



the global voice of  
the legal profession®

# Anti-Corruption Committee Update

Committee update from the International Bar Association Legal Practice Division

VOLUME 9 NUMBER 3 OCTOBER 2017



# International Bar Association Conferences 2017–2018



## 2017

2–3 NOVEMBER 2017 MANDARIN ORIENTAL HOTEL, HONG KONG SAR

Asia Pacific Mergers and Acquisitions

4 NOVEMBER 2017 HANOI, VIETNAM

IBA-APAG International Arbitration Training Day: Introduction of the IBA Soft Laws

4–5 NOVEMBER 2017 QUEEN MARY UNIVERSITY OF LONDON, LONDON, ENGLAND

IBA-ELSA Law Students' Conference: International Human Rights Law

6–7 NOVEMBER 2017 HILTON SÃO PAULO MORUMBI, SÃO PAULO, BRAZIL

Latin American Anti-Corruption Enforcement and Compliance

10 NOVEMBER 2017 MOSCOW MARRIOTT ROYAL AURORA HOTEL, MOSCOW, RUSSIAN FEDERATION

9th Annual 'Mergers and Acquisitions in Russia and CIS' Conference

15 NOVEMBER 2017 LEVEL 39, 1 CANADA SQUARE, CANARY WHARF, LONDON, ENGLAND

European Start Up Conference

15–17 NOVEMBER 2017 THE GRANGE ST PAULS, LONDON, ENGLAND

8th Biennial Global Immigration Conference

15–17 NOVEMBER 2017 LABADI BEACH HOTEL, ACCRA, GHANA

Rising to the Challenge of Africa's Economic Development

16 NOVEMBER 2017 FOUR SEASONS HOTEL LONDON AT PARK LANE, LONDON, ENGLAND

Private Equity Transactions Symposium

17 NOVEMBER 2017 MONDRIAN LONDON, LONDON, ENGLAND

Building the Law Firm of the Future

30 NOVEMBER – 1 DECEMBER 2017 HILTON BUENOS AIRES HOTEL, BUENOS AIRES, ARGENTINA

The New Era of Taxation

1 DECEMBER 2017 MOSCOW MARRIOTT HOTEL NOVY ARBAT, MOSCOW, RUSSIAN FEDERATION

11th Annual Law Firm Management Conference

7–8 DECEMBER 2017 MILLENNIUM BROADWAY HOTEL, NEW YORK, USA

Investing in Asia

7–8 DECEMBER 2017 JUMEIRAH FRANKFURT, FRANKFURT, GERMANY

4th Annual Corporate Governance Conference

## 2018

18–19 JANUARY 2018 HONG KONG SAR

IBA Law Firm Management Conference: Growth Prospects for Law Firms in Asia

29–30 JANUARY 2018 etc. venues FENCHURCH STREET, LONDON, ENGLAND

7th Annual IBA Finance and Capital Markets Tax Conference

1–2 FEBRUARY 2018 THE WESTIN PARIS – VENDOME, PARIS, FRANCE

6th IBA European Corporate and Private M&A Conference

14–16 FEBRUARY 2018 PARIS INTERCONTINENTAL, PARIS, FRANCE

IBA/ABA International Cartel Workshop

23–24 FEBRUARY 2018 HOTEL EUROSTAR GRAND MARINA, BARCELONA, SPAIN

3rd Mergers and Acquisitions in the Technology Sector Conference

25–26 FEBRUARY 2018 HILTON PUERTO MADERO, BUENOS AIRES, ARGENTINA

21st Annual IBA Arbitration Day

5–6 MARCH 2018 CLARIDGE'S, LONDON, ENGLAND

23rd Annual International Wealth Transfer Practice Law Conference

8–9 MARCH 2018 HONG KONG SAR

3rd IBA Asia-based International Financial Law Conference

9–10 MARCH 2018 THE TAJ MAHAL PALACE, MUMBAI, INDIA

The Changing Landscape of M&A in India –

11–13 MARCH 2018 INTERCONTINENTAL LONDON PARK LANE, LONDON, ENGLAND

19th Annual International Conference on Private Investment Funds

14–16 MARCH 2018 HYATT REGENCY HOTEL AND INTERCONTINENTAL PRESIDENTE HOTEL, MEXICO CITY, MEXICO

Biennial IBA Latin American Regional Forum Conference

20 MARCH 2018 NEW DELHI, INDIA

Pre-International Competition Network Forum

22–23 MARCH 2018 LONDON, ENGLAND

Insurance – Into the Unknown: Challenges and Opportunities

9–11 APRIL 2018 INTERCONTINENTAL, LISBON, PORTUGAL

Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL)

12–13 APRIL 2018 LONDON, ENGLAND

8th World Women Lawyers' Conference:

From Courtrooms to Boardrooms: The Impact of Women

19–20 APRIL 2018 RADISSON BLU HOTEL WATERFRONT, CAPE TOWN, SOUTH AFRICA

Africa: Opportunities and Challenges in M&A Transactions

21 APRIL 2018 THE PEACE PALACE, THE HAGUE, THE NETHERLANDS

War and Justice

2–4 MAY 2018 LE WESTIN MONTREAL, MONTREAL, CANADA

IBA Annual Employment and Discrimination Law Conference

6–8 MAY 2018 AMSTERDAM, THE NETHERLANDS

24th Annual IBA Global Insolvency and Restructuring Conference

## IN THIS ISSUE

<b>From the Co-Chairs</b>	<b>4</b>
<b>From the Editor</b>	<b>5</b>
<b>Committee Officers</b>	<b>6</b>
<b>IBA Annual Conference, Sydney, 8–13 October 2017: Our Committee's Sessions</b>	<b>8</b>
<b>Articles</b>	
Argentina's fight against corruption: new reality, new tools	<b>12</b>
State asset recovery in Guyana	<b>18</b>
Anti-bribery compliance meets permits, approvals and licences in India	<b>20</b>
Corporate criminal liability and self-reporting by undertakings in Switzerland	<b>21</b>
US Foreign Corrupt Practices Act – update	<b>23</b>
An ounce of prevention: incorporating anti- corruption provisions into negotiated peace agreements through a forward-looking approach	<b>26</b>
Anti-corruption clauses: are they worth the paper they're written on?	<b>29</b>

### Advertising

Should you wish to advertise in the next issue of the newsletter please contact: [advertising@int-bar.org](mailto:advertising@int-bar.org)

**Contributions** to this committee update are always welcome and should be sent to the Newsletter Officer, David Hamilton, at [david.hamilton@shlegal.com](mailto:david.hamilton@shlegal.com).

## International Bar Association

4th Floor, 10 St Bride Street  
London EC4A 4AD, United Kingdom  
Tel: +44 (0)20 7842 0090  
Fax: +44 (0)20 7842 0091  
[www.ibanet.org](http://www.ibanet.org)

© International Bar Association 2017.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.

### Terms and Conditions for submission of articles

- 1 Articles for inclusion in this committee update should be sent to the Newsletter Officer.
- 2 The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
- 3 Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at [editor@int-bar.org](mailto:editor@int-bar.org).
- 4 The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

This update is intended to provide general information regarding recent developments in anti-corruption law. The views expressed are not necessarily those of the International Bar Association.

# From the Co-Chairs

**W**elcome to the latest update from the Anti-Corruption Committee. Many thanks to David Hamilton as Editor and the featured authors.

The 15th Annual Anti-Corruption Conference at the Organisation for Economic Co-operation and Development in Paris on 13–14 June 2017 was very successful, with the conference selling out weeks before registration ended. We experimented with a revised format this year. It included a variety of speakers – pulling in perspectives from the public sector, not-for-profits, journalists and academics. This gave the conference a fresh appeal to our audience and provided excellent discussions and professional development.

Coming up, we have a busy autumn with conferences and ongoing projects including the following.

## Conferences

- The IBA Annual Conference in Sydney, 8–13 October 2017; and
- Regional Latin American Anti-Corruption Enforcement and Compliance Conference in São Paulo, 6–7 November 2017.

## Ongoing projects

### *Judicial Integrity Initiative*

In partnership with the Basel Institute on Governance, the IBA has published *The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption*.<sup>1</sup> The report has been created using the results of a global survey, involving 1,577 legal professionals from 120 countries, in country consultations and additional research. Congratulations and thanks go to Rob Wyld, Lindsay Sykes and Tomislav Šunjka along with all other members of the Committee who participated in the publication.

### *The definition of grand corruption project*

The IBA Legal Projects Unit is undertaking a review to consider an appropriate definition for ‘grand corruption’. This arises out of

work being undertaken by Transparency International to arrive at a consistent definition of grand corruption.<sup>2</sup>

### *Whistleblower protections*

This project aims to identify how the IBA can best contribute to work being done internationally on whistleblower protection laws. It also aims to adopt a holistic approach in relation to the protection of human rights, reviewing and considering the various standards and approaches to whistleblower protections being developed within industries and countries to try and arrive at a framework with harmonised laws. We are grateful for the leadership of Jitka Logesova, Vice Chair of the Anti-Corruption Committee, who is representing us on this project.

### *Afghanistan Independent Bar Association anti-Corruption project*

Work continues with the Afghanistan Independent Bar Association (AIBA) on assisting it to develop anti-corruption guidelines and internal disciplinary procedures for the AIBA Monitoring Board. Robert Wyld continues his excellent work coordinating this project.

### *Working Group on sextortion*

‘Sextortion’ is a term coined by the International Association of Women Judges to describe a form of sexual exploitation and corruption that occurs when people in positions of authority – whether government officials, judges, educators, law enforcement personnel or employers – seek to extort sexual favours in exchange for something within their power to grant or withhold. The IBA is undertaking a project on this topic and Ashleigh Buckett will be representing the Committee during the Working Group’s initial meeting in Belfast in late May 2018.

Our subcommittees are also hard at work and have presentations and reports planned for the October 2017 Annual Conference. Special thanks go to our subcommittee chairs; see page 7 for details.

## Pascale Dubois

The World Bank Group,  
Washington, DC  
pdubois@  
worldbank.org

## Bruno Cova

Paul Hastings, Milan  
brunocova@  
paulhastings.com

We highly encourage you all to get involved in the activities of our subcommittees by contacting the subcommittee chairs, or to get involved in any of the other ongoing projects in which the Committee is involved. We look forward to seeing all of you at the upcoming conferences and meetings.

#### Notes

- 1 Available at [www.ibanet.org/Legal\\_Projects\\_Team/judicialintegrityinitiative.aspx](http://www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx).
- 2 What is grand corruption and how can we stop it? Available at [www.transparency.org/news/feature/what\\_is\\_grand\\_corruption\\_and\\_how\\_can\\_we\\_stop\\_it](http://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it).

## David Hamilton

Stephenson Harwood,  
London

[david.hamilton@shlegal.com](mailto:david.hamilton@shlegal.com)

# From the Editor

It is with great pleasure that I present this latest update on behalf of the Anti-Corruption Committee.

Many thanks to Pascale Dubois and Bruno Cova for their continued chairing of the Committee. My thanks also go to those who have contributed articles. It is a slightly thinner volume this time round owing to the proximity of the previous edition. I am, nevertheless, very grateful to those who were able to send me their submissions in short order.

These include:

- An update on Argentina's fight against corruption;
- State asset recovery in Guyana;
- Corruption risk in obtaining licences and other approvals in India;
- Corporate criminal liability and self-reporting by undertakings in Switzerland
- An update on Foreign Corrupt Practices Act enforcement in the United States;

- Negotiating anti-corruption provisions into peace agreements; and
- Anti-Corruption Clauses.

The diversity of jurisdictions represented even in this relatively small collection of articles is proof that the fight against corruption is a truly global effort. This is also reflected in the attendees at the Committee's annual conference in Paris in June (and I was particularly pleased to be a panel member this year discussing internal investigations), as well as the IBA's Annual Conference.

I hope that you will enjoy this update. The work of the Committee relies upon the enthusiastic participation of its members, and contributions to this update are always welcome. I would be delighted to hear from you if you would like to contribute to future editions. Please drop me a line – my contact details are above and a full list of Committee Officer details appear on page 6.

