CROSS-BORDER INVESTIGATIONS: KEY ISSUES

Ashish S. Joshi
Lorandos & Associates
Ann Arbor, Michigan

Introduction

Multinationals operating in foreign jurisdictions must maintain corporate vigilance. Relaxing that vigilance can be a "bet the company" decision with devastating consequences; the Bhopal disaster in India that had enormous legal, financial, international and humanitarian consequences for Union Carbide Corporation, is a prime example.[1] As corporations have expanded their business and operations globally, the frequency and magnitude of cross-border investigations and transnational litigation regarding corporations' business practices and conduct has increased dramatically. In a recent survey conducted by KPMG[2], companies stated that four of the top six challenges in conducting cross-border investigations deal with cultural and legal differences. 92% of the respondents to the survey expected cross-border investigations to continue at the current pace or to increase.

One of the reasons for the increase in cross-border investigations is a surge of U.S. investigations into extra-territorial misconduct of the U.S. corporations and/or individuals for a range of offenses, from Foreign Corrupt Practices Act (FCPA) violations to tax fraud. It used to be the case that the Department of Justice and the Securities Exchange Commission focused their enforcement efforts generally on U.S. entities and individuals. Not anymore. The DOJ and SEC have expanded their focus to foreign entities and individuals and their conduct on foreign shores. As evidenced by the *Siemens*[3] settlement, U.S. prosecutors and regulators are receiving increased cooperation from their counterparts abroad. European and other foreign law-enforcement agen-

[1] Corporate Compliance Answer Book 2009, edited by Christopher Myers, Practicing Law Institute, pg. 526.
[2] *See* Cross-Border Investigations: Effectively Meeting the Challenge, KPMG International (2007) available at - http://www.kpmg.com/Global/IssuesAndInsights/ArticlesAndPublications/Pages/Crossboarderinvestigations.aspx.
[3] In December 2008, Germany's Siemens AG and three of its subsidiaries entered guilty pleas to violating the FCPA. The DOJ and SEC jointly announced record fines exceeding $800 million against Siemens for engaging in a pattern of bribery that "was unprecedented in scale and geographic reach." U.S. Department of Justice, *Press Release No. 07-296* (April 26, 2007). Interestingly, Siemens was investigated for "worldwide bribery"; virtually none of the offensive conduct on the part of Siemens took place in the U.S. *Id.*

cies are increasingly working in tandem with U.S. authorities in areas such as antitrust, FCPA and insider trading enforcement. In a 2008 speech, SEC Chairman Christopher Cox noted, "the most striking change of the last few years is that it is no longer possible for the SEC to do its work in the United States without a truly global strategy. That's because what goes on in other markets and jurisdictions is now intimately bound up with what happens here."[4]

Another reason for the surge in cross-border investigations is that the foreign governments have also increased their focus on corporate wrongdoing.[5] The increased activity by the Organization for Economic Cooperation and Development (OECD) on bribery and corruption is one example. Laws that counter terrorist financing which stretch beyond any individual country's border, is another.

As a result of these two trends, cross-border legal and practical issues in internal investigations have become increasingly important. Cross-border investigations raise complications surrounding a host of issues, such as conflicting employee legal protections, data privacy and varying governmental interest in the subject of the investigation. The challenges that a company should anticipate when conducting and coordinating a cross-border investigation, include dealing with: (a) foreign evidence; (b) multilingual computer data; (c) foreign nationals; (d) foreign languages; (f) a parallel domestic and/or foreign investigation; (h) foreign laws and procedure; and (i) applicability of foreign privileges and immunities.

Cross-Border Investigations: Substantive Considerations

A preliminary issue in any cross-border investigation is to first consider which regulator is likely to exercise jurisdiction over the allegedly wrongful conduct.

1. Subject Matter Jurisdiction

[4] David B. Anders, *Issues Arising In Cross-Border Investigations*, PLI Corporate Law and Practice Course Handbook, June 2008, pg. 57.
[5] Ashish S. Joshi, *Britain's Fight Against The 'Silver Lance": A Radical Overhaul of the U.K.'s Bribery Laws*, The Champion, February 2009.

