countries on investigations, and resolve those cases in a coordinated settlement in which one fine is paid and, in effect, divided between the authorities in different jurisdictions. We saw that in the *Braskem* and *Odebrecht* cases and others. This is, of course, preferable to a situation in which clients are potentially paying multiple times for the same conduct on different timetables.

In Brazil, how much do the various authorities compete or coordinate? Are there techniques that can be employed to get them to coordinate or stand down that have been effective?

Bottini: There were initially some conflicts between authorities, each one defending its own ability to sign agreements. But the public bodies are now beginning to realise that coordinated work is more efficient and useful. We must reinforce that and avoid supporting the conflict between public institutions.

Franco: Within Brazil, generally speaking, each authority has its scope of action, as well as powers to investigate and punish potential offenders. These challenges concern plea bargains and leniency agreements. On the former, we have always questioned who could actually negotiate these agreements, because they are under the criminal regime, and thus could be with the police, the MPF or both, as well as other authorities.

Law No. 12.850/2013, the Criminal Organisations Law, the main legal statute on the issue (in Item I of Chapter II, Articles 4, Paragraph 2, and Article 6, Aections II and IV), makes it clear that the members of the MPF and the police investigatory teams, the latter with the consent of the first, are those who have the authority to sign the agreements.

However, this understanding changed in June 2018, when the Federal Supreme Court judged a Direct Action of Unconstitutionality proposed by the Attorney General's Office that questioned the legitimacy of the police investigation teams to conclude plea bargains. In other words, we can see intense competition between members of the MPF and the police for the ownership of the agreements – which does not mean that, depending on the circumstances, they also do not coordinate to carry out the investigation.

Regarding the participation of other authorities, there is no legal provision for their participation in the negotiation process and approval of the plea bargain. Nonetheless, in practice, the authorities share relevant evidence to which they usually have access, upon request, although the rate of sending and returning is low in comparison to what is requested.

Regarding leniency agreements, the issue becomes a bit more complex, since the Brazilian legal system provides four pathways for their approval.

Under Law 12,846/2013 (the Brazilian Clean Company Act), the jurisdiction for signing anti-corruption leniency agreements belongs to the Federal Comptroller's Office (CGU), a federal government body focused on the defence of public assets and developing transparency in management.

In 2016, an ordinance (No. 2.278/2016) was passed creating case-specific commissions to negotiate each leniency agreement, made up of lawyers indicated by the Federal Attorney General's Office as well as members of the CGU. While the CGU remains responsible for the agreements, as under the terms of the Clean Company Act, this ordinance involves other authorities prior to the application of sanctions.

In addition, the federal Court of Auditors of the Union (TCU) has a role; it was not mentioned in the Brazilian Clean Company Act, but Normative Instruction No. 74/2015 was issued, creating a process for it to supervise the negotiation and conclusion of leniency agreements as provided for in the Act.

The legislation as it is now does not provide for involvement of the MPF, although there are bills being drafted in Congress in which the agency would be expected to participate in the agreements. Nonetheless, the CGU has been working with the agencies, including in *Lava Jato*.

The same Clean Company Act provides for a leniency agreement for bid-rigging offences with terms very similar to the anti-corruption leniency agreement. The CGU is again the agency responsible for concluding the agreement; and again, the participation of the TCU and the MPF is not clear.

Law No. 12,529/2011 (the Antitrust Law) has rules on antitrust leniency agreements in Articles 86 and 87, together with the internal rules of CADE [the Administrative Council for Economic Defence], in Articles 237 to 251. In this case, it is CADE that has the authority to conclude leniency agreements. The MPF may participate through the choice of the party making the leniency agreement and, while it is thus not mandatory, in view of the criminal repercussions of antitrust, the MPF is very regularly invited to participate.