# Committee Officers

## Co-Chairs

Pascale Dubois  
The World Bank Group, Washington, DC  
pdubois@worldbank.org

Bruno Cova  
Paul Hastings, Milan  
brunocova@paulhastings.com

## Senior Vice Chair

Leah Ambler  
OECD, Paris  
leah.ambler@oecd.org

## Vice Chair

Jitka Logesova  
Kinstellar, Prague  
jitka.logesova@kinstellar.com

## Secretary

Leopoldo Pagotto  
Trench Rossi e Watanabe Advogados, São Paulo  
leopoldo.pagotto@trenchrossi.com

## Newsletter Officer

David Hamilton  
Stephenson Harwood, London  
david.hamilton@shlegal.com

## Website Officer

Saskia Zandieh  
Miller & Chevalier Chartered, Washington, DC  
szandieh@milchev.com

## Membership Officer

Liz Kyo-hwa Chung  
Kim & Chang, Seoul  
khchung@kimchang.com

## Conference Quality Officer

Leopoldo Pagotto  
Trench Rossi e Watanabe Advogados, São Paulo  
leopoldo.pagotto@trenchrossi.com

## North America Regional Officer

Edward Davis Jr  
Seqour Law, Miami  
edavis@astidavis.com

## Regional Representative Central America

Rodrigo Callejas  
Carrillo & Asociados, Guatemala City  
rodrigo.callejas@carrillolaw.com

## Regional Representative Latin America

Maximiliano D'Auro  
Beccar Varela, Buenos Aires  
mdauro@ebv.com.ar

## Regional Representative Middle East

Ibtissem Lassoued  
Al Tamimi & Company, Dubai  
i.lassoued@tamimi.com

## Regional Representative Africa

Olumide Akpata  
Templars, Lagos  
olu.akpata@templars-law.com

## Regional Representative Eastern Europe

Elvan Sevi Firat  
Firat Izgi Attorney Partnership, Istanbul  
sevi.firat@firatizgi.com

## Regional Representative North Asia

Taek Rim (Terry) Oh  
Lee & Ko, Seoul  
tro@leeko.com

## Regional Representative Western Europe

Eoin O'Shea  
Reed Smith, London  
eoshea@reedsmith.com

---

### Asset Recovery Subcommittee

**Chair**

Yves Klein  
Monfrini Bitton Klein, Geneva  
yklein@mbk.law

---

### Drivers of Corruption Subcommittee

**Chair**

Kath Hall  
ANU College of Law, Acton  
kath.hall@anu.edu.au

---

### Double Jeopardy Subcommittee

**Chair**

Francesca Petronio  
Paul Hastings, Milan  
francescapetronio@paulhastings.com

---

### Structured Criminal Settlements Subcommittee

**Chair**

Abiola Makinwa  
The Hague University of Applied Sciences,  
The Hague  
a.o.makinwa@hhs.nl



*King's College London & IBA*

## EXECUTIVE LLM


**For more information and how to apply:**

Visit [www.kcl.ac.uk/executivellm](http://www.kcl.ac.uk/executivellm)

Email [executivellm@kcl.ac.uk](mailto:executivellm@kcl.ac.uk)

Tel +44 (0)20 7848 5926

## A unique opportunity to learn with, and from, the best

King's College London and the International Bar Association (IBA) have collaborated to offer an elite world-class professional LLM. Designed to bring together wide-ranging legal perspectives and expertise from around the world, the Executive LLM aims to confront some of today's most challenging global legal issues.

This two-year, part-time advanced Master of Laws course is for ambitious commercial, in-house or regulatory lawyers, keen to build on their achievements and develop their careers.

The Executive LLM offers a range of unique course content designed to equip you with advanced legal, commercial, and policy knowledge as well as sectoral expertise. You will also develop complementary skills that will make you a more rounded, more accomplished and more successful lawyer.



# IBA 2017 Sydney

8–13 OCTOBER  
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



## Anti-Corruption Committee sessions

### Monday 1430 – 1730

#### **Mock trial: It's the way business is done here, don't worry! A fraud, corruption and money laundering trial of a multinational company and its chief financial officer (CFO)**

*Presented by the Criminal Law Section, the Anti-Corruption Committee, the Business Crime Committee and the Criminal Law Committee*

*Session Moderator*

**Robert Wyld** *Johnson Winter & Slattery, Sydney, New South Wales, Australia*

This interactive criminal trial looks at the potential liability of a corporation and its CFO, charged with numerous counts of foreign bribery, conspiracy, money laundering and false accounting.

The session will examine key issues of:

- the extraterritorial jurisdiction of Australian courts over foreign corporations and their officers;
- the criminal liability of a corporation and that of individual directors, officers and employees in the organisation;
- the liability of a corporation and its CFO for the conduct of foreign subsidiaries and their agents;
- the availability of plea bargaining to reduce or eliminate the criminal exposure of the corporation and/or corporate officers; and
- avoiding the unexpected: anticipating and responding to parallel criminal and regulatory proceedings in multiple jurisdictions.

*Speakers*

**Tarik Abdulhak** *NSW Crown Prosecutors' Chambers, Sydney, New South Wales, Australia*

**Shaul Brazil** *BCL Solicitors, London, England; Membership Officer, Criminal Law Committee*

**Dan Conaway** *Conaway & Strickler, New York, USA*

**Bruno Cova** *Paul Hastings (Europe), Milan, Italy; Co-Chair, Anti-Corruption Committee*

**Adriana De Buerba** *Perez-Llorca, Madrid, Spain; Conference Quality Officer, Criminal Law Committee*

**Hon Justice Elizabeth Fullerton** *New South Wales Supreme Court, Sydney, New South Wales, Australia*

**Andrew George** *Doogue O'Brien George, Melbourne, Victoria, Australia*

**Hannah Laming** *Peters & Peters, London, England; Regional Representative Europe, Business Crime Committee*

**Sonja Maeder Morvant** *LALIVE, Geneva, Switzerland; Vice Chair, Business Crime Committee*

**Chris Maxwell QC** *NSW Crown Prosecutors' Chambers, Sydney, New South Wales, Australia*

**Enide Perez** *Sjöcrona van Stigt, Rotterdam, The Netherlands; Co-Chair, Criminal Law Committee*

**Matthew Reinhard** *Miller & Chevalier, Washington, DC, USA; Co-Chair, Criminal Law Committee*

**Brind Zichy-Woinarski QC** *W Brind Zichy-Woinarski QC, Melbourne, Victoria, Australia*

Buses will be departing from outside the main entrance of the conference centre at 1400 for this session.

OLD BANCO COURT, ST JAMES ROAD COURTS, ST JAMES RD,  
SYDNEY

### Monday 1615 – 1730

#### **Anti-corruption issues in the mining industry**

*Presented by the Mining Law Committee and the Anti-Corruption Committee*

*Session Co-Chairs*

**Pedro Freitas** *Veirano Advogados, Rio de Janeiro, Brazil; Co-Chair, Mining Law Committee*

**Carlos Perez-Cotapos** *Cariola Diez Perez-Cotapos & Cia, Santiago, Chile; Treasurer, Mining Law Committee*

This session will focus on the current anti-corruption measures applied by the mining industry concerning the relationship with public authorities/officers and the relationship with communities, addressing issues such as permitting, mining licences, legislative changes, contracts and communities participation. The idea is to discuss the relevant law and the applicable standards in the industry, the challenges that mining companies face in this regard and the possibilities to make improvements concerning this topic.

*Speakers*

**John Boscarol** *McCarthy Tétrault, Toronto, Ontario, Canada*

**Peter Leon** *Herbert Smith Freehills South Africa, Johannesburg, South Africa*

**Lucinda Low** *Steptoe & Johnson, Washington, DC, USA*

**Rachel Nicolson** *Allens, Melbourne, Victoria, Australia*

ROOM C4.3, CONVENTION CENTRE, LEVEL 4

## Monday 1615 – 1730

### Cybercrime as a political weapon

*Presented by the Cybercrime Subcommittee, the Anti-Corruption Committee, the Criminal Law Committee, the Senior Lawyers' Committee, the Technology Law Committee and the War Crimes Committee*

*Session Chair*

**Monty Raphael QC** *Peters & Peters, London, England; Co-Chair, Cybercrime Subcommittee*

Cybercriminals attack people, organisations and governments for many reasons: malice, money and fame. However, in the past few years, a new breed of cybercriminal has emerged: 'hacktivists' use their skills to promote a political agenda. They may or may not be directly affiliated with any government or political party, but their actions can wreak havoc in places in which they will never step foot.

Going beyond generally accepted espionage and spycraft, the most high-profile example of this so far has been the hack of the United States Democratic National Committee (DNC) and the release of its senior staff's private emails on WikiLeaks, attributed to groups linked to Russian security services. In the face of this, how should the US and the rest of the world respond? What can governments, businesses and individuals do to protect themselves or fight back when attacked?

*Speakers*

**Felicity Gerry QC** *Carmelite Chambers, London, England*  
**James Vint** *Navigant, Chicago, Illinois, USA*

ROOM C2.2, CONVENTION CENTRE, LEVEL 2

## Monday 1615 – 1730

### The Arab region: doing business in the midst of an economic downturn

*Presented by the Arab Regional Forum and the Anti-Corruption Committee*

*Session Chair*

**Lamia Matta** *Miller & Chevalier, Washington, DC, USA; Co-Chair, Arab Regional Forum*

We will explore existing bankruptcy legislation and legal reforms related to it, as well as ongoing efforts to improve the legal and regulatory infrastructure for small and medium-sized businesses. The session will also cover the legal framework around digitalisation, including intellectual property rights, data protection and cloud computing. A major part of the discussion will be devoted to recent trends in dispute resolution and enforcement in the region. This will cover developments in the rules of various arbitration centres, as well as landmark cases in the enforcement of arbitration awards.

*Speakers*

**Omar Alrasheed** *Omar Alrasheed & Partners, Riyadh, Saudi Arabia; Secretary-Treasurer, Arab Regional Forum*

**Walid Azzam** *Hadef & Partners, Dubai, United Arab Emirates; Regional Representative Middle East, Asset Recovery Subcommittee*

**Ghada Darwish** *Ghada M Darwish Law Firm, Doha, Qatar; Officer, Arab Regional Forum*

**Diana Hamade Al Ghurair** *International Advocate Legal Services, Dubai, United Arab Emirates; Membership Officer, Arab Regional Forum*

**Rebecca Kelly** *Morgan Lewis & Bockius, Dubai, United Arab Emirates*

ROOM C4.7, CONVENTION CENTRE, LEVEL 4

## Tuesday 0930 – 1230

### Offshore structures as a barrier to recovery of assets from criminals

*Presented by the Anti-Corruption Committee, the Alternative and New Law Business Structures Committee, the Business Crime Committee, the Individual Tax and Private Client Committee and the Professional Ethics Committee*

*Session Chair*

**Yves Klein** *Monfrini Bitton Klein, Geneva, Switzerland; Chair, Asset Recovery Subcommittee*

*Co-Moderators*

**Stephen Baker** *Baker & Partners, Jersey, Channel Islands; Senior Vice Chair, Asset Recovery Subcommittee*

**David O'Mahony** *7 Bedford Row Chambers, London, England*

The misuse of legal structures to conceal crime proceeds and assets of criminals has been in the news for the past few years, leading notably to the adoption of beneficial ownership registers by several countries. However, the adoption of such registers may have the unwanted effect of weakening some asset recovery tools. There have also been case law developments that may make trusts an obstacle to recovery of assets that are not crime proceeds.

This session will be divided into two parts.

The first part will explore the question of whether beneficial ownership registers facilitate or hinder asset recovery.

The second part will discuss recent case law, according to which a discretionary trust may be a safe shield against the enforcement of criminal confiscation and civil asset recovery orders.