Principles governing the extraterritorial application of U.S. law are set forth in the Restatement (Third) of Foreign Relations. Under those principles, a state may exercise jurisdiction where the alleged conduct "has or is intended to have a substantial effect within its territory."[6] Factors that courts consider in ascertaining subject matter jurisdiction include: (1) the extent of the domestic effect; (2) the connections between the state and the entities and/or persons engaging in the conduct in question; (3) the character of the conduct and the extent to which it is regulated elsewhere; (4) the degree to which justified expectations are protected; (5) the importance of the regulation internationally; (6) the law's consistency with international custom; (7) the extent of another state's interest; and (8) the likelihood that extraterritorial application would create a conflict with the laws of a foreign jurisdiction.[7] In ascertaining subject matter jurisdiction, a court will weigh domestic and foreign considerations. Domestic considerations include: (1) the nature and extent of the specific law at issue; (2) congressional intent behind the legislation; and (3) constitutional limitations. Foreign considerations include issues of comity and fairness.[8]

2. Personal Jurisdiction

The existence of personal jurisdiction turns upon whether an entity has sufficient "minimum contacts" with the country exercising jurisdiction such that exercising jurisdiction does not "offend 'traditional notions of fair play and substantial justice.'"[9] A corporation's operations within a particular jurisdiction must render it foreseeable that it could be haled into the forum court.[10] An entity that "purposefully avails itself of the privileges of conducting activities within the forum state" will be subject to jurisdiction in the forum's courts.[11]

3. Forum Non Conveniens

Even after exercising jurisdiction, a court may find that other interests favor having another forum hear the case. A court may dismiss a case on *forum non conveniens* grounds pro-

[6] *See generally* Wilmore, Hendrix and Calamita, *International Litigation*, 39 International Law. 297 (Summer 2005).
[7] Anders, *supra*, pg. 58.
[8] *Id*.
[9] *Int'l Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945).
[10] Anders, *supra*; *also see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
[11] *Hanson v. Dencla*, 357 U.S. 235, 253 (1958).

vided that there is another court which is available and adequate and that would also be more convenient or better serves the interests of Justice. Also, a foreign court need not provide exactly the same procedures as U.S. courts; the procedures simply have to be adequate.

Cross-Border Investigations: Procedural Considerations

1. The Organization and Culture of the Corporation

An effective investigation plan must take into consideration the operation and culture of a corporation. How is the organization structured? What is the organization hierarchy? Is the organizational chart strictly followed in practice? How does an entity collect, process and store information? How are the decisions made? Are the usual corporate formalities observed in making decisions? Who makes these decisions? Understanding the structure and culture of the corporate entity in question is *sine qua non* in crafting a cross-border investigation plan.

Generally, businesses function as vertical organizations. Vertical organization are hierarchically structured and the management control is centralized. The business operations are typically compartmentalized into separate departments specializing in a specific function or product line. In these organizations, top-level management exerts strong, if not complete, control over the business operations and activities. On the other hand, horizontal organizations are structured with cross-functional and complementary teams across the organization. The corporate "hierarchy" is flattened and the employees are often cross-trained and have skills and tasks that complement other teams across the organization. Before making and implementing decisions in an investigation, the investigator must familiarize himself or herself with the organization and culture of the entity undergoing investigation. Decisions such as evaluating document retention policies, document collection strategies, witness interviews, making and implementation of corporate decisions, should be made only after considering the organization and culture of the entity.

2. Person in Charge of Investigation

Generally, in domestic internal investigations the Board appoints an Audit Committee or

a special investigation committee to oversee the investigation. The Audit Committee then assigns the in-house counsel to conduct investigation or may appoint outside counsel in charge of the investigation and to report to the Committee. In cross-border investigations, appointing an in-house counsel to conduct investigation would not be prudent.[12] In some foreign jurisdictions, such as the United Kingdom, adequate independence of the investigation can only be established by using outside counsel. In other countries, such as Germany, in-house counsel is generally seen as the advocate for the corporation, and therefore lacking in sufficient independence. It is always prudent to have an outside counsel be in charge of investigation – especially where the corporation desires the protection of privilege. However, no matter who leads the investigation, it is imperative that the investigation have one single point of management control. Without that, the process is likely to be chaotic.

