



THE ONLY GLOBAL ASSOCIATION OF YOUNG LAWYERS

Seminar on Internal Corporate Investigations

A promotional banner for the seminar. On the left is a photograph of the Lion Capital of Rosette in London. To the right of the image are the AIJA logo and the ICDR Young & International logo. Below these logos is the text '18-19 June 2010' and '18-19 juin 2010' followed by 'LONDON' and 'United Kingdom' in a large, light green font. A red-bordered box contains the text 'TWO SEMINARS AT THE SEMINAR WEEKEND'. At the bottom, a green bar contains two numbered items: '1 ANNUAL ARBITRATION CONFERENCE' and '2 SEMINAR ON INTERNAL CORPORATE INVESTIGATIONS', with their French equivalents 'CONFERENCE ANNUELLE D'ARBITRAGE' and 'SEMINAR ON INTERNAL CORPORATE INVESTIGATIONS' respectively.

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18-19 June 2010
18-19 juin 2010 | **LONDON**
United Kingdom

1 ANNUAL ARBITRATION CONFERENCE
1 CONFERENCE ANNUELLE D'ARBITRAGE

2 SEMINAR ON INTERNAL CORPORATE INVESTIGATIONS
2 SEMINAR ON INTERNAL CORPORATE INVESTIGATIONS

TWO SEMINARS AT THE SEMINAR WEEKEND

SEMINAR REPORT

Reporters

David Kennard, Peters & Peters Solicitors LLP

Christopher David, Kingsley Napley LLP

ASSOCIATION INTERNATIONALE DES JEUNES AVOCATS – INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Association sans but lucratif – Non-Profit Association – Siège: Luxembourg (Grand-Duché de Luxembourg)

Office: Avenue Louis Lepoutre 59/20 – BE-1050 Brussels – T. +32 2 347 33 34 – F. +32 2 347 55 22

e-mail: office@aija.org – www.aija.org

Reporter: David Kennard

FRIDAY MORNING 18 JUNE 2010

THE TOOLKIT FOR CORPORATE INVESTIGATIONS

Speakers: **Jonathan Tickner** / Peters & Peters, London, **Bill Waite** / The Risk Advisory Group PLC, London, **Andreas Länzlinger** / Bär & Karrer, Zurich, **Claudius O. Sokenu** / Arnold & Porter, New York

- Events which might trigger an internal investigation:
 - o Execution of warrant by City of London Police
 - o Tip-offs
 - o Findings unearthed by internal/external audit
 - o Systematic reporting such as 'hot line'

- Structuring an investigation:
 - o Consider using an external law firm to investigate (a different firm than used by the company for day-to-day transactional work)
 - o Do not permit in-house counsel to investigate senior management – could kill a career!
 - o Ascertain who is responsible for the investigation: (eg Finance Director, Internal Audit etc.)
 - o Give consideration to PR issues/investor relations

- Conducting the investigation:
 - o Ensure single point of client contact
 - o Maintain confidentiality
 - o Involve HR
 - o Involve and update Audit Committee where applicable
 - o Manage shadow investigations by auditors
 - o Give consideration to these three issues:
 - Stabilise (i.e. stop what is happening and secure evidence)
 - Investigate
 - Remediate
 - o Make sure employees are available to be interviewed – do not dismiss too early.
 - o Use of 'Upjohn warnings' when interviewing employees
 - o Works Council will need to be consulted and kept up to date when conducting investigations in parts of Europe such as in Germany.
 - o The key to conducting a good interview: preparation. Create an environment conducive to discussion – aggression rarely works!

DEALING WITH THE REGULATORS (WHAT IS EXPECTED FROM COMPANIES?)