Finally, Law No. 13,506/2017 on administrative sanctions in the financial system provides for leniency agreements in the realm of the Central Bank of Brazil and the CVM [The Securities and Exchange Commission of Brazil]. According to this law, the authority to sign the agreement belongs to both the Central Bank and the CVM. However, there is an

express provision in Article 30, Paragraph 6, that the conclusion of the agreement in the administrative sphere 'does not affect the performance of the Public Prosecutor's Office and other public bodies within the scope of their corresponding authority'. Also, in Article 31, Paragraphs 2 and 3, it is guaranteed that the Central Bank and CVM must notify the MPF when they receive proposed agreements and provide information whenever requested by the same. Thus, it is a hard task to define to what extent public bodies compete and collaborate with one another in the development of all investigations – a very tough question that makes us very cautious when advising clients on this matter.

Bottini: I agree with Isabel about the dispute between prosecutors and policemen. But in Brazil, executives try first to negotiate a plea bargain with the prosecutors, because they are able to offer clearer benefits and there are guidelines that ensure some security in the agreement (Orientação Conjunta No. 01/2018, as issued by the 2nd and 5th Câmaras de Coordenação e Revisão). There are a few cases of agreements with the federal police, in general when prosecutors were not interested (for example, the *Palloci* case and others). But after this Supreme Court decision mentioned by Isabel, that trend may change.

Peace: I'd also like to get your views on the tactics used by the Brazilian Federal Police in corruption investigations. Many of the techniques employed by the Brazilian Federal Police are considered to be quite aggressive from a US perspective, where the rights of those accused or suspected of crimes are well known and spelled out in the law. How aggressive are the police tactics and have they evolved over the years in a way that further takes into account the due process rights of those investigated? How do you help international clients in particular deal with the differences in policing?

Bottini: It is difficult to limit this answer to police tactics, in part because the prosecutors often lead investigations too; as such, I will consider the investigation tactics of both police and prosecutors. First, when there is a plea agreement, as is usual in *Lava Jato*, the police and prosecutors get all the information they can from the person agreeing to cooperate. With this information, they ask for judicial authorisation to obtain bank and tax data, and to search for and take documents in homes or offices; and use international cooperation to get information from abroad. Sometimes, they use temporary arrests to get some suspects out of the way and avoid the destruction of evidence. Those temporary arrests by law can last five days, with a further five days available on request. It is an aggressive instrument and has been criticised a lot, because it is an arrest without evidence that said person really is obstructing justice. When we suspect that a client is being investigated and those measures can take place, we usually go to the authorities to tell them that the client is disposed to talk, to present documents and to cooperate – so there is no need for aggressive measures. We have avoided a lot of incidents with this.

Franco: To be honest, I am not so sure that Brazilian police tactics in the corporate arena are that aggressive. In my experience, all dawn raids on clients of mine in the recent past have been, for obvious reasons, scary, but none of these clients have complained about any

disrespect to their rights or to them personally. It is true that we are always training companies for these dawn raids, and clients know to call us immediately when the police arrive – especially international clients. Training is essential – but I have not heard complaints about their tactics and manners. In the case of international clients, the best we can do is to alert them to all possibilities and to try to enable them to deal with these measures as best they can, if they occur, providing the best assistance lawyers can offer.

Formerly, the tactics of police investigations were largely confined to telephone interceptions. No doubt this tactic sourced good material for the investigations, but it was not efficient, since it took a long time to get an important recording and left no other evidence that could be trusted. However, in *Lava Jato*, the police innovated. The investigations have developed substantially through plea bargains, leniency agreements, delivery of documents by informants and also by the controversial searches and seizures.

Of course, there will always be discussion about the aggressiveness of these measures. On the one hand, police and prosecutors claim that such measures are provided for by law and that they have the support of the population, so it is not appropriate to speak of disproportionate measures. On the other hand, those being investigated and their lawyers say that such measures violate fundamental rights, and that the evidence from prized collaboration and leniency agreements are unreliable and that the police and the prosecutors cannot base their cases exclusively on these measures. Parties will always try to defend their interests; it is up to the court to decide whether a particular measure is, in the circumstances under consideration, legal or illegal.

Clare Bolton: Given the challenges and the conflicts between agencies, both within Brazil, in the region and with the US agencies – how does this set of complex relationships affect a company's decision to self-report suspected corruption?