As with the domestic investigation assembling the right team is critical to a cross-border investigation's success. It is essential to recruit counsel and staff who are knowledgeable and sensitive to the cultural, linguistic, and substantive issues that are likely to arise in a cross-border investigation. Some of the considerations in choosing a team are:

i. Language: Cross-border investigations inherently involve interacting with witnesses in foreign countries, often in a foreign language. When interviewing a witness, it is important that the witness is comfortable during the interview and that the investigator has confidence that both the questions and answers are clearly understood. Investigators may be required to articulate a question in a foreign language. If so, the nuances of any response to the question posed must be comprehended. It is not uncommon for things to get lost in translation. While interpreters can always be used, it is prudent to have a skilled member on the team who is fluent in the foreign language and customs.

ii. Culture: Cultures are the most challenging part of cross-border investigations. Different countries have different ways of conducting business. Also, investigations handled by companies and law enforcement authorities differ in different jurisdictions. Expected cor-

[12] In fact, the author firmly believes that even in domestic internal investigations, companies are better off in appointing an outside counsel to lead the investigation.

porate behavior in Denmark may at times starkly differ from what would perfectly acceptable behavior in China or Indonesia. Corporate conduct that is considered to be "traditional" in the West may not be followed or even respected by the new emerging economies in the East. Dealing with this challenge can require an intimate knowledge of the country's or the region's differences. Two important challenges often arise in cross-border investigations: (1) Maintaining "face" and (2) Demonstrating respect.

Maintaining "face" is a very important issue in many cultures, especially in Asian countries. "Face" is a term that has a relationship with the concepts of honor and humiliation.[13] This is a matter that needs to be handled delicately and by a counsel experienced in international investigations. An investigator acting as a bull in a china shop may cause a serious damage to the relationship that a company has with its agents and employees in a foreign office. Depending upon *how* and *when* a question is asked, a witness or a person in a foreign country could maintain or lose face. The same applies to demonstrating respect. Respect can be affected by an investigator's body language as well as by the spoken word. Ignorance of basic customs in a foreign country may be viewed as being disrespectful and may hamper the investigation. Examples include not knowing how to give and receive a business card in Japan or how to address and/or treat a senior employee, not necessarily in terms of corporate hierarchy, in India.

iii. Knowledge of foreign laws: It is important for multinational companies with overseas operations to ensure that those likely to be involved in performing cross-border investigations are aware of the relevant local customs and laws. Issues that are especially important to understand are: (1) what may be illegal in one country may in fact be custom and practice in another. For example, it is perfectly acceptable in some countries to pay a "fee" to conduct business, whereas in others such an act is considered to be illegal and may have serious consequences. (2) the manner and extent in which the local authorities will pursue prosecution; (3) whether the country where the investigation is taking place

[13] *See* note 2, KPMG Report, pg. 15-16

will allow the team to gather "evidence"[14]; (4) data privacy laws and (5) the overall attitude of local authorities to foreign-controlled businesses operating in their country.[15]

Cross-border investigations call for a paradigm shift. It would be a folly to conduct a cross-border investigation from a domestic paradigm. Undertaking a paradigm shift of this nature may require a significant shift in a company's internal culture. However, if the cross-border investigation is to be a success, such as a shift is essential. Companies must take cultural differences into account while conducting an investigation. In some cultures, the local management should be involved to obtain cooperation of local staff; while in others, this must be avoided at all costs. Overall, having a "local" on the investigation team is invaluable.

3. Collecting Evidence Abroad

In a cross-border investigation, counsel should focus on two issues when considering collecting evidence abroad: (a) the corporation's ability to obtain and transfer data or evidence from a foreign jurisdiction and (b) the ability of the U.S. regulators and prosecutors to obtain evidence from a foreign jurisdiction.