Speakers: **Michael O'Kane** / Peters & Peters, London, **Robert W. Henoch** / Kobre & Kim LLP, New York, **Benjamin Borsodi** / Schellenberg Wittmer, Geneva

Reporter: David Kennard

- Learn from the mistakes of Tony Hayward (Chief Executive, BP):
 - o Be well prepared for any examination by a regulator (particularly if the interview is given in public)
 - o Practice addressing difficult questions and preparing satisfactory answers

- Trends and developments in Government Investigations:
 - o From the UK perspective, there are a number of departments that conduct investigations:
 - Financial Services Authority (FSA)
 - Funded by fees and fines
 - Poor record
 - Increasingly muscular approach towards individuals for example in prosecuting insider dealing

 - Serious Fraud Office (SFO)
 - Generally the SFO wants to try and reach deals with suspects
 - The greatest tool it has is debarment from EU public sector procurement (automatic in the UK; discretionary in USA)

 - Office of Fair Trading (OFT)
 - Unique: immunity guaranteed
 - Three types of investigations:
 - o Type A: No investigation and 1st investigation
 - Automatic immunity for undertaking and current and former employees and directors
 - o Type B: Investigation other than 1st investigation
 - Discretionary immunity extended as in Type A if info "genuinely advances" investigation
 - o Type C: The rest-normally after a raid
 - Need to provide 'substantial added value'
 - Sparingly used
 - If individual was on the periphery of cartel, more likely to be granted
 - No final decision until after interview with OFT
 - o Privileged material must be handed to the OFT (including solicitors' advice)

 - o Moving forward in the UK, it will be interesting to see how a global regulator (incorporating all the above departments) will deal with the inherent differences across the departments

- From the US perspective:
 - o Timing and the method of the reaction to an enquiry by a regulator is crucial.
 - o Those assisting companies in dealing with regulators often instruct external ethics counsel to advise them.
 - o Whistleblowers should be taken very seriously.
 - o Need to conduct an investigation swiftly
 - o Consideration needs to be given as to which department the client should self-report.

- From the Swiss perspective:
 - o If writing a report on behalf of a company, care must be had to ensure it is honest and forthright otherwise there may be criminal and civil consequences
 - o Under the "1001 law" if you lie to a Federal Agent you commit a crime

THE CHALLENGES OF PROTECTING ATTORNEY-CLIENT PRIVILEGE

Reporter: Christopher David

THE CHALLENGES OF PROTECTING ATTORNEY-CLIENT PRIVILEGE

Speakers: **Tanja Jussila** / Waselius & Wist, Helsinki, **David Drake** / Serle Court, London, **Stein van Thiel** / Loyens & Loeff, Amsterdam, **Stephanie Traband** / Jones Walker, Miami

Tanja Jussila

Purpose of the session was to provide a general overview of Client Attorney Privilege/Legal Professional Privilege.

LPP in basic terms is the duty/right not to disclose documents subject to LPP. For a pan European view see Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities [Para's 77 and 86]

LPP or Client Attorney Privilege is more expansive in the US than in Europe as can be oral and written advice – in the EU in generally only applies to written communications and In-house Counsel are not covered.

Finland

With regards to Finland specifically – LPP applies to legal advice pending litigation and only applies to member of the Bar (In house lawyers cannot be members of the Bar).

Stein van Thiel

Netherlands

In the Netherlands a form of LPP applies to Lawyers, Doctors, Clerics, Receivers and Tax Inspectors.

- Any lawyer (Advocaat) has the right of LPP;
- The Duty of Secrecy is part of a lawyers rules of conduct and applies only in the capacity of a lawyer and is not absolute (for example in the case of someone being in physical jeopardy);
- Lawyer may refuse to testify;
- LPP may be waived by the lawyer not the client;
- Experts have derived right of LPP;
- During raid/search & Seizure – Lawyer can identify LPP documents which then cannot be seized; and
- Location of documents is irrelevant.

David Drake

United Kingdom

In the UK there are two types of privilege: –

Legal Advice Privilege: Lawyer/Client communicates in relation to legal advice; and
Litigation Privilege: Communications between lawyer and client or 3rd Party for the purpose of legal proceedings.

Four points to consider:

1. Predominant Purpose Test – Communications which purpose is predominantly for litigation – it is recommended that the purpose of the communication is specified so there is a paper trail. Includes all working material.

Privilege belongs to the client.

2. Bank of England vs. Three Rivers – key series of cases in relation to LPP.
3. Waiver – LPP can be lost voluntarily or involuntarily if the documents escape into the public domain.
4. Design of documentation – important to make documents 'free standing' so they cannot be disclosed as context.

