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INTRODUCTION[1]

It's 4pm on a Friday afternoon and your phone rings. The Chief Financial Officer, based in Germany, has noticed an unusual number of product returns from the company's Japanese customers, and a whistleblower has been hinting at irregular business practices in that business. This is of particular concern because the CFO did not realize that the products at issue had a right of return, the CEO has had a difficult relationship with the business manager responsible for the Japanese market, and the company, which recently started trading depository receipts on the New York Stock Exchange, is scheduled to release its quarterly financial results in ten days.

The questions come fast and furious. How does the company figure out the number of returns, whether it is material, and whether something unlawful has happened? Should there be an investigation and, if so, who should undertake it? Will the review be privileged? What should the scope of the investigation be? Who should supervise it? Does the company need to be concerned about preserving documents? Are there laws that limit the company's ability to review the business manager's email, or to discipline him if there is a problem? Will the investigation delay the company's ability to issue its quarterly financial report? When should the Board of Directors or the Audit Committee of the Board be alerted to the issues? When should the company's external auditors be contacted? When does the company have an obligation to report the issue to the UK or US regulators, or to the company's shareholders? What will the whistleblower now do? Do you need to, or would it be smart to, approach a regulator proactively (and if so, whom)? Who needs to be told internally; and at what stage does telling people create a problem even if there is no substance to the issue? In short, how serious a problem is it and what do you need to do?

This scenario, or something very similar to it, is increasingly familiar to general counsel and to those lawyers who represent public companies. The legal issues presented by corporate clients are increasingly multi-jurisdictional, as clients push to sell products and provide services all over the world. At the same time, the legal regimes that apply to international corporate conduct remain, to a very large extent, enforced locally, but sometimes in parallel.

We wrote this book to help counsel, both in-house and at private law firms, take a broad, cross-border perspective in advising public companies that undertake internal investigations of potentially illegal, unethical, or regulation infringing conduct. For many of our clients, the world has shrunk, as they raise capital, sell products, and provide services in numerous countries around the globe more frequently and on a greater scale. As a consequence, in conducting internal investigations, we are almost invariably considering legal issues and cultural norms in multiple jurisdictions. This process is rapidly becoming more complex and more critical to businesses. In this introduction, we seek to identify some of the themes that have accompanied these developments.

When conducted properly, internal investigations are an effective means for management or the Board to learn quickly about potential illegal or unethical conduct by employees and to formulate an appropriate legal, regulatory and PR strategy. An internal investigation can reassure the corporation's various constituencies that the company is properly addressing its problems. It can recommend changes to prevent a recurrence of problematic conduct. It can also help companies to receive lenient treatment from regulators. In short, it is part of good governance. Of course, there are perils and an investigation that is not properly thought through, or is poorly executed, can create more problems than it solves. For companies that operate in multiple jurisdictions, this means that the team conducting the investigation must also understand the nuances of the legal requirements in each country.

The most highly regulated and legally developed country, in this respect, has traditionally been the United States where these issues have long been in development. This process has accelerated with the stock market decline that followed the burst of the dot-com bubble at the turn of the century, and the exposure of fraudulent activity at major companies such as Enron and WorldCom. US regulators all responded with significant changes in legislation and rules governing corporate conduct intended to deter fraud and bring greater transparency to corporate decision making and accountability to corporate managers, thereby bringing about a noticeable change in the environment. The success of these programmes and the later financial crises have fuelled the process leading to greater levels of regulatory activity and the regulators making the case for ever wider powers.

The stakes have increased tremendously. The SEC, DOJ, and State Attorneys General have become more active in the past decade, expanding their resources and aggressively pursuing corporate officers, directors, and general counsels and even the corporate entity itself. Fines can run into hundreds of millions of dollars for the largest companies with the most substantial problems. Individual offenders have received jail sentences that are measured in decades. And all of this has occurred against a backdrop of related private, civil litigation in the US that has cost companies millions of dollars to defend and billions of dollars to settle.

Although the reverse is sometimes seen, it is generally the regulators that have been driving this process, with the civil litigation following in the wake. The increased vigilance and vigour of all the regulators have dramatically changed the risk profile of companies in the US and the circumstances in which, and frequency with which, they turn to investigations.

