



# The Guide to Corporate Crisis Management

Second Edition

Editors

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

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and Werner F Ahlers

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# Publisher's Note

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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.

# Contents

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**Introduction: Effective Crisis Management in Latin America** ..... 1  
Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, *Sullivan & Cromwell LLP*

## **Part I: Navigating Political Risks**

- 1 **Fire Marshals, Not Firefighters: A Different Approach to Crisis Management in Latin America** ..... 9  
Thomas F McLarty III, *McLarty Associates*
- 2 **Dealing with the Challenges of Political Violence and Crime in Latin America**.....16  
Jack Devine and Amanda Mattingly, *The Arkin Group LLC*
- 3 **Navigating a Corporate Crisis: Managing the Risks of Downsizing in Venezuela**..... 26  
Fulvio Italiani and Carlos Omaña, *D’Empaire*
- 4 **M&A in a Crisis-Prone Environment: Red Flags and Warning Signs in Peru**..... 31  
José Antonio Payet and Carlos A Patrón, *Payet, Rey, Cauvi, Pérez Abogados*

## **Part II: Stakeholder Relations**

- 5 **Singing from the Same Song Sheet: How Collaboration Between Legal and Communications Can Mitigate a Crisis** ..... 43  
Paul A Holmes and Eric M Wachter, *Finsbury*
- 6 **Mining Projects in Peru: Community Relations, Indigenous Rights and the Search for Sustainability** ..... 53  
Luis Carlos Rodrigo Prado, *Rodrigo, Elías & Medrano Abogados*
- 7 **Data Privacy and Cybersecurity: Crisis Avoidance and Management Strategies**..... 63  
Jeremy Feigelson, Andrew M Levine, Christopher Ford, Joshua Smith and Stephanie Cipolla, *Debevoise & Plimpton LLP*
- 8 **Never Let a Good Crisis Go to Waste: The Role of Culture, Perception and Common Sense in Crisis Management** ..... 79  
Pablo Jimenez-Zorrilla and Gregorio Lascano, *Anheuser-Busch InBev*
- 9 **Crisis Management as a Tool for Approaching Shareholder Activism**..... 87  
Sergio J Galvis and Werner F Ahlers, *Sullivan & Cromwell LLP*

**Part III: Anti-Corruption and Government Investigations**

- 10 Anti-Corruption in Latin America..... 97  
James M Koukios, Ruti Smithline, Gerardo Gomez Galvis and Julian N Radzinski,  
*Morrison & Foerster LLP*
- 11 Roundtable: Lava Jato and Its Impact on Investigations in Latin America.....111  
Breon Peace, *Cleary Gottlieb Steen & Hamilton LLP*  
Geert Aalbers, *Control Risks*  
Isabel Franco  
Augusto Loli, *Rebaza, Alcázar & De Las Casas*  
Pierpaolo Cruz Bottini, *Bottini & Tamasauskas Advogados*  
Sergio J Galvis, *Sullivan & Cromwell LLP*  
Clare Bolton, *Latin Lawyer*
- 12 Representing Individual Executives in Latin America..... 126  
Mauricio A España, Hector Gonzalez, Andrew J Levander, Mariel Bronen  
and Yando Peralta, *Dechert LLP*

**Part IV: Securities and Regulatory Actions and Litigations**

- 13 Dealing with a Hostile Administrative State: The Argentine Case..... 143  
Héctor A Mairal, *Marval, O’Farrell & Mairal*
- 14 Securities Litigation After a Crisis: What Latin American Companies Can Expect  
in a US Court Proceeding .....155  
Brendan P Cullen, *Sullivan & Cromwell LLP*
- 15 Cross-Border Transfer Pricing Investigations and Proceedings ..... 170  
José Luis Fernández Fernández and César De la Parra Bello, *Chevez Ruiz Zamarripa*

**Part V: Restructuring and Insolvency**

- 16 Weathering a Financial Crisis in Brazil .....181  
Camila Goldberg, Conrado C Stievani and Igor Silva de Lima,  
*BMA – Barbosa Müssnich Aragão*
- 17 Financial Distress: An Action Plan for Corporate Restructurings in Mexico..... 194  
Eugenio Sepúlveda, *Galicia Abogados*
- About the Authors ..... 207
- Contributors’ Contact Details ..... 223

# 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 or financial distress leading to possible insolvency. In Latin America, a region that remains one of tremendous promise and opportunity for investors and corporations, these situations can present particularly complex and multifaceted challenges for leaders managing a crisis owing to 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 in the past few years, as companies doing business in Latin America have seen a series of crises topple politicians and wound companies. Perhaps the most wide-ranging crisis arose from the *Lavo Jato* bribery investigations in Brazil and related investigations, where several executives have been sentenced to prison and companies have been subject to hundreds of millions of dollars in fines from authorities in countries in 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 largest economies.

