

## "Trust but verify"

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**The surge in investigations under the US Foreign Corrupt Practices Act has led to an increase in awareness in international anti-corruption legislation. But are legal practitioners sufficiently attuned to the ins and outs of anti-bribery laws? And what are the precautions that they have to take, not only to protect their clients, but to protect themselves? Emiliano Mellino goes in search of the answers**



In Latin America it can no longer be said that understanding anti-corruption legislation is simply the responsibility of the criminal lawyer. The growth in the reach and use of the US's Foreign Corrupt Practices Act (FCPA) in recent years - hitting many big-name companies with significant fines - should open the eyes of business lawyers who need to understand that in order to properly advise their clients they need to have an understanding of anti-corruption legislation both in their jurisdictions and internationally.

With this goal of raising awareness in mind the the International Bar Association (IBA) has launched a series of pilot training sessions in Latin America to teach lawyers about the pitfalls that corruption holds for their profession. The lawyers that led and attended the IBA's training sessions revealed that business lawyers not only need to know these norms in order to properly advise their clients, but also to cover their own backs.

The urgency for these sessions seems greater than ever. In a recent survey of corruption perceptions in the global legal profession - part of the IBA's wider anti-corruption strategy alongside the training sessions - almost 80 per cent of Latin American lawyers said that corruption was an issue for their profession while 40 per cent were unaware what international conventions exist to tackle corruption.

Though the survey might not be perfect - in the largest Latin American legal jurisdiction, Brazil, it had fewer than 20 respondents - it does give a first impression, which lawyers interviewed by Latin Lawyer agree with: even though the level of awareness is growing, the region's business lawyers do not know enough about the FCPA and other anti-bribery conventions. "You could see it in the training sessions, in the questions that were asked by many partners, many of them from important Argentine firms, you noticed that there was very little awareness and familiarity with the FCPA," says Estudio Beccar Varela partner Maximiliano D'Auro about the recent session in Buenos Aires. "It's still not a priority, businesses are still not aware of what's at stake."

The FCPA prohibits the bribing of foreign officials by companies or individuals that are somehow connected to the US. It also sets out accountancy provisions for companies with securities registered in the US. Recent cases have increased its visibility. The bribery case involving Siemens in various jurisdictions, including Argentina and



Venezuela, landed the company a US\$800 million fine, the largest in FCPA history. D'Auro says that this case helped to raise the awareness about these anti-corruption legislations, but in any case he struggled to convince his firm to take the law seriously."In my firm I had to fight internally to make sure that people recognised that the FCPA was something that business lawyers should be aware of," he says.

But it is not just the FCPA that business lawyers are unfamiliar with. "Eight or nine years ago Mexico passed the OECD Anti-bribery Convention. People from the OECD came to the local bar, went to institutions, sent out flyers and from this convention the penal code was modified to include bribery of foreign officials," says Corporación Mexicana de Asesores de Derecho (COMAD) partner Roberto Hernández García, who helped organise the training sessions in Mexico. "But lawyers are still unaware that this exists."

In Latin America, Argentina, Mexico, Brazil and Chile have all signed the OECD Anti-bribery Convention, which criminalises bribery of foreign officials in international business. The day after IBA round table Hernández ran a session on similar topics for the Mexico branch of the International Chamber of Commerce, but this time it was oriented to business. He says that in this session he saw much more awareness and concern than in the session oriented at lawyers.

"The lawyers that come to these sessions have very well known firms that work with decent people so they do worry but it is not something that is targeted at them because they are not the kinds of people that offer their services to conduct corrupt acts," he says.

### **A long arm**

Even if lawyers are becoming more aware that these laws exist there is still a lot of ignorance with regards to the letter of the law and its reach. "[At the sessions] there are a lot of questions about the extraterritorial application but I am not sure if there was as much sensitivity to the position of the Department of Justice (DoJ) and the application of the FCPA to them in Latin America," says Lynn Neils, former US prosecutor for the Southern District of New York and currently white-collar crime partner at Mayer Brown LLP.