*Speakers*

**Andrew Bodnar** *Matrix Chambers, London, England*

**Hon Justice Nicholas Davidson** *Christchurch High Court, Christchurch, New Zealand*

**Edward Davis Jr** *Sequor Law, Miami, Florida, USA; North America Regional Officer, Anti-Corruption Committee*

**Michael O'Meara** *Sixth Floor Chambers, Sydney, New South Wales, Australia*

**Duncan Osborne** *Osborne Helman Knebel & Scott, Austin, Texas, USA*

**Dominic O'Sullivan** *Gerard Brennan Chambers, Brisbane, Queensland, Australia*

**Eryn Schornick** *Global Witness, Washington, DC, USA*

ROOM C4.10, CONVENTION CENTRE, LEVEL 4

## Tuesday 1430 – 1545

### Culture, compliance, governance: making the perfect triangle

*Presented by the Corporate Counsel Forum and the Anti-Corruption Committee*

*Session Chair*

**Elias Hayek** *Squire Patton Boggs, Dubai, United Arab Emirates; Vice Chair, Corporate Counsel Forum*

Corporate governance and compliance are areas of focus for corporations in all parts of the globe. To what extent are these influenced, or even driven, by the culture within a corporation? How

Continued overleaf 



does diversity and a multicultural approach within a company affect overall corporate culture? How do regulators around the world view corporate culture and its role in regulation, enforcement and penalties? If companies can get corporate culture right, will compliance and corporate governance follow?

*Speakers*

**Caroline Cox** *Billiton, Sydney, New South Wales, Australia*  
**Bernard Lankes** *IBM Australia, Sydney, New South Wales, Australia*  
**Abhijit Mukhopadhyay** *Hinduja Group, London, England*

ROOM C3.6, CONVENTION CENTRE, LEVEL 3

## Wednesday 0930 – 1230

### Global anti-corruption update

*Presented by the Anti-Corruption Committee, the Asia Pacific Regional Forum and the Professional Ethics Committee*

This annual and very popular session will review the current trends and developments in anti-corruption policy, investigations and enforcement from around the world in an engaging roundtable dialogue with world experts. The session will review current and future trends in anti-corruption laws, enforcement and prosecutions.

**Panel 1**

*Moderator*

**Bruno Cova** *Paul Hastings (Europe), Milan, Italy; Co-Chair, Anti-Corruption Committee*

*Speakers*

**Olumide Akpata** *Templars, Lagos, Nigeria; Regional Representative Africa, Anti-Corruption Committee*  
**Hui Chen** *US Department of Justice, Washington, DC, USA*  
**Satyajit Gupta** *Advaita Legal, New Delhi, India; Committee Liaison Officer, Asia Pacific Regional Forum*  
**Paul Monaghan** *The Law Society of New South Wales, Sydney, New South Wales, Australia*  
**Taek Oh** *Lee & Ko, Seoul, South Korea; Regional Representative North Asia, Anti-Corruption Committee*  
**Leopoldo Pagotto** *Trench Rossi e Watanabe, São Paulo, Brazil; Secretary, Anti-Corruption Committee*

**Panel 2**

*Co-Moderators*

**Claire Daams** *Monfrini Bitton Klein, Geneva, Switzerland*  
**Robert Wyld** *Johnson Winter & Slattery, Sydney, New South Wales, Australia*

*Speakers*

**Peter Crozier** *Australian Federal Police, Canberra, Australian Capital Territory, Australia*  
**Kannan Gnanasihamani** *Attorney General's Chambers, Singapore*  
**Sarah McNaughton SC** *Commonwealth Director of Public Prosecutions, Canberra, Australian Capital Territory, Australia*  
**Laode Syarif** *Corruption Eradication Commission, Jakarta, Indonesia*  
**Hock Chuan Tan** *Messrs Tan Hock Chuan & Co, Petaling Jaya, Malaysia*  
**Jayasuriya Weliamuna** *Colombo, Sri Lanka*  
**Jia Zhaoyang** *Guangzhou R&F Properties Co, Beijing, China*

ROOM C4.9, CONVENTION CENTRE, LEVEL 4

## Wednesday 0930 – 1230

### Impact of increased transparency requirements on holding structures

*Presented by the Taxation Section, the Anti-Corruption Committee, the Individual Tax and Private Client Committee and the Taxes Committee*

*Session Co-Chairs*

**Niklas Schmidt** *Wolf Theiss, Vienna, Austria; Vice Chair, Individual Tax and Private Client Committee*  
**Ewout van Asbeck** *Van Doorne, Amsterdam, The Netherlands*

Many holding structures for both individuals and corporates have historically been driven by a desire to maintain the privacy of the ultimate owners. Increased transparency requirements will render this objective much harder to achieve. How will holding structures change as a result? Paradoxically, could the transparency changes lead to a greater focus on tax optimisation if they prevent privacy being maintained, so eliminating any need for compromise between the two objectives?

*Speakers*

**Eric Fort** *Arendt & Medernach SA, Luxembourg City, Luxembourg*  
**Matias Milet** *Osler Hoskin & Harcourt, Toronto, Ontario, Canada*  
**Edouard Milhac** *CMS Bureau Francis Lefebvre, Neuilly-sur-Seine, France*  
**Nicola Saccardo** *Maisto e Associati, Milan, Italy*  
**Professor Miranda Stewart** *Tax and Transfer Policy Institute, Canberra, Australian Capital Territory, Australia*

ROOM C4.4, CONVENTION CENTRE, LEVEL 4

## Wednesday 1430 – 1730

### Towards global corporate criminal liability?

*Presented by the Litigation Committee and the Anti-Corruption Committee*

*Session Co-Chairs*

**Bruno Cova** *Paul Hastings (Europe), Milan, Italy; Co-Chair, Anti-Corruption Committee*  
**Timothy Strong** *Taylor Wessing, London, England; Vice Chair, Litigation Committee*

As countries around the world try to improve business behaviour with ever tougher legal and regulatory requirements, this session will explore whether global exposure to criminal liability is becoming a reality for corporates and what may be coming next in this area. We will cover multijurisdictional liability and how to manage exposure to it, whether existing compensation regimes are sufficiently focused on the victims of corporate misconduct, and the impact of human rights law on business behaviour.

*Speakers*

**Rodrigo Callejas** *Carrillo & Asociados, Guatemala City, Guatemala; Regional Representative Central America, Anti-Corruption Committee*  
**Felicity Gerry QC** *Carmelite Chambers, London, England*  
**Sandrine Giroud** *Lalive, Geneva, Switzerland; Co-Chair, Young Litigators Forum*  
**Janet Hoffman** *Janet Hoffman & Associates, Portland, Oregon, USA*  
**Tean Kerr** *Lander & Rogers, Sydney, New South Wales, Australia*  
**Taek Oh** *Lee & Ko, Seoul, South Korea; Regional Representative North Asia, Anti-Corruption Committee*

ROOM C2.3, CONVENTION CENTRE, LEVEL 2

## Thursday 1430 – 1730

### Africa – a continent with abundant resources and capability for growth: where lies the road map for the promotion of growth, development and poverty elimination?

Presented by the African Regional Forum, the Anti-Corruption Committee and the Antitrust Committee

Session Co-Moderators

**Linda Kasonde** *Mulenga Mundashi & Company, Lusaka, Zambia; Officer, Bar Issues Commission*

**Sternford Moyo** *Scanlen & Holderness, Harare, Zimbabwe; Ex officio, IBA's Human Rights Institute*

Africa has an abundance of resources. This is one of the major factors behind the growth experienced by African economies during the past 15 years. What are the major features of resources laws needed to enable African countries to leverage this endowment for growth, development and elimination of poverty?

Speakers

**Frances Adu-Mante** *Rofam Consultancy Services, Accra, Ghana*

**Heather Irvine** *Falcon & Hume, Sandton, South Africa*

**Benoit Le Bars** *Lazareff Le Bars, Paris, France*

**Jacob Saah** *Saah Partners, Accra, Ghana*

PARKSIDE BALLROOM 1, CONVENTION CENTRE, LEVEL 2

## Thursday 1430 – 1730

### Duties of confidentiality and the Panama Papers

Presented by the Professional Ethics Committee, the Alternative and New Law Business Structures Committee, the Anti-Corruption Committee, the Closely Held and Growing Business Enterprises Committee and the Bar Issues Commission

Session Co-Chairs

**Jeffrey Merk** *Aird & Berlis, Toronto, Ontario, Canada; Secretary-Treasurer, Professional Ethics Committee*

**Steven Richman** *Clark Hill, Princeton, New Jersey, USA; Co-Chair, Alternative and New Law Business Structures Committee*

Lawyers in virtually all jurisdictions have duties of confidentiality regarding their clients and their clients' affairs. In the past, there has been more 'hacking' of lawyers' data banks to disclose such information in unauthorised circumstances. One example is the unauthorised disclosure from an internal source of the information from a Panama-based law firm. In addition, many other leading international firms have been hacked externally and many firms have implemented additional security measures to restrain or limit hacking. This panel will consider some of the ethical considerations relating to these matters. The IBA and Organisation for Economic Co-operation and Development (OECD) are carefully considering similar issues. The discussion of the panellists is not to be construed as any indication of the current or future thoughts of the IBA and/or OECD with respect to these matters. The questions relating to privacy and security of data and information are important to law firms.

Speakers

**Stig Bigaard** *Copenhagen, Denmark; Vice Chair, Closely Held and Growing Business Enterprises Committee*

**Martin Kenney** *Martin Kenney & Co Solicitors, Tortola, British Virgin Islands*

**Ricardo León-Santacruz** *Sanchez DeVanny, Monterrey, Mexico; Membership Officer South America, Taxes Committee*

**Laurent Nguyen** *Zico Group, Ho Chi Minh City, Vietnam*

**Aditi Rani** *Advaya Legal, Mumbai, India*

**Meg Strickler** *Conaway & Strickler PC, Atlanta, Georgia, USA; Co-Chair, Cybercrime Subcommittee*

**Pieter Tubbergen** *Schaap Advocaten Notarissen, Rotterdam, The Netherlands; Website Vice Officer, International Sales Committee*

ROOM C3.5, CONVENTION CENTRE, LEVEL 3

## Thursday 1615 – 1730

### Franchising and anti-bribery/anti-corruptions laws: compliance and investigation

Presented by the International Franchising Committee and the Anti-Corruption Committee

Session Chair

**Luciana Bassani** *Dannemann Siemsen Advogados, Rio de Janeiro, Brazil; Vice Chair, International Franchising Committee*

The session will focus on how international franchising may be affected by both domestic civil and criminal, and long jurisdictional reach anti-corruption laws and how to benefit from robust and proactive compliance language and culture, investigation and programmes. This session will also discuss the degree of control franchisor exercises over franchisees and related consequences.

Speakers

**Professor Allan Fels** *University of Melbourne Law School, South Yarra, Victoria, Australia*

**Etsuko Hara** *Anderson Mori & Tomotsune, Tokyo, Japan*

**Jitka Logesová** *Kinstellar, Prague, Czech Republic; Vice Chair,*

*Anti-Corruption Committee*

ROOM C3.4, CONVENTION CENTRE, LEVEL 3

## Friday 0930 – 1045

### Rule of Law Symposium: the anti-corruption revolution in Latin America

Presented by the Rule of Law Forum and the Anti-Corruption Committee

Session Co-Moderators

**Homer Moyer** *Miller & Chevalier, Washington, DC, USA; Co-Chair, Rule of Law Forum*

**Carmen Pombo** *Fundación Fernando Pombo, Madrid, Spain; Co-Chair, Rule of Law Forum*

Recent months have seen remarkable developments across Latin America in the fight against official corruption, including the sprawling Lava Jato ('Car Wash') case in Brazil, which by many measures has already become the largest anti-corruption case in history. Elsewhere in Latin America, anti-corruption initiatives led by prosecutors, civil society activists, and multi-national corporations have begun to transform the anti-corruption environment throughout the region, with high-level investigations leading to resignations of heads of state, prosecutions of numerous public officials and corporations, and new levels of attention by corporations to anti-corruption compliance.

Hear the perspectives and insights on these historic developments directly from prosecutors, civil society activists, and corporate compliance professionals who have experienced this 'revolution' first-hand.

Speaker

**Roberta Pegas** *Telefonica, São Paulo, Brazil*

ROOM C4.5, CONVENTION CENTRE, LEVEL 4



## ARTICLES

# Argentina's fight against corruption: new reality, new tools

**Roberto P Bauzá**

Rattagan Macchiavello  
Arocena, Buenos Aires  
RPB@RMLex.com

**U**nder President Macri's administration, Argentina has entered an era of promised transparency and concerted efforts to battle corruption, which is considered to be a widespread, endemic evil and a major obstacle to sustainable development.