Multinational corporations often have offices in Europe, Asia, the U.S. and other parts of the world. When crafting an investigation plan, an investigator must consider the hurdles associated with collecting, reviewing and transporting evidence from foreign jurisdictions to the U.S. Production of documents in foreign countries – especially the European Union – face various regulatory hurdles. European Union regulations extend data processing and transfer protections to any corporate record that contains "any information relating to an identified or identifiable natural person." Further, as the U.S. is not generally considered a country that falls within the "safe harbor" provisions for data transfer, the repercussions for the use of the records must be evaluated. Data processing and transfer restrictions may apply even for intra-company data transfers in connection with an investigation. Further analysis must be conducted if there is a possibility of disclosure outside the company to a regulator at the conclusion of the investigation. Also,

[14] In China, for example, any attempt to gather evidence without obtaining express permission from China's central authority could expose the investigator and his team to criminal sanctions.
[15] *See* note 2, KPMG Report, pg. 15-16

as discussed below, national laws prohibiting the exporting of certain documents may subject a person to criminal penalties for violation. This is true even though the U.S. courts may view such laws as efforts to stymie discovery in the U.S. courts by foreign countries.

Employee consent generally is an option to overcome these data processing and transfer restrictions. However, such "consent" must be freely given and the categories of data to which an employee consents must be unambiguous and specifically listed. Moreover, in the EU, in the employer-employee context, consent is deemed to be not given freely because of inherent imbalance of bargaining power between employee and employer. While these considerations are being analyzed, the investigator should move to preserve the integrity of the data on a local basis. An investigator should also consider the location of back-up files and data storage. Are back-up files stored in different locales? Are those locales subject to similar data transfer restrictions? Was the data properly stored there under the laws of the originating jurisdiction in the first place? These questions need to be addressed and answered before the data residing in a region with data transfer restrictions is processed and/or transported. Also, if using third party forensic professionals, an investigator must ensure that the contractors have agreed to abide by appropriate confidentiality restrictions and compliance with laws governing collection, transport, storage and use of data.

An investigator must also consider the ability of other parties – especially the U.S. regulators, prosecutors and/or plaintiffs' lawyers - to obtain evidence from a foreign jurisdiction. Corporations facing potential civil litigation, governmental investigation and/or prosecution must be aware that U.S. regulators, prosecutors and/or plaintiffs' lawyers can obtain information from foreign countries in various ways. In addition to the formal methods set forth below[16], regulators are increasingly cooperating with their foreign counterparts on an informal and *ad hoc* basis.[17]

(a) The Hague Evidence Convention

Under the Hague Evidence Convention, parties engaged in litigation in the U.S. can ob-

[16] *See* Anders, supra at 69.

[17] At a recent FCPA symposium, Mark Mendelsohn, the Deputy Chief of the DOJ's Fraud Unit, announced that the year 2008 was the year of "foreign coordination" amongst the law enforcement and regulatory agencies. Mendelsohn noted that the DOJ was "now working with our foreign law enforcement colleagues in bribery investigations to a degree that we never have previously." *See* "2008 Year-End FCPA Update," Gibson, Dunn & Crutcher LLP, at 7 (January 5, 2009), available at www.gibsondunn.com.

tain evidence from other countries that are members of the convention. Requests for documents are sent directly through a "central authority" in each of the countries involved. The request is executed with the same measures of compulsion as are provided by the domestic law of the country that received the request. The Hague Convention is intended to streamline the process of obtaining discovery located abroad by bypassing the traditional Consular and/or diplomatic process. However, the U.S. Supreme Court has held that the U.S. plaintiffs in civil litigation are not *required* to pursue production through the Hague Convention before pursuing other methods of production.[18]

(b) Letters Rogatory

A letter rogatory is a request by a domestic court to a foreign court to obtain evidence from a witness for use in a domestic forum.[19] Letters rogatory may seek witness testimony or documents or serve process or judicial summons on a person or entity located in a foreign jurisdiction. Generally, for a domestic court to issue letters rogatory, litigation must be pending or be within reasonable contemplation. The process of obtaining evidence through letters rogatory is uncertain, time-consuming and burdensome. Letters rogatory however may be subject to a challenge in the recipient country.