Peace: From a US perspective, the DOJ in particular has implemented policies that provide meaningful incentives to companies to self-report. In November 2017, the DOJ issued its FCPA Corporate Enforcement Policy, which made permanent a pilot programme implemented in 2016 that addressed cooperation in FCPA matters and the benefits companies would receive for such cooperation. Under the Enforcement Policy, companies receive enhanced credit for 'voluntarily self-disclos[ing] misconduct in an FCPA matter, fully cooperat[ing], and timely and appropriately remediat[ing]'. Also, there is now a presumption that the DOJ will decline to prosecute a company that satisfies these criteria (as outlined in the Policy) so long as there are no 'aggravating circumstances'; where a company satisfies the criteria, but is ineligible for a declination owing to aggravating circumstances, they will receive a 50 per cent reduction off of the low end of the fine range under the US Sentencing Guidelines. The DOJ has, in fact, declined to prosecute certain companies and has publicised that fact. So, the benefits of self-reporting in the United States are now more transparent and concrete. That clarity will likely drive more companies to self-report in the face of evidence of corruption, where the United States has jurisdiction. Given the increased cooperation and coordination between the US authorities and those in other countries, like Brazil, once a company has decided to self-report in the United States, it should consider

whether self-reporting to authorities in the other countries that have jurisdiction over the entity and conduct makes sense. The decision on whether to do so is a complicated one and many factors must be taken into account.

Aalbers: Breon is absolutely right to point out that the decision on whether to report to government is a complex one, and that is certainly the case in Brazil. Some of the reasons have already been discussed, including the challenge in determining which government agency or agencies to approach first. Other factors include the fact that once the company has reported and the matter becomes public, as is often the case, the company may expose itself to a host of other legal actions, including public and private civil actions, shareholder class actions and, depending on the nature of the matter, probes by other regulatory agencies and potentially the tax authorities. Additionally, the frequently associated media exposure can be hugely damaging from a reputational perspective, as well as financially, particularly for publicly listed companies. And finally, there may be criminal implications for a company's executives. This is one of the reasons why, in the face of a serious corruption allegation, it is so critical for companies to engage counsel, and to swiftly and independently investigate the allegation to determine the credibility of the allegation, so that it can subsequently decide more objectively on whether to report, what and to whom. Of course, frivolous allegations or speculative rumours need to be given due consideration, but these generally do not warrant embarking on a full-blown investigation.

Peace: Augusto, what are the considerations regarding cooperation in Peru, particularly where authorities in other countries may have jurisdiction over the entity and conduct? Do we see the same dynamic with companies self-reporting and cooperating with authorities? Are the benefits of doing so clear?

Loli: In the last 20 months, since the official investigation into the *Lava Jato* case started here in Peru, it has been met with certain challenges. One of these, which I mentioned previously, is the current political context in which the integrity and transparency of our institutions have been put in question. But beyond that, there have also been challenges from an operational standpoint, arising from the fact that there have been two special prosecution teams, one in charge of overseeing the corruption case and the other the money laundering aspect.

This division of labour by the Prosecutor's Office has created some difficulties in terms of the overall direction of the investigation as well as in reaching an agreement with Odebrecht and its employees. The possibility of signing said agreement has been delayed numerous times. We hope that the recent unification of these two teams will increase the momentum of the investigation, which had been at a standstill, and lead to a favourable outcome. In addition, besides the ongoing criminal investigation, there is currently an administrative procedure opened by the Antitrust Commission of Indecopi [the Peruvian authority on antitrust and consumer protection matters] linked to the existence of the 'Construction Club' cartel but, as far as we know, this has not clashed with the criminal investigation. However, this could change if any of the companies wished to sign an agreement in any of the two cases that may have an impact on the other.

However, in Peru the police have no power to make agreements on effective cooperation. Even the prosecutor's actions in this area must finally be judicially decided in terms of the benefit that is granted to the parties; the prosecution is not autonomous in the handling of this privilege. The biggest problem that plea bargains have in Peru is the handling by the media and the excessive value that is given to them in public opinion (under the debatable idea that the collaborator cannot lie, because, if not, he loses the benefit). This tremendously hinders the objective and efficient development of criminal investigations.

Our procedural legislation has recently introduced the possibility that the companies themselves can undergo an effective cooperation process, a mechanism that previously only existed for individuals. The law allows that the penalties applied in the Penal Code can be exempted, suspended or reduced, and even the bar on contracting with the state, as regulated in the Law of Public Procurement, can be lifted.