In addition to other contributing measures (such as greater publicity of acts of administration, electronic government and a self-proclaimed non-interference with the judiciary), in 2016 the executive sent three main pieces of projected legislation to congress. The legislation constitutes the backbone of its anticorruption efforts:

- a mechanism allowing for reduced sentences in corruption crimes – among other offences – benefiting indicted individuals who collaborate with the investigation;
- a bill establishing criminal responsibility of legal entities for acts of corruption; and
- a bill proposing the forfeiture of title over assets that are the product of, or are otherwise connected with, criminal activity (including acts of corruption).

Cambiamos ('let us change'), the political alliance that put Macri on the presidential seat, does not have a majority in either of the legislative chambers (Chamber of Deputies and the Senate), which calls for permanent negotiation with opposition forces and poses additional challenges to the progress of the anti-corruption legislation. In fact, to date only one of the three bills has passed into law.

Additionally, and even if all projected legislation is adopted, there are still a few question marks and hurdles in the way towards reducing corruption effectively. Some of these obstacles are a historically low level of anti-corruption enforcement; a judiciary still perceived as inefficient and corrupt; the lack of a corporate compliance culture; and the

substantial cultural, legislative and economic differences among the various provincial jurisdictions that would ultimately be in charge of applying the laws.

## Background and political environment

Corruption is a long-standing problem in Argentina, with deep roots, of which some trace back to Spanish colonial times. It has been present in practically all governments throughout the country's history.

Things did not particularly improve after Argentina's latest return to democracy in 1983. Among the administrations that succeeded since, allegations of big-time corruption plagued the two presidential terms of Carlos Menem (1989–1999), although very few were investigated and even fewer ended up in convictions. Menem (born July 1930) has been convicted on counts of illegal sales of weapons to Ecuador. His conviction was ratified by two levels of the criminal justice system and it is presently under review by the Argentine Supreme Court, which has not been an obstacle to Menem's election and tenure as senator for several terms after stepping down as president.

But Argentina showed a particularly poor record in the fight against corruption during the presidencies of Nestor Kirchner (2003–2007) and his wife Cristina Fernández (2007–2015). During those years, the word 'corruption' was squarely absent from presidential speeches and acts of government. Much to the contrary, a series of official and unofficial acts or omissions had the effect of tolerating (if not openly boosting) the rampant corruption swelling in all levels of the administration.

Among other actions, the Kirchners dismantled or rendered ineffective most internal control agencies, exercised heavy

interference and pressure over the judiciary, showed lack of transparency in governmental proceedings, doctored public statistics, attempted to pass laws for controlling the media and manipulated the body in charge of appointing and removing federal judges. Against this backdrop, a small group of Kirchner's cronies and close family members made fortunes dealing with federal or provincial administrations, under the appearance of legitimately awarded bidding processes or direct contracts.

Most of these actions are presently under criminal investigation, which have resulted in Fernández, her Vice-President, a few cabinet ministers and other politicians and business people facing indictments for corruption-related crimes.<sup>1</sup> Fernández has been charged in at least three different investigations on multiple counts, such as being the boss of a criminal organisation dedicated to money laundering and other serious crimes. This notwithstanding, she is presently running for Senate in the October 2017 congressional elections and stands a high chance of being elected.

Argentina is a signatory to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and, as such, it is subject to the periodical reviews implemented by the OECD.<sup>2</sup> The latest 'Phase 3' report issued by the OECD Working Group on Bribery in December 2014<sup>3</sup> provides a good example of the aforementioned environment. The report stated 'grave concerns' about Argentina's commitment to fight foreign bribery and how little progress Argentina had made since previous evaluations. It noted that the country had not implemented the recommendation to introduce corporate liability for foreign bribery or provide nationality jurisdiction to prosecute this crime, and rectify several shortcomings in its foreign bribery offence. More dramatically, and beyond the specific foreign bribery issue, the report pointed out to 'systemic deficiencies in Argentina's criminal justice system', 'widespread delays in economic crime cases' and expressed concern about judicial independence, citing cases of pressure exerted over judges and prosecutors, lack of reaction by the authorities to bribery allegations in the media and 'inconsistent and convoluted rules that hinder and delay the reporting

of crime by public officials'. The report also noted that few Argentine companies had anti-foreign bribery measures beyond limited codes of ethics and that the country had not adopted appropriate measures to protect whistleblowers in both the public and private sectors from discriminatory or disciplinary action.

As of the end of 2016, Argentina had a score of only 36 (out of a maximum grade of 100) in the Corruption Perception Index published by Transparency International, thus ranking in position 95 among 176 surveyed countries.<sup>4</sup>

The violent (and still unsolved) suspicious death of Special Prosecutor Alberto Nisman on 18 January 2015, right after accusing President Cristina Fernández and Argentina's foreign affairs minister Alberto Timerman of covering up Iran's responsibility for a 1994 terrorist attack, marked a sad rock bottom and acted as a powerful symbol of the corrupt atmosphere of the times.

But things were about to change. After taking office in December 2015, coming out of a presidential election that ended a 12-year Kirchner rule, Macri assumed a public engagement towards transparency and the fight against all forms of corruption.

One of the first steps taken in this direction was revitalising key areas of the administration that bear heavily on corruption matters, such as the Anti-Corruption Office and the Financial Information Unit (the agency in charge of fighting and preventing money laundering). In parallel, the administration reached out to the private sector, engaging in dialogue and cooperation with recognised Argentine and foreign experts in anti-corruption and compliance in order to bring laws, regulations and procedure to the highest international standards.

It is no coincidence that Argentina had requested admission as full OECD member in 2016, and that several missions of the organisation visited the country during the second part of that year to review progress in areas such as trade, statistics, financial regulation and anti-corruption.

Regarding anti-corruption specifically, the new administration has concentrated its legislative efforts on the three bills referred to above, out of which only the plea-bargaining system made it into law during 2016. Further progress is expected to be achieved in the coming months.



## Brief description of legislative instruments

### 'Repentant' law (plea bargaining)

Law No 27.304, of 19 October 2016 (the 'Law'), modified Section 41 of the Argentine Penal Code by introducing the figure of the 'repentant' for several criminal offences. The basic feature of the Law is to allow a sentence reduction negotiated by the prosecutor with the 'repentant' (indicted) individual in exchange for relevant information. That information may, for example, help the progress of the investigation, avoid further occurrences of the crime, contribute to identify or indict accomplices or reveal sources of financing for criminal enterprises.

Even though the 'repentant' figure already existed in some isolated statutes for a few specific crimes, the Law made it a part of the Criminal Code and specifically extended it to corruption-related offences such as bribery. In this connection, the Argentine government undoubtedly looked to Brazil for precedent, where plea bargaining achieved astounding success in bringing down large-scale corruption conspiracies and indicting highly placed politicians and businessmen in the so-called *Lava Jato* (Operation Car Wash) investigation.

Some relevant aspects of the law include that:

- convictions may be reduced between one-third and one-half of the applicable prison time and life sentences may be reduced by up to 15 years in prison;
- an individual may only provide information about facts for which they are criminally responsible;
- information concerning other persons must refer to individuals whose criminal responsibility is of equal or higher level than that of the 'repentant';
- politicians subject to constitutional impeachment may not benefit from the plea-bargaining mechanism;
- plea-bargaining agreements must be implemented in writing, with assistance from legal counsel and must be approved by the court in a special hearing;
- individuals making use of this mechanism are entitled to claim the benefits of the witness protection programme; and
- the information provided by the 'repentant' in the context of the plea-bargaining agreement may not be the sole grounds for a conviction – this information must be confirmed and complemented by other evidence elements on the record.

Since its entry into force is still recent, the value of this law as an effective mechanism for combating corruption and bringing down 'big fish' is still to be proven. Some characteristics of the Argentine culture and criminal justice system may limit the intended effect of this tool, as further discussed below. Most significantly, while a few business people and mid-level public officials of the Kirchner era have been indicted and even imprisoned in ongoing corruption investigations, no significant plea-bargaining agreements have been announced signalling responsibility up the political chain.

### *Criminal responsibility of legal entities for acts of corruption*

In October 2016 the Argentine government sent a bill to congress, which was intended to establish criminal responsibility of legal entities for acts of corruption (bribery and other related crimes). This was in response to long-standing requirements and recommendations by the United Nations and the OECD, honouring certain commitments assumed by Argentina before the G20 and following the latest international trends in anti-corruption prevention and enforcement.<sup>5</sup> To date, the Argentine Penal Code sanctions only individuals for corruption-related crimes, while criminal responsibility of legal entities is limited to a few other crimes (such as money laundering, financing of terrorism and some violations to customs, foreign exchange and competition regimes).

Originated in theories of economic analysis of the law, the explicit purpose of the bill is to create strong and effective incentives for compliance in the private sector. Faced with the prospect of receiving heavy penalties themselves, corporations and other legal entities should cooperate in discouraging, preventing, detecting and sanctioning corrupt behaviour of their employees, agents and other related third parties.

In many aspects, the bill follows the Brazilian Clean Companies Act No 12.846. This, together with Chilean law, the UK Bribery Act and the Foreign Corrupt Practices Act (FCPA), is expressly recognised as relevant precedent in the statement of purpose of the project.

The bill entered the Chamber of Deputies, where it underwent several amendments and was eventually approved on 5 July 2017. It is currently awaiting treatment by the Senate in order to become law. The discussion below is based on the text as approved by the

Deputies, which is subject to potential further amendment by the Senate.

#### SCOPE

Legal entities of Argentine or foreign ownership are made responsible for any crimes contemplated in the Argentine Penal Code, when committed on behalf of the entity or for its benefit by any of the entity's (i) owners, shareholders, partners or associates who may have an influence over the corporate will of the entity; or (ii) attorneys-in-fact, representatives, directors, managers or employees.

Even acts of individuals not related to the entity may result in responsibility, to the extent the entity benefited from the criminal act and ratifies it expressly or tacitly.

The entity will not be responsible if the invoked representation is false, or if the individuals acted exclusively for their own benefit.

The bill also establishes criminal and civil liability of controlling entities in respect of their subsidiaries and successor liability of the surviving/resulting entities in cases of mergers and acquisitions, spin-offs and other corporate transformations.

The responsibility of legal entities is independent of the one that may correspond to individuals involved in the illegal acts, and the respective legal proceedings may run separately. Moreover, legal entities may be liable if no specific individual is identified as perpetrator of the crime.

#### PENALTIES

Base penalties shall consist in the following:

- a fine of between one and ten per cent of the entity's gross sales in the fiscal year immediately preceding the criminal conduct. The court may decide that the fine should be paid in instalments over a period of up to five years, when the survival of the company or the maintenance of jobs might be put at risk by a single payment; and
- publication of sentence.

Additionally, penalties may include one or more of the following measures:

- suspension of the company's activities for up to ten years;
- suspension of use of trademarks and patents for up to ten years;
- loss or suspension of any subsidies or other government-granted benefits;
- exclusion from public contracts and calls for bids for up to ten years; and

- termination of legal existence, but only in cases where the commission of crimes is the principal activity of the legal entity.

Aggravating circumstances include involvement of top management in the illegal activity, causation of environmental or community damage, the permanence of the illegal conduct over time and if the company is a repeated offender. In these cases, the fine range will be between ten to 20 per cent of gross sales in the fiscal year immediately preceding the criminal conduct.

On the other hand, applicable sanctions may be reduced up to 50 per cent if the entity voluntarily self-discloses the wrongdoing to the authorities before an investigation is started; or, prior to the commission of the crime, the entity had implemented a compliance programme in accordance with the terms of Sections 29 and 30 of the Law. However, upon applying the penalty reductions, in no case may the fine be less than 0.5 per cent of the entity's gross sales for the fiscal year immediately preceding the commission of the wrongdoing.

The bill also contemplates loss of title over goods and disgorgement of profits obtained from the illicit activity, in accordance with applicable provisions of the Argentine Penal Code.

#### COLLABORATION AGREEMENTS

The entity being indicted may enter into a collaboration agreement with the prosecutor, in exchange for relevant information and collaboration in the investigation. Terms of the collaboration agreement may include payment of a reduced fine (in this case, the minimum is further reduced to 0.1 per cent of gross sales), disgorgement of profits and suspension of the criminal proceedings. Other terms may include performance of community service, disciplinary measures against involved individuals and implementation of compliance programmes (or improvement of existing ones). The collaboration agreement is subject to approval and control by the criminal court. Ongoing obligations under the Data Protection Act may extend for up to three years, and their complete fulfilment shall extinguish the entity's criminal responsibility.