(c) Mutual Legal Assistance Treaties (MLATs)

MLATs are treaties that run between the Untied States and other foreign countries by which DOJ can obtain evidence from foreign entities for use in U.S. domestic criminal investigations. MLAT's are generally used by government attorneys to summon witnesses, to compel the production of evidence, to issue search warrants, to freeze assets and to serve process in foreign jurisdictions. MLATs are available only to government attorneys, not to private parties.

(d) Memoranda of Understanding (MOUs)

[18] *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987).

The SEC has entered into MOUs with many of their foreign regulatory counterparts by which it can obtain the assistance of the foreign regulator to obtain evidence abroad. MOU assistance can include obtaining access to the files of the foreign agency, the taking of witness statements and testimony and the production of documents. Although MOUs can facilitate cooperation, these arrangements are not a prerequisite for SEC cooperation with overseas authorities. SEC frequently cooperates and seeks cooperation on an informal and *ad hoc* basis with foreign regulators on enforcement matters.

4. Potential Barriers To Obtaining Information

Foreign laws, regulations and/or customs may create difficulties in obtaining relevant documents for review. As discussed above, the privacy laws along with the labor and employment laws of many countries are extremely protective of employees and allow employees to refuse to submit to questioning by company counsel who are conducting internal investigations. These laws also may preclude access to data concerning individuals and may protect employees from questioning by counsel. Two prominent examples of these laws that can substantially hamper an internal investigation are:

(a) European Union Data Privacy Directive

On October 25, 1998, the EU Directive on Data Privacy went into effect. The Directive is a series of 34 articles and is a mandatory, comprehensive regulatory scheme aimed at protecting personal data of the citizens of EU's member states. The Directive has two articulated purposes: (1) to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and (2) to encourage the free flow of personal data between member states. Personal data is defined broadly and includes "any information relating to an identified or identifiable natural person."

[19] *See* Intel Corp. v. Advanced Micro Processors, Inc., 542 U.S. 241, 29 n.1 (2004).

The Directive requires that: (i) Personal data must only be collected for legitimate purposes such as compliance with a legal obligation; or to which the data subject unambiguously consents; (ii) the data must be processed fairly and lawfully. The entity that is processing the personal data has a duty to inform the data subject of its identity, the purpose of the data processing, and other specifics relating to the data processing. The Directive also requires that the data must be accurate and up-to-date. "Data subjects" have the right to access their personal data and to change or delete incorrect information. Also, the entity processing the personal data must implement security measures to ensure that the data is adequately protected.

The Directive places strict limitations on the transfer of personal data from a EU member state to a third-party country. These restrictions may apply to intra-company transfers. Violation of or noncompliance with the Directive can result in penalties, fines, civil suits, criminal sanctions and even data embargoes. In order to bridge the difference in their approach to privacy, the US and the EU have entered into a "Safe Harbor Agreement." This Agreement offers a streamlined means for the US companies to comply with the EU's Data Protection Directive. Under this agreement, data transfers from the EU can take place to US companies that agree to meet certain intermediate privacy protection standards.

At times, a company may be faced with the between-the-devil-and-the-deep-sea-choice. U.S. courts have not been sympathetic to companies' fear of sanctions levied by foreign countries for transporting and/or producing data within the company's possession and/or control in U.S. litigation. U.S. courts have held that foreign statutes implementing EU's Data Directive will not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence, *even though that production may violate that statute*. *See Columbia Pictures, Inc., et al., v. Bunnell, et al.*, 245 F.R.D. 443 (C.D. Cal. Aug. 24, 2007).

(b) Blocking Statutes

In addition to the Data Privacy Directive, some European countries, notably France, have enacted *penal* laws that prohibit transmittal of certain types of documents.

The U.S. Supreme Court has historically been critical of foreign efforts to curtail discovery in the U.S. courts by legislating such blocking statutes.[20]

An example of such blocking statute can be found in French Penal Code, Law No. 80-538, which provides that:

> *Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any person to request, seek or disclose, in writing, orally or otherwise, economic, commercial, individual, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.*

The statute makes an exception for discovery obtained through "treaties or international agreements" such as obtaining discovery through the means of the Hague Evidence Convention.