The US has been in the forefront of the trends that have led corporations to conduct internal investigations and to cooperate with governmental inquiries, but the procedures in the US are constantly evolving themselves. The pendulum recently has swung in the US from a general assessment, post-Enron, that there had to be more regulation and greater cooperation with regulators, to an emerging sense, more recently, that some of the regulations may need to be fine-tuned as they are too blunt to effect the desired changes, and may be too expensive and too intrusive.

Countries elsewhere have been grappling with the same issues. They have watched the American experience and adopted some of the American approaches to internal investigations; to a greater extent in the UK and Germany, and a lesser extent in countries like Italy and Spain. Countries outside Europe, particularly in the BRIC economies are rapidly addressing these issues. This trend of learning from the experience of other countries is accelerating as the capital, goods, and services markets become more and more global. As this occurs, there will be higher expectations regarding the ethical standards for corporate conduct and the need for more independent and penetrating internal investigations to detect and remedy misconduct and indeed to set high standards of behaviour proactively.

The US is not the source of all technology in this field, either for regulators or companies. However, inevitably, the volume of cases and the sophistication of the parties involved have led to a deep experience there. Other countries are seeking to adopt the best parts of US experiences (such as the UK's current consultation on adopting deferred prosecution agreements and the role of antitrust leniency programmes in the EU). A look at the US experience may not give the answer to a given problem, but it will almost certainly highlight the issues that are going to have to be explored under local law. Usually they will have been ventilated, if not, indeed, litigated, in the context of a US problem.

The precise details of how those regulators have been extending their powers vary by country. However, the uniform trend has been towards greater and more invasive regulatory powers, more comprehensive regulation, more adversarial treatment of companies, and tougher sanctions. This has also led to changing regulatory relationships between companies and the agencies as they seek to come to terms with the evolving environment. This trend is marked. It is seen in all jurisdictions over the past ten years including such areas as financial markets, antitrust, criminal behaviour, environmental issues, and, increasingly, tax.

While the regulatory schemes in each country are distinct and independent, they are related and many countries follow closely the regulatory changes taking place around the world. Moreover, as discussed below, the standards of the most exigent relevant regime tend to dictate the approach that a multinational company must take in other jurisdictions.

Whether one views these changes as important advances in support of good corporate governance, excesses of ill-advised reforms, or something in between, they have imposed greater accountability for corporate conduct on company management, and increased their responsibility to prevent, detect, and deter unlawful practices. One of the principal tools that these corporate guardians increasingly use to fulfil their responsibilities, and to mitigate fines and penalties, is to initiate internal investigations to identify and address wrongdoing. This, in turn, has driven a growing need for lawyers who are skilled at conducting corporate internal investigations, and who can develop a comprehensive and sensible response to the issues facing the client. The increasing internationalization of corporate activities, and of any problems that emerge with it, requires those lawyers to be able to navigate the rules and expectations of regulators and courts in different jurisdictions, as well as ensuring that the investigation does not run foul of local laws on issues as diverse as self-reporting, export of confidential data, privacy, and employee rights.

Moreover, as investigations dig deeper, and regulators' expectations expand, these issues surface more often and in a more sophisticated fashion. This means that the lawyers involved in such exercises must constantly deepen and broaden their international skills.

For example, in an issue as mundane, but as important, as document collection, the substantive laws and the expectations of clients and their employees differ substantially from one country to another. They will often affect the scope of the documents the investigator is able to collect, the decision regarding where the documents should be reviewed, and whether relevant documents may be transported outside the country of origin.

There is also a much greater use by regulators, and in internal investigations, of detailed document searches. This is a natural consequence of the value of email and IT meta-data information in establishing who was doing what, when, and to whom. Regulators, lawyers, and litigants are increasingly using sophisticated analytical tools in this area, including IT based relevance and clustering software, to sort and order the vast amount of data that is available. Frequently, key search terms are agreed with regulators. This trend—the increasing importance of mining useful information from large document searches—will continue and will become more complicated. It is absolutely crucial that investigative counsel are experts in this area and up to date with the leading IT products. It is extremely dangerous if other parties, including regulators, have greater skills in this respect.