Beyond the area of compliance, the region's leading corporations have faced challenges ranging from environmental or industrial accidents, such as spills or dam failures, which have more recently affected companies in extractive industries or hydroelectric power production, to significant renationalisations 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

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



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 strategy, responsible boards and senior executives must understand how to navigate the specific local contexts in which these challenges unfold and be prepared to put together, on short notice, the right teams that can best advise them to make critical decisions under intense time pressure. 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 or 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 are listed in Appendix I – 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. We also note that all contributions to this volume, 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 starts with the recognition that each corporate crisis develops within a unique political context. Any significant crisis requires deft management of relations with government agencies and other state actors who are likely to assert themselves as key stakeholders. With the benefit of decades of experience in the region, Thomas F McLarty III, the chairman of McLarty Associates, one of the world's premiere private diplomacy advisory firms, emphasises the importance of a comprehensive, disciplined and proactive approach to government relations in Latin America. Advocating a 'fire marshal' model, he urges organisations to recognise risks in advance, so that they can develop preventative government relations strategies that can help avoid crises or, critically, limit the damage when they hit.

Other contributors to Part I share their experiences 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 The Arkin Group's managing director Amanda Mattingly, draw from their years of experience in intelligence and risk management in the region 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. Fulvio Italiani and Carlos Omaña of the Venezuelan law firm D'Empaire Abogados discuss their experiences advising clients managing corporate crises in that country under circumstances of a continually unfolding political crisis. José Antonio Payet and Carlos A Patrón of the Peruvian law firm Payet, Rey, Cauvi, Pérez Abogados discuss how to deal with government investigations and other challenges in different phases of M&A transactions and emphasise the importance of selecting experienced and ethical advisers with deep knowledge of the region and specific jurisdictions.

In Part II, contributors explore the critical role that communications plays in all crisis response strategies. Jeremy Feigelson, a Debevoise & Plimpton LLP partner, and his colleagues, discuss the central role of communications in designing and implementing incident response plans in the areas of data privacy in cybersecurity. With the extraterritorial reach of the European Union's General Data Protection Regulation and similar legislative efforts in other jurisdictions, privacy breaches can quickly balloon into a legal, as well as reputational, crisis, and the authors stress that compliance professionals across Latin America should be thinking about these risks.

Effective communication can also play a vital role in avoiding crises, serving a key role in laying the groundwork for the development of sensitive and capital-intensive projects. Luis Carlos Rodrigo Prado of the Peruvian law firm Rodrigo, Elías & Medrano Abogados considers the case study of the successful management of mining projects in Peru, where the law protects indigenous communities by requiring socioeconomic impact studies and prior consultation with those communities. 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, the CEO of North American operations at the global communications firm Finsbury, along with Finsbury 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.

If effectively managed, corporate crises can also present valuable opportunities. Pablo Jimenez-Zorrilla and Gregorio Lascano of Anheuser-Busch InBev note how an organisation's values and capacity to develop trust with stakeholders are critical for navigating crises and quickly addressing reputational risks they bring. They also explore how companies can seek to create value in crises by pursuing opportunities for preserving and strengthening organisations and their reputations across all stakeholder communities.

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 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.

In Part III, the guide turns to a category of corporate crises in Latin America that has dominated headlines and arguably had the largest impact on that region's business and political environments: anti-corruption investigations and enforcement. Breon Peace of Cleary, Gottlieb, Steen & Hamilton LLP moderates a panel that analyses *Lava Jato* and related investigations. The roundtable participants, based in São Paulo, Lima, New York and London, apply their diverse perspectives as lawyers, former government officials and global risk consultants to discuss how the investigations have affected commercial life in several of the region's major economies.

The phenomenon of the *Lava Jato* investigations can be seen as both a consequence and 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 Koukios, Ruti Smithline, Gerardo Gómez Galvis and Julian N Radzinski. While the anti-corruption risks across the region vary, the authors note that legal regimes are increasingly standardising their laws and increasing cooperation between their enforcement agencies. Familiarity with these trends can help practitioners design and properly prioritise the implementation of robust, risk-based compliance programmes as the best strategy to avoid a corruption-related crisis.

In the last chapter in Part III, Andrew J Levander and some of his Dechert LLP colleagues provide technical guidance and practical advice on matters that corporate leaders often have to confront in anti-corruption investigations that could develop into a crisis. The authors note that executives based in Latin America can face significant personal risks under a US regulatory or criminal investigation because of the extraterritorial reach of applicable US laws and survey the key issues for counsel who are considering and advising on these risks.

Of course, crises can emerge from regulatory or enforcement actions beyond anti-corruption investigations, which is the focus of Part IV. For example, some political developments can increase the possibility of aggressive and unpredictable enforcement action from state agencies across the board, creating a hostile business environment that requires deft management. Héctor A Mairal, partner at Marval, O'Farrell & Mairal in Argentina, focuses on this phenomenon by discussing the case study of Argentina during the Kirchner administration and offers effective strategies that corporate counsel may adopt to deal with political environments that lack a stable regulatory regime and consistent enforcement.