Peace: Earlier, Isabel mentioned the focus on compliance, and it is fair to say that prevention is better than cure. What are the challenges to companies in Latin America with respect to implementing effective compliance programmes? As was discussed earlier, it appears that there has been a cultural shift and more resources are being devoted to compliance – training and personnel. Is that a development you are seeing across industries in Brazil and in Latin America more broadly?

Galvis: There are multiple factors that drive the dynamic of enhanced compliance policies, training and implementation. Of course, there is the adoption and enforcement of more robust anti-corruption laws in home countries and more fluid cooperation by regulators and law enforcement authorities across jurisdictions, but also the M&A and financing markets are drivers as well – one of the first steps we take in the due diligence process in the context of Latin American transactions is to review the company's compliance policies and the concomitant training and implementation.

Aalbers: The implementation or strengthening of compliance programmes has become a priority for major companies in Brazil since 2014 when its anti-corruption legislation was enacted and the *Lava Jato* probe started. We are seeing some movement in this direction in other Latin American countries, although, generally speaking, to date these initiatives have been more modest. A select number of public sector companies have also stepped up their compliance efforts, but effective programmes in the public sector are still a rare exception.

The key challenges to implementing effective compliance programmes in Latin America are threefold: firstly, securing senior level buy-in and an appropriate budget, which is particularly challenging in markets in which companies are struggling to perform. Secondly, overcoming cultural resistance and the (mis)perception that compliance is a business inhibitor and yet another layer of red tape in business environments which are already complex and often bureaucratic; lastly, given how recent the compliance movement is, there is a relatively inexperienced, albeit rapidly growing, talent pool.

A couple of pointers to get leadership on board come to mind. Try to discuss compliance in terms of risk management language, and steer away from overly legalistic jargon. Most of us intuitively understand risk management language and can see value in a well-executed

risk assessment, the pillar of any compliance programme, but few care to listen to lectures on laws and legal concepts. Secondly, engage at board level. Compliance and risk management are rapidly becoming standing agenda items for board meetings. Once the board or one its committees is engaged, it is much easier to engage leadership and secure tone at the top. Thirdly, make it clear from the outset that compliance risk is not owned by the compliance officer, rather that the ultimate responsibility for compliance rests with the frontline team. When you push back responsibility like this you will find that people are much keener to seek advice and open to guidance. And finally, invest in technology to bolster compliance efforts, whether to monitor communications or financial transactions or to automate compliance processes. This is not only more cost-effective in the long term than building large compliance teams, it is a far more effective means to flag potentially relevant issues in real time.

Peace: I agree. It is critically important for the compliance programme to be more than a paper one of written policies and procedures. Adequate resources should be dedicated to the programme and it has to be enforced; potential misconduct must be investigated and disciplinary measures have to be taken where misconduct is found and policies have been violated. And, the programme can't stagnate. It must be periodically evaluated and improved, based on the risk profile of the company. There are real benefits to having a strong compliance programme in Brazil and the United States: in addition to prevention and early detection of corruption, an effective compliance programme can support a legal defence under certain laws, or help the company avoid prosecution or get reduced penalties.

Franco: I agree with all these comments. Let me add something which, to me, has been surprisingly prevalent in São Paulo: here, the incredible number of US subsidiaries dictates the requirements of the market. Companies are demanding that their potential business partners have a compliance programme, including several state-owned companies. We can see that even small companies are being compelled to look into compliance. It is no longer a choice; it is a must!