Stephanie Traband

USA

Similar to UK – to maintain privilege must be a communication to or from an Attorney – includes paralegals, secretaries etc.

Client's privilege

In relation to corporate investigations – must be clear who client is (e.g. in the case of low level employees – “Upjohn Warning” – it is good practice to have a separate engagement agreement.

Federal and State rules may be different

“Fact” is not privileged

It is possible to ‘claw back’ privilege even if disclosed.

Reporter: Christopher David

FRIDAY AFTERNOON 18 JUNE 2010

LABOUR LAW / EMPLOYMENT ISSUES

Speakers: **Marta de Oliveira Pinto Trindade** / Abreu Advogados, Lisbon, **Oliver Grimm**/ Taylor Wessing, Berlin , **Andreas White** / Kingsley Napley LLP, London

Set out why an employment lawyer may be required in a Corporate Internal Investigation.

Issues:

- Need cooperation of key employees (and respect employment rights);
- Data Protection
- Investigation must not cause further problems; and
- Obtain useful results from investigation.

Need to stabilise, investigate and remedy.

Suspension of an employee may stabilise the situation – questions that need to be asked are:

- Is there the legal power to suspend;
- Paid or Unpaid
- What is the maximum period
- Evidence tampering

The power may be derived from the employment contract or may be an implied power.

In Germany it is not usual to suspend an employee as everyone has the right to work. Also in an investigation it is important to keep employee accessible.

HR should always be involved.

The Works Council should always be involved.

The length of any internal investigation should be fair and reasonable in all the circumstances – this may mean it is a lot quicker than any external agency's investigation.

Disciplinary Hearing –

- Should follow own internal document process;
- Should follow ACAS code (UK)
- Disclose all relevant evidence
- Be open minded as to guilt
- Allow employee to be accompanied
- Distinguish if possible between investigators and those on Disciplinary panel

Reporter: Christopher David

INTERNAL INVESTIGATIONS AND CRIMINAL LIABILITY “DEAL OR NO DEAL”

Speaker: **Mark Beardsworth** / Kingsley Napley LLP, London

Investigation should be result driven i.e.:

- Keep company running effectively; and
- Keep officers out of prison.

Key English cases:

- BAE
- Mabey & Johnson
- Innospec
- Balfour Beatty
- De Puy

The SFO believe that despite the ruling in Innospec plea agreements are still possible.

It is important to follow the Attorney Generals Guidelines on Plea Agreements.

Important to recognise that a deal with the DOJ is not a deal with other US Agencies.

Important to get preliminary undertakings with regards use of evidence and other agencies.

CONDUCTING DEALS WITH THE SFO: "THE PROS AND CONS"

Speaker: **Alexander Cameron** / Three Raymond Buildings, London

Reporter: Christopher David

Importance of plea agreements for a company is certainty of results which is important for any business.

At present England does not offer this as it is not possible for everything to be wrapped up together (e.g. Fine, Costs, Sentence and Confiscation).

In addition the English Courts have the constitutional problem that the Judge is the sole arbiter of sentence. Consequently plea agreements are disliked by the judiciary.

It may be possible if AG Guidelines are followed carefully but it is important not to appear to be imposing a sentence on a Judge.

THE AMERICAN LESSON: RECENT DEVELOPMENTS IN FCPA AND DOJ CASES

Speaker: **David Lorello** / Steptoe & Johnson, London

Reporter: Christopher David

90% of all US cases involve plea bargaining.

Plea negotiations can involve charges and penalty.

Pros

- Limits criminal exposure
- Costs
- Eases pressure on the Courts

Cons

- Potential conflict with Article 8 ECHR
- Risk of coercion
- Prisoners dilemma

Plea negotiations may be started in the US by Prosecution or Defence but no other parties.

Generally a settlement is agreed for a plea in return for lesser charges and leniency in sentencing.

Any plea agreement is subject to court approval and the court is not bound by any agreement.

Any sentence will be guided by the Federal Sentencing Guidelines – recent Supreme Court judgement says that these are not mandatory though.

In relation to companies a good option is Deferred Prosecution Agreements – can be excellent but there are significant penalties if a company fails to comply.