As with the foreign statutes implementing EU's Data Directive, U.S. courts have not accorded deference to these blocking statutes. U.S. courts have required the parties in U.S. litigation to produce documents in discovery even where the production may trigger a violation of a blocking statute. In *Enron v. J.P. Morgan Secur. Inc.*[21], the Bankruptcy Court in the Southern District of New York held that the threat of prosecution under the French blocking statute was not sufficient to require that the parties implement Hague Convention discovery procedures. Citing other Second Circuit cases, the court held that "the interest of the United States to apply its procedural rules for discovery for the purpose of adjudicating fully and completely matters before its courts outweighs the interest of France's enactment of the French Blocking Statute."[22]

However, given the increased foreign enforcement and strengthening of French

[20] See, e.g., Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522 (1987).
[21] No. 01-16034 (Bankr. S.D.N.Y. July 18, 2007).
[22] *See Rich v. KIS Cal., Inc*., 121 F.R.D. 254 (M.D.N.C. 1988). (French statute was "solely designed to protect French business from foreign discovery" and is different from other foreign laws "whose subject is a specifically identified legitimate interest."); *Compagnie Francaise D'assurance Pour Le Commerce v. Phillips Petroleum Co.,*

blocking statute, the U.S. courts may change their attitude. Recently, a French court upheld a sentence fining a French lawyer 10,000 Euros for violating the French blocking statute.[23]

Attorney-Client Privilege: Now You See It, Now You Don't!

Protections accorded to the attorney-client privilege differ from country to country. The level of protection that the privilege commands in the U.S. generally does not exist to the same extent in other jurisdictions. Privilege is recognized in most of the common law jurisdictions, particularly those that can trace roots to the UK legal system, such as India, Hong Kong, Singapore, Australia and New Zealand.

Compared to the U.S., attorney-client privilege is given a narrow interpretation and effect in the European countries. And in some countries, such as China and Czech Republic, the privilege is not recognized at all. In the EU, the attorney-client privilege will be recognized when two conditions are met: (1) the communication is made *for the purpose* and *in the interest of the client's defense*; and (2) the lawyer is independent.[24] In EU, a lawyer is only considered "independent" only if he or she is not employed by his or her client. Similarly, the privilege does not extend to in-house lawyers in France, Germany, Russia, Sweden, and Thailand. As a result, conversations between employees and in-house counsel, while protected from disclosure in the U.S., are not likely to be protected in these countries.

Due to the fact that the scope of the privilege may vary from country to country, it is imperative that the investigator consult foreign counsel concerning the extent of protection available afforded by the attorney-client privilege in a particular foreign jurisdiction. Investigator should also check whether the privilege extends to documents or simply applies to oral communications. Even in some jurisdictions where privilege is recognized, a document can lose its privilege by leaving it in the hands of the corporate client.

---

105 F.R.D. 16, 30 (S.D.N.Y. 1984) ("plaintiff's fear [of criminal sanction under the French Blocking Statute]….appear to have no sound basis.")

[23] *See* Couer de Cassation Chambre Criminelle, Paris, Dec. 12, 2007, Juris-Data No. 2007-332254.

[24] *See* Anders *supra*, at 65.

U.S. courts have upheld assertions of privilege based on foreign law with respect to information that might not be protected under U.S. law. In *Eisai Ltd. v. Dr. Reddy's Labs*, 406 F. Supp. 2d 341 (S.D.N.Y. 2005), the court refused to compel production of documents which the plaintiff contended were privileged. These documents contained legal advice provided by Japanese legal professionals known as "benrishi." In Japan, benrishi act as patent agents or patent prosecution attorneys. The Court, recognizing the privilege and engaging in a functional analysis, held that in order to be recognized, the foreign-privilege law need not be identical to the U.S. privilege protections.