Sullivan & Cromwell LLP litigator Brendan P Cullen explains how, for issuers of securities in the United States, corporate crises in Latin America can lead to securities class actions in US courts, and explores effective strategies for defending against these claims. Aggressive enforcement by tax authorities in transfer pricing is another area of increasing concern for corporate compliance officers, and José Luis Fernández Fernández and César De

la Parra Bello of the Mexican firm Chevez Ruiz Zamarripa examine the intricacies of effectively managing these proceedings in that country.

Finally, Part V explores some of the tactics and tools that corporations can use when facing existential crises of potential financial insolvency. Camila Goldberg Cavalcanti, a partner at the Brazilian law firm BMA –Barbosa Müssnich Aragão, and her colleagues discuss how a severe economic recession and corruption probes have hit a number of Brazil’s major corporate groups and cover tools and challenges to address financial crises in the country. Eugenio Sepúlveda of the law firm Galicia Abogados in Mexico then presents key lessons for navigating an insolvency by focusing on aspects of the Mexican legal regime that are most relevant to debtors in financial distress. Both chapters share a common message: the laws governing financial insolvencies offer powerful tools for effectively navigating this type of crisis, but if not properly managed, they can exacerbate a dire situation.

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 toward preparedness and effective response. At the same time, this survey of crises provides some common lessons that should benefit all corporate leaders.

First, while crises are by their nature 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 ‘table top’ 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 missteps 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 played by top executives and key advisers, and how they will coordinate among themselves. A theme that recurs throughout this volume is the importance of defining the right team 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.

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 best position themselves to withstand and emerge strong when an unexpected crisis hits.

We thank again our many illustrious contributors for their insightful and practical contributions to this volume 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 volume would not have been possible, particularly Skylar Sasson, Paloma de Carlos, Fabio Weinberg Crocco and Susan Beck.

# Appendix 1

## About the Authors

### **Sergio J Galvis**

Sullivan & Cromwell LLP

Sergio Galvis is a leading corporate lawyer in the United States who is known for his cross-border work, especially in Latin America. He joined Sullivan & Cromwell LLP after graduating from Harvard Law School and clerking for the Honourable Lawrence W Pierce, Second Circuit US Court of Appeals, and has been a partner of the firm since 1991. He is a member of S&C's management committee, oversees the firm's recruiting and administrative functions and leads its Latin America practice.

Sergio has worked with clients across more than 25 countries in Asia, Europe and the Americas on hundreds of significant matters in a broad range of practices, including crisis management, criminal defence and investigations, workouts and restructurings, corporate governance, sovereign financing, capital markets, M&A and project financing. He also regularly works on OFAC compliance and sanctions issues, especially as they relate to in Latin America situations.

### **Robert J Giuffra Jr**

Sullivan & Cromwell LLP

Robert J Giuffra Jr is recognised as one of the leading litigators in the US. He is a member of Sullivan & Cromwell LLP's management committee, responsible for the litigation practice.

A fellow of the American College of Trial Lawyers, Mr Giuffra has represented Fortune 500 companies in some of the highest-stakes litigations and investigations of the past two decades, including those arising from the financial crisis, *Enron* bankruptcy and *HealthSouth* accounting fraud. He is currently US national coordinating counsel for Volkswagen in diesel emissions litigations and investigations and helped secure landmark

US regulatory and consumer settlements. He also represents Fiat Chrysler in US litigation and investigations over diesel emissions. He has represented leading Latin American companies, including Tenaris in securing the first SEC deferred prosecution agreement and Grupo Mexico in Delaware derivative litigation. He has won precedent-setting US court decisions, including limiting the extraterritorial application of US securities laws.

A graduate of Princeton and Yale Law School, Mr Giuffra clerked for Chief Justice William Rehnquist of the US Supreme Court and for Judge Ralph Winter of the Second Circuit. As Chief Counsel of the US Senate Banking Committee, he was a principal drafter of the Private Securities Litigation Reform Act.

## **Werner F Ahlers**

### **Sullivan & Cromwell LLP**

Werner Federico Ahlers is a partner in Sullivan & Cromwell LLP's general practice group, whose practice focuses on a wide range of cross-border mergers and acquisitions, joint ventures, private equity transactions and corporate matters. Werner advises on a variety of corporate, project and restructuring financing matters, and in the areas of corporate governance and crisis management. He is a core member of the firm's Latin America practice, and regularly acts on equity and debt investments for strategic investors based in and outside the region, private equity, pension and sovereign wealth funds, and bank and multilateral agency lenders. His practice spans diverse sectors, including mining and metals, power and energy, real estate, infrastructure, telecommunications, healthcare and financial services.

Werner has been repeatedly recognised for his cross-border advisory work by leading legal publications, such as *Chambers* (Global and Latin America), *Latin Lawyer*, *Law360*, *The M&A Advisor*, *The American Lawyer* and *The Legal 500* (Latin America and US). Werner serves on the executive sub-committee and as chair of the Latin America sub-committee of the Cyrus R Vance Center for International Justice and as a term member of the Council on Foreign Relations. He is a native speaker of Spanish and is proficient in Portuguese.

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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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