The DoJ has a very broad view of the extraterritorial application of the FCPA and many people might find themselves under its umbrella without realising it, explains Neils, who was one of the trainers in the Argentine and Chilean sessions. "If you are paying your bribes in US dollars and it just gets routed from a bank outside the US to a bank in the US - because it is in US dollars - and then out again to the government official that would be enough for them to take jurisdiction under the FCPA," she says. "A lot of the times you don't even realise that it is getting routed through the US, but whenever it is being paid in US dollars it is very likely that it is getting routed through the US."

D'Auro says that these jurisdictional issues have to be considered even when doing operations as unrelated to the bribery of government officials as mergers and acquisitions. "In an M&A when we do a due diligence for the buyer and we are going over the documents of the company that is being bought we have to consider anti-corruption laws," he says. "Because you can end up being held responsible for something that the company did under different shareholders."

In the training sessions the lawyers also looked at how they could detect possible corrupt transactions, says Juan Ignacio Piña, trainer for the Chilean sessions and partner at Balmaceda Cox & Piña Abogados. "We are in very effervescent markets where a lot of money is coming in and it is very common for a lawyer to receive a call from a company that he doesn't know which pays him [to do something]," he says.



Juan Ignacio Piña

overs for corrupt transactions, says Piña. Real estate businesses, for example, could money laundering and lawyers should be aware of that. Lawyers should also be ent habits, such as closing a deal over dinner, says Hernández.

ment that all these laws modify a bit or put into question all these practices that in or example closing a deal over dinner or giving someone an invitation to do z. "This isn't corruption... but it falls within compliance norms. You can't put yourself e understood that you are doing something in order to prompt someone to do

The FCPA tends to permit bona fide business expenditures and corporate hospitality costs and while the new anti-bribery law being introduced in the UK also accepts hospitality, more emphasis has been placed on this issue. In a letter published last year, British Ministry of Justice spokesman Lord Tunnicliffe said that the bill does not seek to "penalise expenditure on corporate hospitality...but lavish corporate hospitality can also be used as a bribe to secure advantages".

Hernandez says that it is exactly the lack of clear guidelines that worries many people. "It reality the interpretation of the FCPA and compliance norms can fall in the hands of an authority that sees everything as if it were wrong. That is the general worry," he says.

### Lawyers on trial

There is a very real risk for lawyers getting involved in corrupt practices, says Neils, pointing to two ongoing FCPA cases which involve lawyers. One of them is that of British lawyer Jeffery Tessler who in 2009 was arrested after he used his Gibraltar company, Tri-Star Investments, to funnel US\$132 million to Nigerian officials on behalf of engineering company Kellogg Brown & Root.

The other involves Swiss lawyer Hans Bodmer who, in the same year, was convicted of conspiracy to violate the FCPA and lying to FBI agents. He acted as an agent for his client, Victor Kozeny, in a scheme to bribe Azerbaijani officials.

But not everyone agrees with Neils in this respect. "In general I have not seen trials or investigations that involve lawyers except if they were involved, not in their role as lawyer, but in a directorship of a company," says José Ipohorski, an investigator at the Argentine anti-corruption office "It is common for lawyers to take the role of company directors in companies that they advise, and as such are able to authorise payments or taking decisions for which they could be held criminally liable." Outside of this context, says Ipohorski, the other way that a lawyer could potentially be involved in acts of bribery would be if he or she acted as an intermediary.



José Ipohorski

"Corruption can take place directly or indirectly, the latter is where the main risk for the lawyer exists. People who are involved in international bribery will use intermediaries and those people can be accountants or lawyers," he says, adding that this role of intermediary is something that is considered within the Argentine legal code.

The two cases that Neils quoted involved lawyers that were aware that they were behaving illegally. But lawyers can also unwittingly become victims of corrupt operations.