Loli: In Peru, the compliance culture has had a very particular path. In the case of subsidiary companies with parent companies in countries that have an internalised compliance culture, the decision to adopt regulatory compliance programmes has moved on the level of self-regulation. However, these programmes usually respond more to the requirements of the anti-corruption legislation of the parent company's country than to the risk of committing corruption offences under national regulations. The situation is beginning to change with the introduction of Law No. 30424, which entered into effect this year. This law sanctions legal entities for committing corruption crimes (transnational and domestic), among other crimes. Article 17 establishes the possibility of exempting from liability a legal entity that, prior to the commission of the crime, has implemented a suitable prevention model for these crimes. This new legal scenario has motivated companies to start adopting a compliance programme under the minimum parameters that the same law establishes, or adapt what they have to the Peruvian requirements and filter up to the parent company, in order

to be able to take advantage of the exoneration of responsibility. The fact that Peruvian companies are still mainly focused on forming a compliance programme means that these programmes are not fully implemented or consolidated. Therefore, internal investigations do not follow a predictable procedure under the requirements that are normally imposed by mature compliance functions, but are more an assignment of trust to certain advisers so that, in the end, the managers take the best decision on how to proceed. That is usually along these lines: communicate it to the authorities, submit to a cooperation programme, define the scope of the information that will be provided, reparative actions for those affected, etc.

Peace: Let's talk about the involvement of company auditors in corruption investigations. It seems that it is much more common in Brazil for auditors to insist that a 'shadow' investigation be conducted by the investigation arm of the audit firm. Are these becoming the norm now? How has the shadow investigation dynamic influenced how companies deal will potential corruption issues?

Aalbers: External auditors are a critical audience for a company under investigation, particularly when the matter being investigated has the potential to impact financials or appears to question the integrity of the management team. As such, it is important to understand and give due consideration to any concerns external auditors may have related to these points. Shadow investigations have become the norm in major regulatory investigations primarily within public companies in Brazil. The scope of those shadow investigations can vary broadly, but in general, these shadow investigations can be quite comprehensive and interfacing with the auditors can add an additional layer of complexity to an internal investigation. When dealing with the auditors in this capacity, it is critical that the company and the investigations team engage frequently and maintain transparent and candid communications throughout the investigation. Scope and methodology should be agreed early on, and changes to scope well documented, to avoid surprises at the back end of an investigation. While the company and the investigations team should fulfil reasonable information requests, they should also stand firm when the requests extend beyond the scope of the investigation or when fulfilling those requests for information would involve privileged materials. And, while it is understandable that shadow investigators will push the investigations team to cover all angles, there is a significant difference between auditors essentially dictating scope, and providing a recommendation. Tight deadlines to produce reports or information, particularly in the period immediately prior to financial reporting are common, and reasonable efforts should be made to meet them, but pushing back on unrealistic requests is also important to maintain balance in the relationship. Creating and following an organised communications protocol and implementing an audit trail is also critical.

Franco: Breon, you have touched on a very sensitive matter. Unfortunately, a few recent experiences here in Brazil have warranted the concern of company auditors in some cases. And they seem to have become more and more prevalent. As counsel to the client conducting the internal investigations, we are caught in the middle, feeling the pressure to somehow

satisfy the auditors while the client tries to prevent them from taking control of the investigation. This is an art to be exercised on a daily basis. The biggest impact is obviously the cost. No investigation is inexpensive but for the company to have to sort of pay for it twice is really troublesome.

Peace: How has the *Lava Jato* scandal impacted the transactional space – mergers and acquisitions and restructurings – with respect to levels and structures? I also want to get your thoughts on successor liability and how that influences clients' approaches to transactions with companies with a link to *Lava Jato*.

Galvis: I see a number of effects: there has been an overall chilling effect but not a complete break. That chilling effect is particularly strong where the asset in question (for example a concession-based business) has a cloud over it. Also, in situations where US jurisdiction might arise in some fashion, the DOJ/SEC FCPA resource guide to which I referred earlier is of good help here and provides pathways for managing 'successor liability' risk in *Lava Jato*-specific situations and also more broadly, as acquirers in Latin America place compliance with the law at the top of their due diligence priority list. In this regard, due diligence at the negotiation stage, integration post-closing (implementation of codes of conduct, training, controls, etc.) and mitigation (in case of issues problems that arise) are important tools in managing successor liability risk. We also see that certain jurisdictions have taken creative measures to facilitate the disposition of assets by actors who had taken corrupt actions in the past. A good example is Peru where, initially through an emergency decree of the Ministry of Justice, and eventually through legislation, a mechanism has been set up whereby proceeds from the sale of assets by companies convicted of bad acts are paid through a controlled account with a waterfall, pursuant to which the first dollars are used to meet the seller's obligation to pay fines to the government before residual funds are released to the seller or third parties. This allows the buyer to receive the asset free of future claims against it for past bad acts by the seller or its affiliates.