Conflicting statutes and a variety of cultural mores must often be considered in deciding when, and how, to interview company officers, employees, and agents, and in determining how the company should treat persons suspected of wrongdoing. However, under the time pressures present in many international investigations (and with an increasing expectation that investigations will be conducted to equivalent levels of due diligence), some cultural sensitivities are having to give way to the exigencies either of 'head office' or of a foreign regulator. Thus, another trend is the slow harmonization, to a more invasive standard, of the expectations of employees in connection with investigations and the way in which the employees interact with their employer in such circumstances.

Regulators around the world also have different, and at times conflicting, views regarding whether and when companies should report to government officials suspicions of improper conduct, and the degree of transparency the company should allow the regulator into the workings and findings of the investigation. However, the success of, particularly, (i) the antitrust leniency regimes in the EU and US; and (ii) the requirements of financial service regulators to require self-reporting at an early stage of knowledge are informing regulators generally.

Where a matter touches the EU (generally in an antitrust matter, but also in some states in other matters) or the US in antitrust or some wider regulatory, or particularly, criminal respects, the 'cooperation' guidelines or leniency rules have led many companies to self-report indications of potentially improper conduct at a very early stage. Self-reporting may even be a legal obligation, not least in the money laundering area, which can have wide-reaching impact. As a result, prompt self-reporting, and the culture associated with it, is becoming more common.

Moreover, capital markets and shareholders are changing their expectations of the governance standards of companies: more emphasis is being placed on companies 'doing the right thing' when faced with difficult situations, which often manifests itself in pressure to report issues early. Coupled with this, companies are developing more sophisticated relationships with regulators to provide the context in which such reports can be given. However, self-reporting cannot take place (and is actively dangerous) without a sufficient internal investigation to be confident that no one is being misled. Early self-reporting can easily result in incorrect information being transmitted at the beginning of an investigation when there is, inevitably, a fair amount of confusion and the facts, which seemed to be well settled, may well have been misunderstood. Accordingly, there must be a high degree of caution to avoid confusing or misleading any party to whom a report is made, including capital markets. This requires sensitive handling and a degree of transparency, including being prepared to admit uncertainties.

Finally, there is a critical and deep-seated drive towards greater cooperation between regulators around the globe. This cooperation exhibits itself in cross-border assistance between governments that are investigating, prosecuting, and settling the conduct that is the subject of investigations. It has generated a worldwide discussion regarding the degree to which corporations are expected to investigate and remediate their internal problems and the extent to which they will receive credit from regulators for taking those steps and sharing their internal reviews.

It is worth noting that investigation practices have started to become more standardized and a consensus is beginning to form on best practices in corporate internal investigations. We expect that this trend will continue globally. All of this requires that lawyers and their clients stay on top of this area of practice so they can understand how the rules are developing and can achieve results that are appropriate in this multi-jurisdictional environment.

This book identifies the principal issues companies face in internal investigations within different jurisdictions. It suggests some concrete ways for working through the issues. We also hope that it will contribute to the ongoing discussion on global best practices for corporate internal investigations.

First, in Chapter 1, we provide an overview of managing multi-jurisdictional investigations. This chapter addresses, from an international perspective, issues regarding the organization of the investigation, data collection, protection and review, reporting issues, regulatory coordination, capital market issues, and privilege and waiver issues. In Chapter 2, we specifically consider certain issues of data protection (which are partially harmonized across Europe).

We then present a series of more detailed chapters on the laws and practices of different countries, and the concerns that may arise if investigations involve that jurisdiction with separate chapters on the United States, the United Kingdom, Germany, the Netherlands France, Spain, Italy, Japan, Russia, China, Hong Kong, Brazil, and India.

Finally, in the Annexes we have proposed some short summaries of the practical points to consider in the areas of: initiating an investigation; disclosure obligations; privilege; document preservation; employee management; and publicity, drawing on the common themes of the preceding chapters.

We hope that this book will provide a useful desk reference for practitioners dealing with internal investigations particularly in an international context.

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