Need to be aware of International Financial Institution debarment – increasingly being used and could have serious effects on a companies business.

THE ROLE OF PUBLIC RELATIONS

Speaker: **Michael Farrant** / Project Associates UK Limited, London

Reporter: Christopher David

Investigations can be begun due to a number of media reasons:

- Leak
- Cleaners
- Story sold by an employee
- Social Media

If an issue does arise then all companies/organisations should:

- Have a plan in place;
- Practice following the plan;
- Clear everything through the lawyers (do not make a bad situation worse)
- Use external media advisors
- Have a Crisis team:
 - High Level Management
 - Keep it simple and small
 - Clear responsibilities
 - Available (24/7 365 days)
 - Quick
 - Work out key messages
 - Have a media strategy

Do not use spin and do not let clients speak for themselves as will often make situation much worse.

Most important point: Planning

THE ROLE OF THE AUDIT COMMITTEE

Speaker: **Alex Plavsic** / KPMG UK Forensic Practice, London

Reporter: Christopher David

The role of an audit committee is to monitor the companies financial position, financial controls and internal control and risk management as well as any issues that may arise (such as a whistleblower).

In the even of an investigation starting good practice is:

- Form a special audit committee;
- Ensure it has relevant experience;
- Control its terms of reference and budget;
- Update weekly; and
- Day to day contact with external advisors.

The Rules of Engagement:

- Clients should be educated
- Lawyers should work as team
- Banks – keep informed
- Auditors – be aware of shadow investigations
- Regulators – accurate reporting
- Amounts – always caveat as may change

Auditors should follow ISA240.

Shadow investigations – see SEC 10A. Issues are – Privilege and costs.

Conclusions

1. Scenario Plan
2. Do not assume innocence of executives
3. Form a Special Audit Committee
4. Be aware of Shadow Investigation

Reporter: David Kennard

SATURDAY MORNING 19 JUNE 2010

THE ROLE OF COMPUTER FORENSICS WITH INTERACTIVE DISCUSSION AND DEMONSTRATION

Speaker: **Rebecca Palser** / The Risk Advisory Group Plc, London

- Preservation, analysis and presentation of evidence that is admissible in Court
 - o Actions should not change data
 - o Be competent and give evidence explaining relevance and implications of actions
 - o Maintain an audit trail
 - o Ensure compliance with law and principles

- Electronic data sources are wider than might otherwise appear, they include
 - o Web based email
 - o Wireless devices
 - o Swipe card/access card logged data
 - o CCTV
 - o Printers/fax machines

- Often individuals will attempt to cover their tracks by:
 - o Changing file extensions
 - o Nesting data
 - o Hiding text under a white box
 - o Attempting to erase/wipe software (a lot of the time this information can still be recovered. At the very least there will be a record that a particular wiping software has been used together with the settings that had been applied)

LABOUR LAW / EMPLOYMENT ISSUES / IPIT

Speakers: Marta de Oliveira Pinto Trindade / Abreu Advogados, Lisbon, **Martine Hoogendoorn** / Van Mens & Wisselink, Amsterdam, **Owen Bonheimer** / Steptoe & Johnson, Washington

Reporter: David Kennard

- Whistleblowing in England
 - o Public Interest Disclosure Act 1998 governs the law on whistleblowing

- Generally employer has to be doing one of the specified acts in the statute
 - Generally report should not be made to the press – it might be considered more reasonable to go to the police rather than the press
- In Belgium, there is no legislation but there is some guidance
 - In favour of protecting the identity of the employee but not anonymous reporting
 - Complaints should be treated in an independent way
- In the US, public companies have to have hot lines for employees to report such matters. Employees can report anonymously.
- Data protection or Witness Protection
 - Generally the US approach is that the US authorities do not care about privacy of the individual
- Contrasted with the German perspective and the role of the Works Council in any investigation.
 - The Works Council is an elected body of employees not usually consisting of upper management
 - Some large companies have full time members of the Works Council
 - They have special protection against dismissal
 - Procedures for investigation must be agreed with the Works Council before anything is done. They also have to be kept up to date in the investigation.
 - In practice though, the Works Council will generally be sympathetic to the interests of the company in investigating wrongdoing.