#### COMPLIANCE PROGRAMMES

The law establishes general criteria and some specific contents that compliance programmes must fulfil to qualify for penalty



## ARGENTINA'S FIGHT AGAINST CORRUPTION: NEW REALITY, NEW TOOLS

mitigation. Specifically, it is envisioned that the programme may not be alleged as a mitigation cause if the court determines that such programme failed to prevent the wrongdoing due to lack of implementation, follow up or supervision.

### REGISTRY OF SANCTIONED ENTITIES

The bill contemplates the creation of a national registry of sanctioned entities (the 'Registry'), which shall be publicly accessible online. The Registry shall contain information concerning legal entities sanctioned for criminal conduct (once the decision becomes final), with identification of the crime and the type of sanction applied. Information shall remain publicly available in the Registry for up to ten years.

### EXTRATERRITORIAL EFFECTS OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

The bill also modifies Section 1 of the Argentine Penal Code, by extending the jurisdiction of Argentine courts over the crime of bribery of foreign public officials<sup>6</sup> committed abroad by Argentine citizens or legal entities domiciled in Argentina. This amendment is relevant because, to date, this crime could only be prosecuted to the extent it was committed within the Argentine territory or had effects in it.

### AGGRAVATION OF PRISON TERMS FOR CORRUPTION-RELATED CRIMES; STATUTE OF LIMITATIONS

Finally, the bill further modifies the Penal Code by substantially aggravating the prison terms for several corruption-related crimes and excluding them from any statute of limitations.

### *Forfeiture of title over assets related to crime*

On 23 June 2016, the Argentine Chamber of Deputies approved a bill sent by the Executive Branch that establishes a procedure for forfeiture of title (*extinción de dominio*) in favour of the Argentine state over assets that are the product of illicit activities or are otherwise connected with crime.

As in the case of criminal responsibility of legal entities, this bill is currently awaiting treatment by the Senate in order to become law. The discussion below is based on the text as approved by the Deputies, which is

subject to potential further amendment by the Senate.

The bill provides a list of situations in which a judicial action may be started with the purpose of extinguishing legal title over those assets, which includes assets directly resulting from criminal activity, assets used to commit crimes and unjustified patrimonial increase related to illicit activities.

The legal proceedings pursuing the forfeiture must be started by a state attorney before a court of law with civil and commercial jurisdiction, and it is independent of any criminal proceedings existing against the persons who have title over or are in the possession of the assets. However, it is a condition for the admission of the forfeiture petition that the affected person had been indicted in a criminal investigation. Any persons affected by the forfeiture proceedings shall have all legal and constitutional guarantees to appear before the court and exercise their rights of defence.

The bill authorises the Attorney General's office, with the support of the Executive Branch, to form special units dedicated to investigating relevant cases and, if necessary, commence and pursue forfeiture proceedings.

State attorneys are empowered to perform preliminary investigations, request information and cooperation from governmental agencies, private individuals and entities, and may request court orders when they may be necessary for obtaining that information.

Private legal entities or individuals who voluntarily provide evidence leading to asset forfeiture may become entitled to a reward of up to five per cent of the forfeited assets' value. Cooperating individuals may provide testimony under reserved identity and/or request to be included in the witness protection programme.

State attorneys may request injunctions or preliminary measures necessary for the freezing or seizure of the assets while proceedings are underway or even before they are formally started.

The bill establishes an expedite procedure for the forfeiture action, with oral arguments before the court and strict procedural deadlines. The forfeiture decision shall declare extinction of title over the assets and their transfer to a special governmental agency created for that purpose. Appeal grounds are very restricted and appeals shall also be dispatched expeditiously.

The forfeited assets may be applied to several public uses detailed in the bill, such as education, public housing, drug rehabilitation programmes, the justice system, law enforcement and others.

### Current status, assessment and conclusions

As stated above, out of the three bills discussed in this article, only the plea-bargaining ('repentant') mechanism has made it into law as of late July 2017. In the period since it entered into effect, however, no substantial developments have occurred of public record concerning plea bargaining in anti-corruption investigations. In our view, this may be due to two main reasons. The first is that, in accordance with judicial criteria followed by most criminal courts in Argentina, very few individuals are actually jailed in anti-corruption investigations, so effectiveness of the mechanism is somehow reduced. By comparison, most plea-bargaining deals (*delações premiadas*) in Brazil were obtained by negotiating with people who were already imprisoned. In this connection, the increase in prison time associated with corruption crimes (implemented in the second of the bills herein discussed) is precisely aimed at compelling judges to jail individuals indicted under serious corruption charges.

The second reason is that, given the overwhelmingly low rate of convictions for corruption crimes in Argentina, the potential reduction of a jail sentence is probably not that much of an incentive for individuals to self-incriminate or reveal the involvement of others further up the criminal hierarchy. In short, this measure (which is positive by itself) may be rendered almost moot if not accompanied by a change in the behaviour of prosecutors and judges and a general perception of tougher and more effective anti-corruption enforcement.

The other two bills are a stated priority for the Anti-corruption Office and the government at large. Both have been approved by the Chamber of Deputies and await treatment by the Senate. Substantial legislative efforts have been put behind them in the first half of 2017. However, as stated above, since the governing alliance Cambiemos does not possess a majority of its own in the Argentine congress, these projects may still be subject to much discussion and even suffer substantial amendment before they become law.

Finally, in our view, the bill establishing criminal responsibility of legal entities presents a few practical concerns. Because the bill establishes a purely criminal responsibility system (with no prior administrative stage), it will necessarily rely on the existing structure of the Argentine criminal judiciary to be enforced. Some limitations of this approach are:

- absence of a central, specialised body or agency in charge of investigating and prosecuting corruption cases against entities with unified criteria;
- different procedural laws and systems for criminal enforcement in the several Argentine provinces and the autonomous City of Buenos Aires;
- criminal judges and prosecutors with little experience or education in corporate matters and compliance programmes; and
- excessive formalism and protracted average duration of criminal proceedings.

These factors – combined with the very broad range and nature of penalties envisioned by the bill – may result in diverging judgments, lack of predictability about expected corporate behaviour, slow-moving enforcement proceedings and may eventually work against the incentives that the bill aimed to create in the private sector.

In short, these legislative tools seem technically well designed and are backed by a strong political will of the current administration. Their effectiveness in combating and reducing corruption, however, will depend on a greater cultural change that must include cooperation of other political forces, active involvement and commitment by the judiciary and the corporate sector. Only then will Argentina be able to show it has started to turn the page on its corruption-ridden past.

#### Notes

- 1 Nestor Kirchner died on 27 October 2010, while his wife was in office.
- 2 The Convention was signed by Argentina in 1997 and entered into force as from 9 April 2001, after being ratified by the Argentine Congress through Law No 25.319.
- 3 *Phase 3 Report On Implementing The OECD Anti-Bribery Convention In Argentina* (December 2014), available at [www.oecd.org/daf/anti-bribery/Argentina-Phase-3-Report-ENG.pdf](http://www.oecd.org/daf/anti-bribery/Argentina-Phase-3-Report-ENG.pdf).
- 4 'Corruption Perceptions Index 2016' (January 2017), available at [www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016).
- 5 The Chamber of Deputies later extended the scope of the law to all crimes in the Argentine Penal Code.
- 6 Section 258 *bis*, Argentine Penal Code.



# State asset recovery in Guyana

**William Diab**

Florida International  
University College of  
Law, Miami

wdiab002@fiu.edu

Latin American nations have been fighting an uphill battle against corruption in the public sector since their inception. However, while several nations have taken steps to remedy this contamination, in April 2017, Guyana's National Assembly passed the State Asset Recovery Bill (the 'Bill'). The Bill has been called 'unprecedented' by some, and 'dangerous' by others.

The Bill provides for the establishment of a State Assets Recovery Agency (SARA). Its primary function is the civil recovery of state property obtained through the unlawful conduct of a public official or other person, by way of civil proceedings taken in the High Court for a civil recovery order. Although Guyana's efforts to comply with the United Nations Convention against Corruption (signed in 2008) are commendable, the Bill's opponents are cynical and the main points of contention have revolved around the legal status of SARA's director, the director's broad powers, SARA's self-funding capacity and the elements that must be proved in court. However, it is precisely these aspects, along with its international cooperation provisions, that arguably make SARA such an effective entity, as opposed to its predecessor, the State Asset Recovery Unit (SARU).

Under this Bill, the director of SARA shall be appointed by the National Assembly to serve as a corporation sole. As a corporation sole, the director will enjoy autonomy in the functions of their duty and the administration of SARA. Transparency obligations take the form of a detailed annual plan and annual report provided to the National Assembly. Aside from these annual submissions and common place judicial review, SARA has virtually no oversight and its staff is granted immunity for any act done in good faith in the intended performance of any of their official duties.

The Bill provides the director with the authority to request, and expect, the cooperation and assistance of the Director of Public Prosecutions, the Director of the Financial Intelligence Unit, the Commissioner of Police and the Commissioner General during SARA's investigations. Furthermore, SARA may enter into binding memoranda of understanding with any state organ, foreign government or international or

regional organisation, in the recovery of state property. Critics have become weary of the constitutional problems that may arise if a previously independent officer, such as the Director of Public Prosecutions, becomes subject to SARA's sphere of influence.

However, the Bill's proponents have persisted in asserting that this does not grant the director authority to assume or divest the powers inherent in another agency or office but instead facilitates cooperation between different executive agencies with overlapping law enforcement obligations.

SARA is partially self-funding. SARA's main budget must be approved by the National Assembly but the Bill contains certain provisions for the establishment of a Recovery of State Assets Fund, into which 25 per cent of the value of recovered property will be credited. This makes SARA a self-sustaining agency and the director is authorised to use the funds to commence actions under the Act, pay experts, fund training and capacity-building or compensate victims who have suffered losses as a result of unlawful conduct. The Bill's opponents say that this gives the agency a direct interest in the funds raised and could lead to the widely criticised kind of abuse that is prevalent among law enforcement in the United States today. However, in the US, law enforcement regularly seizes individual assets through a process known as *administrative forfeiture*, which only requires a showing of probable cause to believe that the asset was used in the commission of a crime. Additionally, assets may only be forfeited in this manner if the owner declines to contest the claim of forfeiture. If the claim is contested, the government has two options: civil or criminal forfeiture, and the government must meet its respective burden of proof in each case. SARA's function is the civil recovery of state property, not private property, and can only commence with forfeiture after meeting its burden by a preponderance of the evidence to the satisfaction of a judge in the High Court.

Lastly, concerns for due process, specifically a lack of notice, can be attributed to the vagueness of the elements that SARA must prove at trial, namely, that state property was obtained through unlawful conduct. Conduct

is unlawful if it amounts to any offence under any of the laws of Guyana, or if committed overseas would amount to an offence there and under the laws of Guyana. It will not be necessary to prove the commission of a particular crime by a particular person. It will be sufficient to prove that the property was obtained through conduct of a particular type, for example, corruption, bribery or fraud. While such obscurities in a seminal piece of legislation are adequate causes for concern, individuals with interest in a property are not left without recourse. An interest holder may avoid forfeiture of his property if they can prove legal ownership, or if they fall within the exception of a good faith bona fide purchaser. This procedure is not so different from the system of civil forfeiture present in the US, where due process is held as one of – if not the most – sanctified laws in the land.

Furthermore, the director's functions are not confined within the territorial boundaries of Guyana. The Bill contains provisions that allow the director, through the power of the appropriate minister, to enter into reciprocal recovered property sharing agreements, and information-sharing agreements with a foreign authority. The director may make a request for direct overseas assistance if they believe that relevant evidence exists in a country or territory outside Guyana. The director may also initiate proceedings in a foreign country to recover property they believe to be proceeds of any unlawful conduct. The provisions present in this part of the Bill effectually turn SARA into a supranational organisation with the ability to track down and recover property that was once thought to be safely hidden outside the jurisdiction of its seeker.

With all these resources laid out at its disposal, SARA has the potential to become

one of the world's top asset recovery teams. However, its critics remain fearful of what might become of Guyana if such a wealth of resource and power falls into the hands of some with ulterior motives. When does one entity, one office or one officer become too powerful to trust?