"In most cases the lawyer is fully aware or is wilfully blind," says Nicola Bonucci, director for legal affairs at the OECD, adding that there are occasions where a lawyer could end up being involved in a bribery operation simply because he or she is careless. "Sometimes you are an intermediary of an intermediary and enter with good faith, without knowing the full extent of the operation," he says. Consequently, lawyers should be particularly careful when working in any deal, such as procurement deals, that involve government officials and they should not be shy to

ask questions to understand the bigger picture of the operation, says Bonucci.

Offshore jurisdictions should also set a lawyer's alarm bells ringing because "the use of offshore companies is one of the most common patterns" in these bribery operations, he says. "Sometimes you are used to dealing with the headquarters of a company, in say, Washington, but you are approached by a subsidiary [of that company] based in Bermuda to work on an operation," he says. "There could be legitimate reasons for this, but asking a couple of questions doesn't hurt."

In this kind of situation lawyers should remember to ask about the client's policy regarding ethics and bribery. Bonucci advises all lawyers to apply Ronald Reagan's famous phrase "trust but verify" to their day-to-day work, especially when dealing with lawyers that they think they know. "In one of the sessions I attended I asked the lawyers what kind of due diligence they would do if they were approached by a lawyer they think they know in another country to conduct a deal with a company in a third country," he says. "One lawyer replied 'none, because I know the person'"

But that was the wrong answer, says Bonucci, adding that these types of references are particularly prevalent in the legal profession because of its "incestuous" nature. People claim they know someone because they have met them five times in conferences and refer to each other by their first name, but that does not mean that they really know them, he says.

Some places, such as Chile, are becoming particularly aware of how lawyers could be prosecuted under the FCPA and under local laws. Ten months ago the Chilean government passes a new anti-corruption law. This law introduces the concept of criminal liability of legal entities to Chile meaning that whereas before only individuals within corporations could be charged for bribery offences, now the corporations themselves can be charged. The law also includes provisions whereby if a company has a good compliance system and were being investigated for bribery, for example, they would be exempt from prosecution.

"I have talked to a lot of law firms on the phone that have asked me for help designing compliance procedures for their clients and I asked them 'guys how are your own compliance procedures?'" says Balmaceda Cox's Piña. "This was the third-biggest law firm in Chile and they hadn't realised that this law meant a change in the culture not only of businesses in the traditional sense but of all legal entities."

Piña explains that this meant that people started becoming interested in these issues and now he is developing compliance policies for two different firms. But in some countries, such as Argentina, there is very little point in developing FCPA compliance programmes. "In countries such as ours, where [the law] doesn't contemplate grey areas, such as facilitating or grease payments, and where any payments or gifts to a public official are prohibited and constitute a crime, I do not know if it is justified to have an FCPA compliance programme," says D'Auro. "I mean, implementing a policy that says to a lawyer that he cannot participate in the payment of a bribe from client a to a public official is something that is obvious and doesn't need to be written down."

But D'Auro does concede that it is important for firms to carry out third party due diligence procedures on strategic partners, lawyers located in other countries and regions and the firm's suppliers. Ipohorski says that Argentina should follow Chile's path and pass a law that establishes the criminal liability of legal entities, but also laws that extend the jurisdictional reach of Argentine laws and that establish an autonomous definition of foreign public officials.

"There is a consensus now in different parties in the opposition in government and I hope that they reach the consensus to get a modern legislation to fill this legal void," he says.

But even with these deficiencies in some countries, Bonucci is convinced that the legal fabric and awareness in all these countries is growing, which in the future this could lead to more, not fewer convictions.

"In the US the trend for voluntary disclosure is on the up, and it is not because more companies are bribing abroad but because there are more internal controls, better compliance better awareness and a willingness to

deal with the issue and not hide it under the carpet," he says.

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#### Comments

There are currently no comments.