Loli: One of the most relevant changes in Peru has been the law applicable to transactions. In the years before the corruption scandals, we had seen that the tendency with respect to law and jurisdiction applicable in the corporate transaction contracts was to choose the Peruvian law and forum. This was based on the arguments that the assets of the transaction were located in our country, and also that Peru has been enjoying a growing institutional stability. With the corruption scandals, which have brought a lot of uncertainty in politics and thrown doubt on our institutions (including the judiciary), this trend has been reversed and now investors are very reluctant to accept Peruvian law. In that sense, depending on the size of the transaction, we see that more and more foreign law is chosen for this type of transaction (e.g., New York or English law for large transactions, or Florida law for smaller transactions). Another relevant component in current transactions, whether operations in which the Peruvian government participates or even just among private parties, is the incorporation of anti-corruption clauses, which allows the contract to be terminated if any of the parties has committed this type of crime.

The new regulation on criminal liability of legal entities establishes that, in M&A, the responsibility is transferred to the buyer unless the latter has carried out an adequate process of due diligence. That means undertaking reasonable actions to verify that the merged or divided legal entity has not committed any of the five crimes laid out in the law. While the acquiring legal entity does not run the risk of jail time and can only be fined (two to six times the benefit obtained or expected to be obtained with the crime), the level of social reproach that comes when this penalty is imposed, within a criminal process and by a criminal judge, generates a much greater reputational damage. This has caused M&A operations to place greater emphasis on the evaluation of possible criminal contingencies, as part of the due diligence.

Franco: As previously mentioned, the *Lava Jato* operation has significantly affected M&A transactions throughout Brazil and in the Latin American countries it touches. There has been a change of stance and culture recognised as positive in the development of new acquisitions.

The Clean Company Act provides for the administrative and civil liability of legal entities for the practice of acts against the public administration, national or foreign. One of the main novelties brought by the Brazilian law has been the strict liability (regardless of intent or fault) imposed on legal entities for acts harmful to the public administration.

There are two aspects that need to be analysed very carefully in the context of investments and acquisitions of companies. The first refers to Article 4 of the Act, which provides that the legal entity will remain responsible in the event of change in its articles of association or bylaws, corporate transformation, merger, amalgamation or spin-off. In other words, the Act created corporate succession for fines and redress for damages by acts of corruption committed by third parties, including the management of the sellers of a particular company or establishment.

For this reason, legal entities should be cautious in undertaking corporate restructuring because of this maintenance of liability. It is true that the Clean Company Act limits the successor liability in certain scenarios, such as mergers, where the sanction is restricted to the obligation to pay a fine and full compensation for the damage caused, up to the limit of the assets transferred, as the other penalties apply only in case of simulation or obvious fraud, duly proven.

Such rules have caused an incredible change in the conduct adopted in corporate reorganisations. The care and diligence of the corporate players began to be multiplied whether in the position of a buyer or even as the seller, the latter concerned with being involved in money laundering schemes.

Furthermore, we have seen an amazing change of attitude in due diligence activities, not to mention the drafting of the transaction agreements. Buyers are now often performing level three due diligence, including not only interviews of major players in the target but quietly sending detectives to the field to ensure that the target is free of corruption.

In addition, to mitigate succession risks, new transactions have included provisions in the sale and purchase agreements, with heightened representations and guarantees with reinforced indemnity, compliance programmes and related guarantees.

It is worth noting that in Brazil there are no mechanisms such as those in the United States, which has a more advanced system that authorises agreements with the DOJ and SEC before the conclusion of the M&A transaction, so that the buyer may be exempted from penalties related to acts of corruption practiced by the sellers or the target company.

Peace: Are members of the board of directors of companies potentially at risk in corruption investigations in Brazil and Peru? How can they best manage the risk?