The most threatening development for any democracy is a centralised authority. So it is no surprise that opposition is fierce in the face of legislation that ventures to create an office with broad powers and relatively few restrictions. However, in times of great urgency, it has become the common practice of rational democracies to adopt policies that reflect a harsh solution to a serious problem. In the US, for example, the war against organised crime saw the enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO), facilitating the imprisonment of hundreds of individuals in one trial. The war on drugs gave rise to the imposition of minimum sentences and the widely criticised three-strike rule. And the war on terror with its notorious Patriot Act is yet another example when even constitutionally protected liberties can be relegated for the sake of national security.

Guyana scored 34 on Transparency International's 2016 Corruption Perceptions Index and, while this reflects a grave squandering of public assets, in other countries across Latin America, the situation is still even worse. This Bill may be necessary to purge Guyana of the scourge of corruption that plagues the entire continent. Therefore, if it is successfully managed and disciplined, and those fears of abuse are abated, we may very well see more SARAs in nations across Latin America, forming a web of highly trained and competent experts with one common mission: to give back to each their own.



# Anti-bribery compliance meets permits, approvals and licences in India

**David Simon**

Foley & Lardner,  
Washington, DC  
dsimon@foley.com

**Sherbir Panag**

Panag & Babu,  
New Delhi  
sherbir@  
pblawoffices.com

Obtaining permissions, approvals and licences in India creates high risks for bribery on account of there being significant interaction between the company and government authorities. The bribery risk manifests itself further on account of:

- poor knowledge on what permissions, approvals or licences a company must obtain;
- not preparing for the bureaucratic hurdles and the time involved in overcoming them; and
- having someone from the organisation with limited or no experience in this area oversee the process.

In January 2017, the US Securities Exchange Commission (SEC) announced a \$13m settlement with Mondeléz arising out of payments made by its Cadbury operation in India in connection with obtaining approvals and licences.<sup>1</sup>

The fact pattern is familiar. Before its acquisition by Mondeléz, Cadbury was in the process of expanding its manufacturing facility in Baddi, Himachal Pradesh, India. The SEC alleged that Cadbury determined that the expansion would require more than 30 different licences and approvals from various government agencies in India. As many non-Indian companies do, Cadbury hired an agent, according to the SEC, without conducting any due diligence on the company or its principals and without entering into a written contract, to assist in obtaining the required regulatory approvals. The SEC claimed that Cadbury paid in the range of \$100,000 to the agent for the work.

According to the SEC, the agent withdrew (in cash) most or all of the funds paid in by Cadbury. According to Indian press reports, the payments made by Cadbury appeared to correspond in time with the dates crucial approvals came through. And the agent did not even prepare the approval applications – Cadbury employees did that work. Moreover, the agent did not provide documentary support for the services it was paid to provide, other than invoices listing the licences and approvals obtained.

The SEC concluded there was a Foreign Corrupt Practices Act (FCPA) books, records and internal controls violation – having ‘created the risk that funds paid to [the] Agent... could be used for improper or unauthorised purposes’.

While bribery is not usual in these circumstances, permissions, approvals and licences can be obtained in India without paying bribes. Companies can minimise bribery risk by following these four steps:

## Don’t panic

Determine what permissions, approvals and licences the company needs. If you do not have the capacity to do so in-house, consider engaging legal counsel for this purpose. The bureaucracy notwithstanding, there is always a stipulated procedure (however difficult to find) and the compliance requirements must be determined in advance. Remember, you can’t be asked for ‘magical documents’.

## Plan ahead

Work backwards from the date/event before which the concerned permission, approval or licence is due, to prevent a last-minute rush that would expose the company to a greater bribery risk.

Factor in a buffer time for contingencies such as organising documents, board resolutions with foreign directors, documents needed to be notarised outside of India for use in India, etc. Over and above this, build in time to handle objections/questions/queries/show causes from the concerned government authority. In short, don’t cut it too fine.

## The right person for the right job

Oversight of the permissions, approvals and licences must rest with a person from the organisation who has the ability and capacity to oversee the process. For example, having the head of human resources overseeing the approval of a factory plan isn’t the best idea.

In the event that the company does not have such a resource, consider legal counsel or qualified project consultants.

### Get organised

Make your compliance task simpler by listing out:

- the concerned permission/approval/licence;
- when it is due;
- who is responsible; and
- when work on obtaining the same starts.

Sometimes agents and consultants are necessary to help navigate the Indian bureaucracy. But engaging agents and consultants involves risk, where such third parties may be trading on connections and relationships and could well be making improper payments (with or without your knowledge), exposing you to serious FCPA risk. To minimise the risks posed by engaging third parties to interact on your behalf, follow these four steps:

1. Conduct appropriate due diligence to ensure they are qualified, competent and do not have a reputation for a lack of integrity. Due diligence in India can be complex and needs careful review. There is no centralised database to conclusively access criminal records and therein lies

a challenge.<sup>2</sup> It is thus imperative for companies to risk assess and invest in due diligence accordingly.

2. Enter into a written agreement that specifically identifies the work to be performed and the compensation to be provided and includes appropriate anti-bribery language. Additionally, consider entering into a business partner integrity pledge – a document in the form of an affidavit by the third party specifying their adherence to anti-bribery laws.
3. Make sure the compensation is reasonable, customary and appropriate for the work performed.
4. Insist on complete documentation of the services before you pay invoices – if the agent is queuing for three hours at a municipal office, the invoice should include that detail. As a standard practice, do not process invoices that include expenses incurred by a third party without adequate supporting documents being presented.

#### Notes

- 1 See [www.sec.gov/litigation/admin/2017/34-79753.pdf](http://www.sec.gov/litigation/admin/2017/34-79753.pdf).
- 2 Laurel Burke, David Simon and Sherbir Panag, 'Compliance Challenges in India: Why Your Program May Not Translate: Part 2' (9 September 2016), available at <http://complianceandethics.org/compliance-challenges-india-program-may-not-translate-part-2>.

**Daniel Lucien  
Bühr**

Lalive, Zurich  
dbuhr@lalive.ch

**Sophie Stählin**

Lalive, Zurich  
sstahlin@lalive.ch

## Corporate criminal liability and self-reporting by undertakings in Switzerland

**U**nder Swiss criminal law, undertakings commit a corporate offence if they fail to prevent bribery, money laundering, financing of terrorism or the participation in or support of a criminal organisation. In the past two years, the number of criminal investigations against undertakings for suspected corporate criminal offences significantly increased, in particular in relation to bribery and money laundering. Concurrently, Swiss enforcement agencies are promoting self-disclosure by undertakings and have recently concluded a first settlement.

### Swiss Criminal Code

Swiss criminal law applies to natural persons and only uses the instrument of corporate criminal liability in specific circumstances set forth in Article 102 of the Swiss Criminal Code (SCC), under which companies can be fined up to CHF 5m and can be ordered to disgorge illicitly gained profits.

According to Article 102, paragraph 1 SCC, an undertaking can be held liable for a crime committed in the exercise of its commercial activities, if it is not possible to attribute the



crime to a specific natural person as a result of the undertaking's inadequate organisation (so-called *derivative* corporate liability). Under Article 102, paragraph 2 SCC, an undertaking can be held liable irrespective of the criminal liability of a natural person,<sup>1</sup> if it failed to take all necessary and reasonable organisational measures to prevent bribery, money laundering, financing of terrorism or the participation in or support of a criminal organisation (so-called *original* liability).

Swiss authorities have jurisdiction for corporate offences under Article 102, paragraph 2 SCC, if the predicate offence is committed in Switzerland or if the organisational weakness is located in Switzerland. The latter is the case for all undertakings domiciled in Switzerland and for all foreign undertakings with corresponding compliance functions in Switzerland.

Article 102 SCC was introduced in 2003 and, until two years ago, only a handful of cases existed. However, in the past two years, the number of criminal investigations against (and convictions of) companies has increased significantly (for example, Siemens/Yamal Pipeline, Odebrecht/Braskem, HSBC, BSI, Falcon Bank, Lombard Odier). The most active enforcement agency is the Federal Office of the Attorney General (OAG), which has repeatedly made public statements that it is allocating significant resources to combat bribery of foreign officials and money laundering. The OAG is certainly benefiting from an ever-growing number of suspicious activity reports (SAR) filed by financial intermediaries. (The OAG received 1,726 SAR reports in 2016 and 487 reports were under review by the Money Laundering Reporting Office at the end of 2016.)

### Self-reporting development

Considering the practice in a number of jurisdictions to either not impose sanctions

at all or to impose reduced sanctions on undertakings that timely self-disclose and fully cooperate with the competent agencies and remediate their organisational weaknesses, the OAG invites undertakings to self-report suspected failures to prevent criminal offences (in particular, bribery of foreign officials).

A few months ago, the first Swiss corporate settlement in a case of self-reporting of an organisational failure to prevent bribery of foreign officials under Article 102 SCC was reached with the OAG. In calculating the fine for the failure to prevent bribery, the OAG took into account the company's timely voluntary disclosure, full cooperation during the investigation and its significant remediation efforts. In the absence of a statutory basis for a full declination, the OAG closed the matter by imposing a symbolic fine of CHF 1 on the company and ordered disgorgement of profits.

With this first settlement in a case of self-reporting, the OAG mirrored the practice of other countries to grant declinations or reduced sanctions in case of voluntary self-disclosure, full cooperation and adequate remediation.

In summary, undertakings should make sure that their compliance management systems are effective in preventing bribery by their employees and intermediaries. Should concerns in this respect arise, the facts should be investigated and a legal risk assessment and evaluation of the appropriate risk treatment measures (such as self-reporting) should be conducted.

#### Note

- 1 The Swiss Federal Supreme Court has recently ruled that an undertaking's original liability requires actual proof of the predicated offence committed but the natural person does not have to be convicted. See Decision of the Federal Supreme Court of 11 October 2016, 6B\_124/2016.

**Aiysha S Hussain**

Miller & Chevalier,  
Washington, DC  
ahussain@milchev.com

# US Foreign Corrupt Practices Act – update

Following the 2016 presidential election in the United States, many commentators were uncertain as to whether Foreign Corrupt Practices Act (FCPA) enforcement would be a key priority under the Trump administration, particularly given President Trump's past characterisation of the FCPA as a 'horrible law' that 'should be changed'.<sup>1</sup> However, early into President Trump's tenure, senior Department of Justice (DOJ) and Securities and Exchange Commission (SEC) officials confirmed their commitment to FCPA enforcement. Indeed, the recent uptick in cases being initiated confirms that FCPA enforcement continues to be a priority for the SEC and DOJ.

## Early indicators of the Trump administration's enforcement policy

In particular, in late April 2017, Attorney General Jeff Sessions affirmed that the DOJ would remain committed to enforcing the FCPA in order to continue to 'create an even playing field for law-abiding companies' so that 'companies... succeed because they provide superior products and services, not because they have paid off the right people'.<sup>2</sup> Also of note are remarks by Deputy Assistant Attorney General Trevor McFadden at a compliance conference on 18 April 2017, which provide a window into current DOJ FCPA enforcement policy. After reiterating the DOJ's commitment to enforcing the FCPA, McFadden asserted that, among other things, the Department intends to: (1) continue to 'prioritise the prosecutions of individuals who have wilfully and corruptly violated the FCPA'; (2) continue to consider 'voluntary self-disclosures, cooperation and remedial efforts' when making charging decisions involving companies; (3) make a 'concerted effort to move corporate investigations expeditiously', with the expectation that cooperating companies will do so as well; and (4) focus on wrapping up old investigations. He also stated that the DOJ's 'aims are not to prosecute every company we can, nor to break our own records for the largest fines or longest prison

sentences. Our goal is for companies and individuals to voluntarily comply with the law.'<sup>3</sup> In the context of his nomination, SEC Chair Jay Clayton also expressed his support for the role of the FCPA as a 'powerful and effective means' to combat corruption. In his remarks he emphasised coordination with the DOJ and international anti-corruption enforcement efforts.<sup>4</sup>

Most indicators suggest that the DOJ will continue to focus on FCPA enforcement. The DOJ's issuance of new guidance regarding corporate compliance programmes, the Department's decision to endorse the Obama administration's broad reading of the FCPA in the ongoing case against Lawrence Hoskins,<sup>5</sup> and its recent announcement that the DOJ FCPA Pilot Program<sup>6</sup> will be extended, represent a continuation of the Department's direction over the past few years.

