

Zen & The Art of Legal Networking

INSIGHTS & COMMENTARY ON RELATIONSHIP BUILDING WITHIN THE INTERNATIONAL LAWYERS NETWORK

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Corporate Breakout Session - Anti-Corruption Laws - Around the World Part I

Following [introductory comments from Alishan Naqvee](#), [comments on the FCPA from Stuart Gerson](#) and the [UK Bribery Act from Charles Wander](#), the group discussed their thoughts on anti-corruption legislation in their own countries. The discussion was quite lengthy, so I've broken it up into multiple posts.



[Sueli Avellar Fonseca](#) began with comments about Brazil, which she noted is rated highly on the corruption scale. She said that all the public departments and politicians engage in corruption. The government had created a commission to investigate the existence of corruption and their conclusion was that there is no evidence. Despite this, over the last eight years of the current government, they have made approximately 20 commissions and these commissions are all paid duties to vote in favor of the government.

Stuart commented that this is why a country like Brazil presents huge problems for outside companies doing business there. Sueli agreed and said that the UK and US authorities don't care that it's customary in Brazil to take bribes. She said that it's not the government receivers of the bribes who will turn you in, but your competitors. So there is risk.

She said that for them, it's terrible. She gave the example of a minister who is currently involved in a case because during two months of the election, he received about \$6 million, which he called a "consulting fee." In fact, it was to influence him. He used the money to buy a very big

house, which he put in the name of a small company and two domestic employees, saying that he paid rent to them. The media discovered this and interviewed the employees, who said they didn't know they owned real estate and had never received any rent payments. Sueli added that this is a very bad situation, particularly because he is the second most important man in the government.

Charles said that under the UK legislation, this raises a problem on so many different levels, because if you have a British company doing business in your jurisdiction, and you have an agent working in the jurisdiction who is getting involved in making "grease" or "speed" payments, then that individual who's working in the foreign jurisdiction is committing the offence under the UK legislation. Additionally, the company in the UK of whom this person is an associate under the UK legislation is probably committing the offence of failure to prevent, because the defense requires that you have to look at the country, the sector, the transaction, the arrangement you have in place.

Another of the principles that you have to deal with is due diligence, so Charles said that you can't close your eyes, you have to investigate these things. In that kind of situation, it seemed to him that you have an official in the country, and if they ever came to Britain, they would find themselves prosecuted. And you have a company in Britain, they are going to fail to be able to make that defense, because when you look at the Transparency International scale and you look at what's happening on the ground, someone is going to say that you haven't done your due diligence or a proper risk assessment. The problem seemed to Charles that you're almost creating the issue for the UK company that has to go out and do the risk assessment and come to the conclusion that they can't do business in that jurisdiction because the defense will fail.

So the more overt it is, the more it's coming out in the media, and the more it's known, the more likely it is that the defense is simply not going to fly in the UK. This new offence is going to mean that people can't do business.

Sueli commented that in Brazil, they used to have a labor court judge who sold his decisions for big money. He was put in prison, but for many years, he was able to sell his decisions. She said that although someone is finally in prison for corruption, it is rare.

Stuart said that there are a fair number of settled and decided cases in the US, and the UK will catch up as their statute gains momentum. He added that it's not a hypothetical that what was described by Charles is a problem for US companies. Their firm does a lot of business in Brazil, which is a giant country with tremendous economic opportunities. The US government likes their government, which has been a force for stability. But the fact of the matter is that there is this tremendous risk and ultimately, companies will have to make the decision as to how to balance the risk against the reward.

His firm is doing healthcare deals in Brazil, and they're looking at the possibility of more, so it's important to develop the due diligence tools, the risk assessment, and use a third party to conduct this. They have started to work with consultants who can do background investigations and who have data profiles of the criminal records of people and have investigators on the ground trying to match what the US government is doing.

Stuart added that he doesn't know what the UK enforcement tools will be, but the US is increasingly using undercover FBI agents as legates in various embassies around the world. They're using techniques that you'd see in common law criminal prosecutions - wire taps, sting operations with undercover officers, etc. However, it is about the balance of risk against rewards - companies are still going to do business in Brazil, they just need to do as much as possible to protect themselves and have the best defenses.

[Mitchell Karsch](#) said that his firm has done a number of deals in Brazil for some of his clients. When the UK Bribery Act first came up a few months ago, they said they had to put into some of their transaction documents all of these undertakings. Although they've always had the FCPA and people seem to have accepted those over the years, they're now adding in the UK Bribery Act and there's a whole covenant section of the document, which is about a page and a half, about how they will undertake to comply with it. Some examples are having training sessions with employees, telling their vendors and agents about it and having them sign an undertaking.

He said that their clients look at them like they're crazy, since the UK Bribery Act hasn't come into force yet, but he found that after three or four deals, they seem to accept it. And the company has rolled out serious training programs, and they do come from the CEO. He said that what he's heard from the colleagues that he's worked with, is that as long as you have a serious training program and you run people through it, and give them these covenants to sign each year, it's thought that that will be acceptable.

Charles cautioned that the thing you have to watch out for locally is people saying "yeah, yeah, yeah" and signing, but are they actually complying? Or are they deliberately closing their eyes and signing these things? Mitchell clarified whether it was the parent company being fined, and Charles and Stuart said it was.

[Luis Lavalle Moreno](#) commented that he's seen these types of covenants in mergers & acquisitions, and said that sometimes it's part of the deal to assign a particular jurisdiction's law as the applicable law. He wanted to know how that would work in anti-corruption cases.

Stuart said that under the FCPA, it would involve whether there's somehow a defense in law that in the possibility of committing a bribe when something is mandated by the law of the country in which you're doing business. But he couldn't think of many of those things that would apply, because he just doesn't know of statutes that authorize certain kinds of payments. If they're fees, they're going to be legal on their face. But in terms of the application of US law, the US courts will trump any other law with the FCPA in the focused area to which it applies.

Luis asked if a US or UK company was acquiring a Brazilian company, and not a subsidiary, what would happen. Mitchell said that if they do a deal and something bad happens in Brazil, if the UK authorities come in, the parent company will try to show that they did all these things to try to prevent the fine. The person could still be arrested locally in Brazil, but it's preventing the parent company from being fined. Charles agreed and said that it's not going to be enough for the parent company to say that the local guy told them he wasn't making bribes.

To answer Luis' question, he said that these laws transcend the borders and are essentially "superjurisdictional." They have to look from the UK point of view, and if they have a substantial company in the UK with worldwide operations, and they're doing deals around the world, they have to start thinking about how to protect the holding company.

Mitchell added that his client has an internal audit team that goes in on every deal now, and in addition to the normal diligence, they'll also add in compliance diligence.

In the next post, we'll cover the remaining conversation that the delegates had with respect to anti-corruption.

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