Aalbers: Board members can be at risk if they are negligent or careless in exercising their core duties, which are ultimately based on protecting shareholder value and reputation, and impartially defending the interests of the shareholders. Ensuring that a company has effective risk management, internal controls and compliance in place to prevent fraud and corruption risks and their impact on financial results and company reputation arguably sits squarely within a board's mandate. Equally, they should ensure that the company puts mechanisms in place through which allegations of fraud and corruption can be escalated to the appropriate company bodies, and, where necessary, seek appropriate external expertise to allow a thorough and independent investigation to take place, with no interference from the company's leadership. And finally, for publicly listed companies, board members have a duty to inform the market about relevant matters which may significantly impact the value and trading of shares. Clearly, a serious allegation of corruption or fraud could fall into this latter category. Failure or unwillingness to fulfil any of the above could expose board members to civil and possibly criminal responsibility.

Loli: This question about the liability of the board of directors is one of the most exciting and frequently discussed topics in modern criminal law in Peru, especially owing to the growing tendency to seek liability for criminal actions by a company's management, which culminates in the establishment of criminal liability for the legal entity itself. However, it is a subject that we must treat very carefully, to neither encourage impunity nor fall into arbitrariness. The current Peruvian jurisprudence is heavily inclined to establish criminal responsibility for crimes of corruption in those cases where one can demonstrate a certain level of knowledge or direct intervention in the criminal acts by the members of the board. However, it is very unlikely that a negligent or careless act can generate criminal liability to the members of the board (although this will most likely result in civil liability), especially when those members are not engaged in day-to-day management of the company. Corruption offences are sanctioned only if there is a direct awareness by the members of the board.

However, this discussion has not been resolved; indeed, it has been revived, with the entry into force in our country earlier this year of the law that establishes the criminal responsibility of legal entities for five crimes, including bribery, collusion and influence peddling. To the extent that the justification for penalising a company has to do with the existence of an organisational defect that encourages or allows the commission of criminal acts within it, there is much discussion about the responsibility that should fall upon managers who did not implement minimum measures for the prevention of illicit behaviour.

In this sense, our permanent recommendation for our clients, directors of companies, is to take seriously the culture of compliance and promote this in a committed manner in the company. That means not just incorporating codes of ethics, policies or the fairly generic anti-corruption protocols, which today are found everywhere on the internet, but more importantly being concerned with a true evaluation and analysis of any potential criminal activities that may have occurred. This is achieved not only by analysing processes and organisational charts of their companies, which in many cases include the description of what the company aspires to be, but with well-prepared interviews by experts that capture how the company really operates in those areas or positions most exposed to criminal risks. Only to the extent that the directors take this obligation seriously can they be at peace.

Bottini: The negligence of the board members of a company could bring criminal liability if they have a duty to take measures to stop crimes within the company. Those duties must be accounted for in law or be contained within the company rules. This criminal liability for omission will only exist if the board member or executive has the effective power to stop the crime and could have known about its existence. That liability is outlined in Article 13, Paragraph 2 of the Criminal Code and it has been used to bring criminal procedures against high-level executives.

Franco: I agree with Augusto that the matter of liability of the board of directors is one of the hottest topics – it is in Brazil too, as can be seen by the number of individuals who have been arrested during the *Lava Jato* operation. Answering this question objectively, yes.

According to Brazilian law, board members can be held accountable for the company's actions. This is for a very simple reason. As I have already said, in Brazil there is no criminal responsibility of the company and, therefore, in determining a crime, the decision-making power of each individual must be verified: whether the manager could have had knowledge of some form of conduct by a subordinate and if he or she had an obligation to do something (for example, the chief compliance officer). Bottini mentioned criminal liability already. In addition, our corporate law (Law No. 6404/76) provides that the administrator is not personally liable for their obligations undertaken on the company's behalf, but he or she will be civilly liable for the damage that he or she may cause when acting with negligence or wilful misconduct. Therefore, each person will be held accountable to the extent of his or her contribution, even assuming the risk, to the development of the criminal conduct.

Corruption investigations, expropriation, industrial accidents: corporate crises take many forms, but each can be equally dangerous for companies in Latin America.

Published by *Latin Lawyer*, edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, *The Guide to Corporate Crisis Management* is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region. More than 40 leading practitioners from a variety of disciplines have contributed their knowledge and insights from their experience.

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