With respect to the SEC's involvement in FCPA enforcement, the Supreme Court's recent decision in *Kokesh v SEC* will certainly impact the types of cases the SEC will pursue and the settlements it can negotiate. Prior to this decision the SEC argued – and courts agreed – that disgorgement is an equitable remedy not subject to the five-year statute of limitations set forth in 28 US Code (USC) section 2462. After this decision, the SEC will abandon monetary remedies in cases that occur outside of the five-year limitations period and will have to move quickly on cases that are near the five-year limitation. With respect to settlement negotiations, previously parties who were exposed to significant disgorgement liability beyond five years would settle for a more limited timeframe to avoid exposure. The SEC no longer has that leverage. Indeed, companies may even forgo voluntarily disclosing potential wrongdoing in the hope that the statute of limitations will pass before the SEC learns of it.

## Recent trends in enforcement

As far as looking for trends in cases pursued and resolved in 2017, there has been an increase in declinations and a higher than



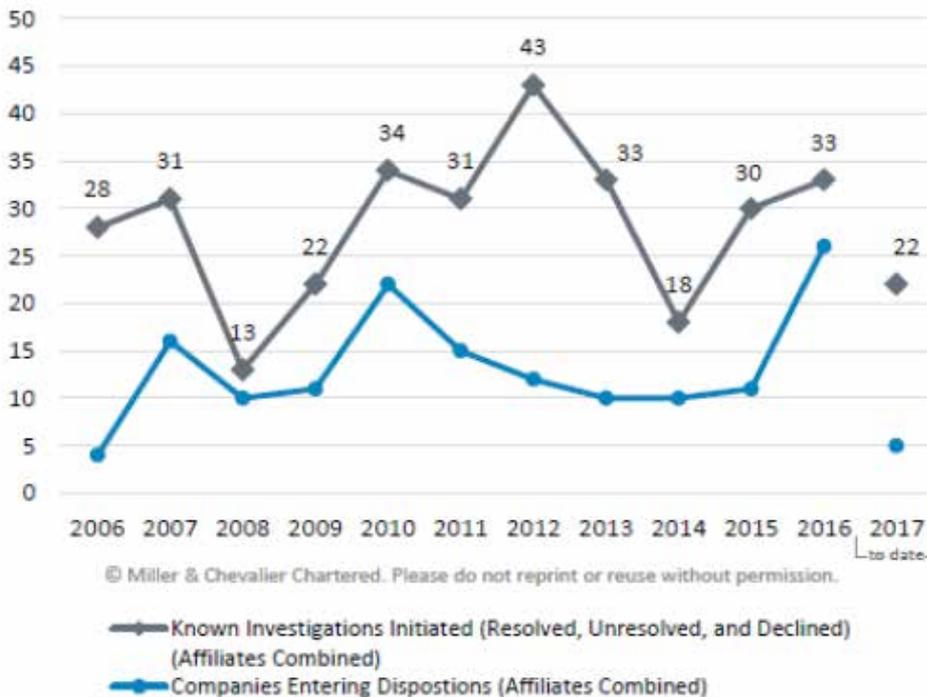
## US FOREIGN CORRUPT PRACTICES ACT – UPDATE

usual number of newly opened FCPA investigations in 2017. At the time of writing, there have been 21 declinations – decisions by the DOJ or SEC to close an active FCPA investigation without enforcement. It is impossible to know all the reasons behind the increase in declinations; however,

according to recent remarks by Deputy Assistant Attorney General McFadden, the Fraud Section is ‘focused on wrapping up old investigations’ noting that prosecutors have a responsibility to stop or close an investigation where they ‘do not have evidence of the requisite criminal intent’.<sup>7</sup>

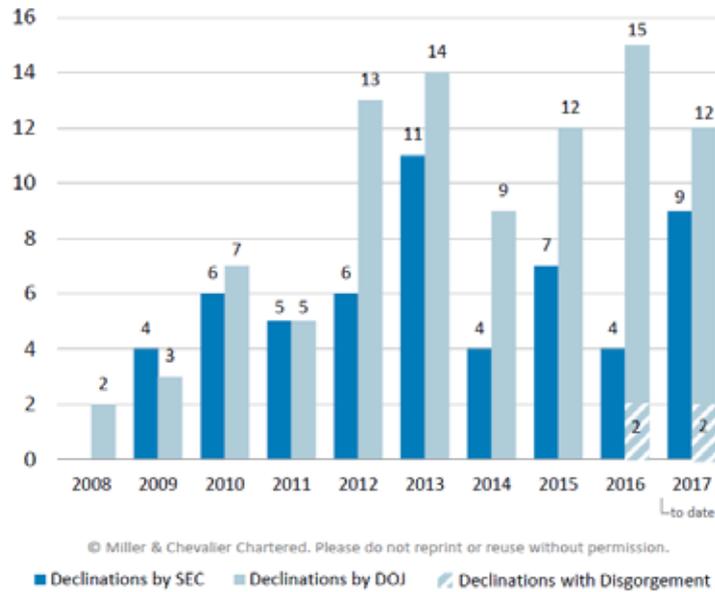
Miller & Chevalier

### Known FCPA Investigations Initiated from 2006 to 2017 To Date



Note: Updated through July 26, 2017. Note that the initiation date attributed to each investigation is based on public disclosures and may change as additional information becomes available. There may be a lag time of several months between the initiation of an investigation and its public disclosure.

**Known Declinations in FCPA Investigations from 2008 to 2017 To Date**



© Miller & Chevalier Chartered. Please do not reprint or reuse without permission.

■ Declinations by SEC ■ Declinations by DOJ ▨ Declinations with Disgorgement

**Note:** Updated through July 27, 2017. Includes only cases where formal decisions to close an investigation without enforcement could be confirmed. Because the reasoning underlying an agency decision to close an FCPA investigation without enforcement is often difficult to discern, we track "declinations" based upon a broad interpretation of the term.

In addition, Miller & Chevalier has identified 22 FCPA-related investigations opened by US enforcement agencies. By comparison, by October 2016, Miller & Chevalier had only identified 18 investigations initiated by the SEC or DOJ that year. The numbers in this chart are likely to rise, since public companies often wait months, or even years, to disclose the existence of an investigation.

The recent turnover in personnel at the SEC and DOJ has likely contributed to the pace of FCPA enforcement. The loss of experienced personnel and the need to train new personnel may have slowed enforcement, at least in the short term. However, given recent public statements by senior DOJ and SEC officials and trends in enforcement, it appears that FCPA enforcement will continue to be a priority for both agencies.

**Notes**

- 1 See, Ed Silverstein, 'Donald Trump has called the FCPA a "horrible" law', Inside Counsel (17 August 2015), available at [www.insidecounsel.com/2015/08/17/donald-trump-has-called-the-fcpa-a-horrible-law](http://www.insidecounsel.com/2015/08/17/donald-trump-has-called-the-fcpa-a-horrible-law).
- 2 The United States Department of Justice, 'Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference, Washington, DC' (24 April 2017), available at [www.justice.gov/opa/](http://www.justice.gov/opa/)

[speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual](http://speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual).

- 3 The United States Department of Justice, 'Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit, Washington, DC' (18 April 2017), available at [www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti](http://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti).
- 4 Committee on Banking, Housing, and Urban Affairs, Nomination of Mr Jay Clayton, 23 March 2017, Response to Questions for the Nomination of Mr Jay Clayton to be a Member of the Securities and Exchange Commission, from Ranking Member Sherrod Brown, pp 8–9, available at [www.millerchevalier.com/sites/default/files/resources/FCPARReview/FCPARReviewSpring2017\\_ClaytonResponse.pdf](http://www.millerchevalier.com/sites/default/files/resources/FCPARReview/FCPARReviewSpring2017_ClaytonResponse.pdf).
- 5 Brendan Pierson, 'U.S. Prosecutors Fight Ruling Limiting Foreign Bribery Cases' *Reuters* (2 March 2017), available at [www.reuters.com/article/us-usa-corruption-alstom-idUSKBN1692W0](http://www.reuters.com/article/us-usa-corruption-alstom-idUSKBN1692W0).
- 6 The United States Department of Justice, 'Acting Assistant Attorney General Kenneth A Blanco Speaks at the American Bar Association National Institute on White Collar Crime, Miami' (10 March 2017) available at [www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national](http://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national); The United States Department of Justice, 'Acting Principal Deputy Assistant Attorney General Trevor N. McFadden of the Justice Department's Criminal Division Speaks at ACI's 19th Annual Conference on Foreign Corrupt Practices Act, New York' (20 April 2017), available at [www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-justice-departments](http://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-justice-departments).
- 7 See n3 above.

**Jessica A Berrada**World Bank Integrity  
Vice Presidency Unit,  
Washington, DCjaberrada@  
worldbank.org

# An ounce of prevention: incorporating anti-corruption provisions into negotiated peace agreements through a forward-looking approach

## Introduction

Negotiated peace agreements accomplish goals along a continuum from merely suspending a conflict, to managing, resolving or finally transforming the conflict into a positive working relationship among the parties.<sup>1</sup> Accomplishing transformation of a conflict requires both backward-looking approaches to address grievances and forward-looking approaches to prevent and manage future disagreements.<sup>2</sup> However, parties that focus agreements on forward-looking outcomes, such as anti-corruption, tend to yield long-term resolution at a higher rate than backward-looking agreements; primarily backward-looking agreements neither address the root of the conflict nor establish mechanisms to resolve future conflict peacefully.<sup>3</sup> More specifically, states that incorporate provisions into the peace agreement that address good governance, rule of law and transparency of government actions – anti-corruption provisions – into their peace agreements tend to fare better economically, socially and politically.<sup>4</sup>

This article explores some of the theories, strategies and pitfalls of negotiating anti-corruption provisions into peace agreements that balance backward and forward-looking elements. It examines these elements in the context of peace negotiations, and provides justification for incorporating specific anti-corruption provisions in negotiated peace agreements. It also assesses methodologies and common characteristics of successful anti-corruption provisions in peace agreements.

## Negotiation elements in peace agreements

### *Backward-looking elements*

Backward-looking approaches to negotiating peace agreements assign responsibility and

impose consequences for parties' conduct during the conflict.<sup>5</sup> Backward-looking outcomes of a negotiation end violence, resolve current confrontations, and seek retribution for past actions.<sup>6</sup> One study estimates that as many as 70 per cent of peace agreements focus on primarily backward-looking action.<sup>7</sup> The main focus of those agreements are items like amnesty for rebels, prisoner releases and police reform.<sup>8</sup> This means that the majority of negotiated peace agreements are unlikely to resolve or transform a conflict.<sup>9</sup>

An external mediator is a critical element for many peace negotiations. An external mediator can bring and keep the parties at the table, balance power among the parties, and move the negotiation towards a final agreement and implementation.<sup>10</sup> If mediators are successful in negotiating forward-looking agreements, they may choose to incorporate some backward-looking provisions to lay the groundwork for forward-looking outcomes; or they may choose to ignore parties' backward-looking demands entirely in favour of letting go of the past and moving the parties forward.<sup>11</sup> Either way, the mediator is responsible for helping parties move past a zero-sum mentality and look ahead rather than backward.<sup>12</sup>

### *Forward-looking elements*

The main objective for forward-looking peace negotiations is to form a new relationship between or among the parties.<sup>13</sup> The negotiation must provide the parties with new ways to view or describe each other, interact, cooperate and collaborate.<sup>14</sup> This is done in a variety of ways, but the most successful peace agreements establish institutions that plan

for cooperation and accountability to handle future conflict.<sup>15</sup> Forward-looking outcomes of a negotiation contemplate ways to prevent future violence; look for opportunities – beyond the negotiations – for the parties to cooperate; resolve the underlying causes of the conflict; create a new political system so parties can resolve differences peacefully; and seek to change attitudes of the parties and the public.<sup>16</sup>

Mediators adopting a forward-looking approach often meet with parties before negotiations start to present them with a vision for the future and extol the value of changing their attitude toward the other parties.<sup>17</sup> Parties may also adopt a forward-looking approach once they've experienced momentum towards positive outcomes from ongoing negotiations.<sup>18</sup>

### **Importance of incorporating anti-corruption provisions**

Peace negotiations provide a unique opportunity for parties to address past injustices traced to corruption and establish institutions to prevent corruption through good governance, integrity and transparency.<sup>19</sup> There are two main reasons why anti-corruption provisions are and should be incorporated into negotiated peace agreements. First, addressing corruption as a cause of conflict prevents future conflict. Secondly, countries that incorporate anti-corruption provisions into negotiated peace agreements tend to fare better in multiple aspects.

During and after a conflict, a country is at high risk for corruption because the governance institutions that once provided accountability and transparency no longer exist.<sup>20</sup> The lack of transparency and accountability creates an environment for corrupt behaviour to thrive.<sup>21</sup> When corruption thrives, money is funnelled away from the legitimate economy and deprives the state of needed revenues.<sup>22</sup> The dwindling revenue stream further weakens governance structures that would have provided even a modicum of controls; which, in turn, scares away potential investors – and the vicious cycle continues.<sup>23</sup> While bribery may work in the short term to get things done, this downward spiral can have long-term destabilising effects such as 'renewed conflict by peace spoilers, reduced governance ability, continuing economic decline, and state capture by organised crime'.<sup>24</sup>

From a positive standpoint, countries that place integrity high on their post-conflict agenda tend to obtain higher average development assistance, attain faster economic growth, control corruption more successfully, and achieve overall political stability at higher rates than countries that inadequately address anti-corruption.<sup>25</sup> Development assistance not only incentivises parties to negotiate, it also incentivises them to incorporate integrity provisions into the final agreement.<sup>26</sup> Countries with the provisions receive an average 24 per cent increase in foreign development assistance compared to just seven per cent for countries without integrity provisions.<sup>27</sup> The World Bank's Control of Corruption index indicates that most countries with anti-corruption provisions in their peace agreements experience a drop in corrupt behaviour within the five years following the agreement.<sup>28</sup> Lastly, new political systems set up during peace negotiations and supported by integrity provisions are 4.7 per cent less likely to be destabilised or overthrown by unconstitutional or violent means.<sup>29</sup> Anti-corruption provisions not only help prevent future conflict, but also place post-conflict societies in a better position to succeed overall.

### **Methods of incorporating anti-corruption provisions**

Taking anti-corruption as an example of a cause of prior conflict, negotiated peace agreements would need to address anti-corruption across a potentially wide range of settings such as public procurement, education and social services. One successful approach for incorporating anti-corruption provisions across multiple sectors is to create a committee structure that involves all of the parties simultaneously.<sup>30</sup> Each committee should be responsible for addressing anti-corruption within its assigned sector.<sup>31</sup> The benefits to this approach are that it mainstreams anti-corruption in every facet of the system, simplifies disagreements and facilitates ownership of the results at the local level.<sup>32</sup>

Another successful approach starts by outlining an overall formula for the range of issues the negotiations will cover at the outset.<sup>33</sup> In this way, the causes of the conflict are dealt with separately from discussion about how to prevent future issues with integrity provisions.<sup>34</sup>

Perhaps the best example of a successful incorporation of anti-corruption provisions into a peace agreement started with one



party developing a position paper.<sup>35</sup> The paper analysed all the issues and a variety of options for each, which took into account the interests of all factions.<sup>36</sup> Once the paper was developed, the party discussed the findings in town-hall-style meetings with communities across the country.<sup>37</sup> The meetings generated more ideas and created consensus among all the parties.<sup>38</sup> This method, while time-consuming and labour-intensive, resulted in a solution that was clear, powerful, and fully backed by factions that previously disagreed on the details of how to move forward.<sup>39</sup>

In addition to the methodology for developing peace agreements to address multiple aspects of a given issue, the form of the peace agreement is also important.<sup>40</sup> Vague or imprecise provisions are less implementable than specific and detailed formulations.<sup>41</sup> A common mistake in peace agreements seems to be laying out broad statements and principles about good governance and fighting corruption with the intent to create a commission after the work of the peace talks are complete.<sup>42</sup> Research shows that it is worth the investment of time during the peace talks to introduce and agree on detailed approaches to achieve the broader principles of integrity.<sup>43</sup>

### Conclusion

While negotiated peace agreements may require mediators to incorporate backward-looking elements, the sooner the negotiation moves away from issues of the past and focuses on the future, the more successful the peace agreement will be in providing lasting stability. The negotiation is not only an opportunity to create lasting peace, but it is also an opportunity for the parties to build relationships that will carry them into implementing the peace agreement. Forward-looking agreements address the root causes of past conflict by establishing new political systems and institutions to manage future conflict non-violently. By focusing on the future, negotiating specific instead of broad agreements, and developing a shared narrative, mediators and parties can provide post-conflict societies with a strong foundation for lasting stability.

### Notes

- 1 I William Zartman and Victor Kremenyuk (eds), *Peace versus Justice: Negotiating Forward- and Backward-looking Outcomes* (2005) 1.
- 2 Bertram I Spector, *Negotiating Peace and Confronting Corruption: Challenges for Post-Conflict Societies* (2011) 14.
- 3 See n 1 above, 289; see n 2 above, 14–15.
- 4 See n 1 above, 289; see n 2 above, 98.
- 5 See n 1 above, 2–4.
- 6 *Ibid.*
- 7 Dr Leslie Vinjamuri and Aaron P Boesenecker, *Accountability and Peace Agreements: Mapping Trends from 1980 to 2006*, Centre for Humanitarian Dialogue (2007), available at [www.files.ethz.ch/isn/39727/0907\\_Accountabilityreport.pdf](http://www.files.ethz.ch/isn/39727/0907_Accountabilityreport.pdf).
- 8 *Ibid.*
- 9 See n 3 above.
- 10 See n 2 above, 7. See also I William Zartman (ed), *Evasive Peace: Negotiating an End to Civil Wars* (1995).
- 11 See n 1 above, 294.
- 12 *Ibid.*, 295.
- 13 *Ibid.*, 294.
- 14 *Ibid.*
- 15 *Ibid.*
- 16 *Ibid.*, 2–4.
- 17 *Ibid.*, 295.
- 18 *Ibid.*
- 19 See n 2 above, 7–8.
- 20 *Ibid.*, 11.
- 21 *Ibid.*
- 22 *Ibid.*
- 23 *Ibid.*
- 24 *Ibid.*, 6. See also, Philippe Le Billon, ‘Overcoming corruption in the wake of conflict’ in *Global Corruption Report 2005 Special Focus: Corruption in Construction and Post-Conflict Resolution*, (13 April 2005) 73–82, available at <http://liu.arts.ubc.ca/wp-content/uploads/2016/03/Corruption-Report-English.pdf>.
- 25 See n 2 above, 98.
- 26 *Ibid.*, 100.
- 27 *Ibid.*
- 28 *Ibid.*
- 29 *Ibid.*, 104.
- 30 *Ibid.*, 111.
- 31 *Ibid.*
- 32 *Ibid.*
- 33 *Ibid.*
- 34 *Ibid.*
- 35 *Ibid.*
- 36 *Ibid.*
- 37 *Ibid.*
- 38 *Ibid.*
- 39 *Ibid.*
- 40 *Ibid.*, 139.
- 41 *Ibid.*
- 42 *Ibid.*
- 43 *Ibid.*

**Pavlo Bespalov**

Dr Reddy's  
Laboratories, Kiev  
pavlo.bespalov@  
drreddys.com

# Anti-corruption clauses: are they worth the paper they're written on?

**R**ecently I realised that anti-corruption clauses I have been using for almost four years have become outdated. The language of such clauses seemed no longer protective enough. The provisions looked not explicitly clear and to the point. They simply did not provide sufficient comfort 'in case anything happens'. On the other hand, these old clauses also created difficulties in work. Many local companies still disagree when they see 'Foreign Corrupt Practices Act (FCPA)', 'foreign anti-corruption laws' or 'compliance with Code of Conduct'. It takes time to explain or adjust the wording. So neither protection nor the comfort is there.

When was the last time you revised your anti-corruption clauses? Do they provide necessary protection and make negotiation a breeze? It is my belief that anti-corruption clauses should not be treated as force majeure provisions. The later are rarely read and hardly ever revised.

At a conference in June 2016, I joined an interesting discussion about anti-corruption clauses. Someone shared a thought that anti-corruption clauses are mere declarations. No third party would share any details of its corrupt behaviour. And no third party ever enforced anti-corruption clauses. It is true that I was not aware of cases where anti-corruption clauses were practically enforced or cited by the parties, law enforcement authorities or courts. At least in Commonwealth of Independent States (CIS) markets.

I think anti-corruption clauses are not only an important element of ensuring your third party does the right thing, but also a protection for a company. Here are five reasons why you should include anti-corruption clauses in your agreements.

## Set the right expectations

Now it is not a problem if one of your managers forgot to tell your vendor that your company can be liable under FCPA. When it is in the contract it will be presumed that they did. Your vendor's lawyer will definitely notice

the clause while reviewing the contract. This may trigger an internal discussion resulting in positive change in practices.

## Enhance your culture of zero tolerance

One thing is to have a policy and training. Another thing is when not a single contract gets approval without anti-corruption clauses. This is to show what matters. This is walking the walk.

## Grant audit rights

It depends on the jurisdiction what level of information you can get legally. And it depends on your resources how deep you want to go, if some data is not easily available. Why not save costs and ask for documents directly from your vendor?

## Grant termination rights

Inclusion of a right to terminate agreement in case of violation of anti-corruption clauses is a must. Otherwise the situation can become a nightmare. This is when you are stuck having a contract with a party undergoing a corruption scandal, suffering reputation damages, and not being able to terminate the contract under a threat of contractual damages.

## Grant the possibility to recover damages

This is probably not that easy to enforce in Ukraine. However, such clauses are still better to have than not. In cases where your contract is subject to more progressive jurisdiction damages, recovery provisions are priceless. A few years ago, if you needed anti-corruption clauses, you would have to pay a solid fee. The law firm would persuade you that there is no one-size-fits-all solution, so they need to do a lot of work to tailor such clauses to your industry, geography and size of the business. Now, quality content is out there in big volumes. It is standardised, saturated with value and costs nothing.

# IBA App – additional functionality now added

– available from the App Store and the Google Play Store

The IBA App has been updated to become even more user friendly, providing you with the latest legal news, updates and content while on the move.

All new functionality is now available for both the App in the Apple Store and for the Android version in the Google Play Store.

## New functionality:

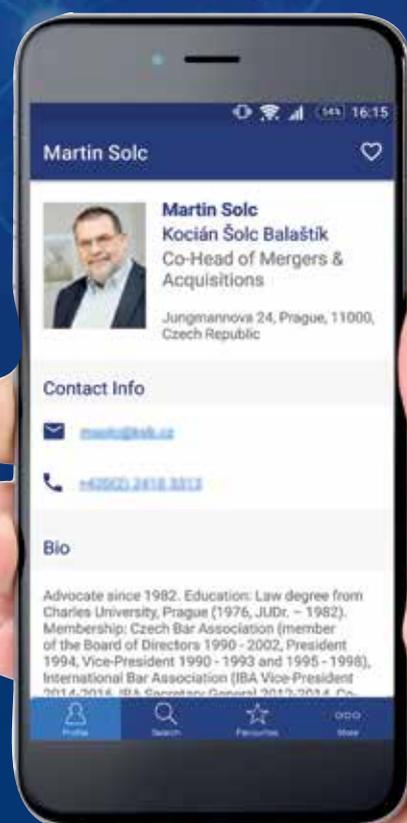
- Access to IBA Digital Content – with new articles, stories and items of interest available and updated daily
- The ability to download PDFs and podcasts from the IBA Digital Content library to your mobile device

## With the IBA App you can still:

- Search for IBA members by name, city, country, committee or area of practice and make contact via email
- Upload a profile photo and write a short biography

## How do I access the App?

- Simply download the App (search for International Bar Association and download the IBA Members' Directory) via the Apple App Store or Google Play Store
- Login with your IBA membership user ID and password
- Search the full IBA Member Directory or update your My IBA profile



Don't let valuable contacts pass you by,  
update your profile today!



the global voice of  
the legal profession®