Privilege Against Self-Incrimination

As with the attorney-client privilege, privilege against self-incrimination differs around the world. In the U.S., the protections of the Fifth Amendment privilege can be asserted in any proceeding - criminal, civil, investigatory, and regulatory - as long as there is a *genuine risk* of incrimination. However, while the Fifth Amendment precludes drawing adverse inferences against defendants in criminal cases, the same is not true for civil or regulatory actions - even if the government is a party to the action and would benefit from such adverse inference. Defendants subject to parallel proceedings therefore must make the exceedingly difficult choice whether to (i) testify at the civil proceedings and risk incriminating themselves at their criminal trials, or (ii) invoke the Fifth Amendment and risk an adverse inference in the civil proceedings.[25]

Moreover, cross-border investigations often highlight the differences in the way the privilege is interpreted and/or protected in different jurisdictions. For instance, while in the U.S., a witness may "take the Fifth", and refuse to answer a question because the answer may incriminate him, in Canada, the witness *must* answer the question but the use that can be made of the answer is restricted. Therefore, the Canadian protection against self-incrimination arises only *after* an incriminating answer has been compelled and the witness has "spilled the proverbial

[25] *See* Anders, supra, at 68.

beans."[26] A legitimate fear of Canadian witnesses who may have been interviewed in a cross-border investigation is whether the American authorities would be able to "make an end-run around the 5th Amendment."[27] In a recent decision that has been widely criticized in Canada, the Ontario Court of Appeal ordered Conrad Black and others to testify at depositions in Canada, even though that testimony might be admissible against them in parallel U.S. proceedings.[28]

Then there are jurisdictions where the privilege against self-incrimination is actually broader in its applicability that the U.S. For instance, Indian Constitution grants the privilege against self-incrimination not only to individuals but also to corporations.

Disclosure

Finally, an investigator has to decide *whether*, *when* and *how* to disclose the "problem" or the result of the investigation and to *which* regulatory, government and/or agency. In cross-border investigations where multiple regulators or government agencies are involved, this becomes a complex exercise. Some considerations[29] on this issue include:

(a) Timing: Who gets the first call? Generally, in cases where a U.S. regulator is involved and the company has strong ties to the U.S., the U.S. regulator would get the first call. If the U.S. is the "home country," in this regulatory climate, it would be difficult to imagine circumstances where a foreign regulator is made aware of the "problem" or the results of an investigation before his counterpart in the U.S. is made aware of the same.

[26] *See* Linda Fuerst and Nadia Campion, *The Right Against Self-Incrimination: Disclosure in Cross-Border Investigations*, a paper presented at the Canadian Institute's 19th Annual Securities Super Conference (2009).
[27] Brian Greenspan, Brett Cohen and H. Roderick Anderson, *When the Americans Come Knocking: Immunity Implications for Compelled Testimony* (Toronto, Ontario: Osgoode Professional Development CLE, April 2007), pp. 11-12.
[28] *See Catalyst Fund General Partner Inc. v. Hollinger Inc.*, [2005] O.J. No. 4666 (Ont. C.A.)
[29] Henry Klehm, III, *Cross-Border Considerations In Internal Investigation*, PLI Corporate Law and Practice Course Handbook Series (June 2008), pg. 315.

(b) Leaks: No regulator likes to learn about something from a press report or from a foreign counterpart – especially when the regulator has been made aware of an on-going cross-border investigation. Disclosures or deliberate "leaks" to press is often more of a rule than an exception in many jurisdictions. Also, with increased international cooperation amongst the regulatory and law enforcement agencies, communication among regulators should be assumed. Once a disclosure is made to one, it is likely to be quickly passed to others.

Conclusion

The investigation of cross-border fraud and/or misconduct involves numerous legal issues, jurisdictions, and cultural challenges. Geographical challenges alone often overwhelm businesses faced with undertaking a cross-border investigation. The time and expense involved in transporting the investigative team to a foreign locale of the investigation can make the cross-border investigations costly. At times, the companies try to achieve the cost savings by using local counsel or investigators. However, if the issue is serious and the company ultimately plans to disclose the findings of the investigation to the Government, it would be prudent to have the investigation conducted by one firm or counsel. As globalization continues to expand, regulators and law enforcement agencies – especially of the U.S. – can be expected to be increasingly aggressive in investigating and/or prosecuting extra-territorial conduct that they perceive to be in violation of the country's regulatory and/or criminal law. The costs to respond to such cross-border investigations are undoubtedly high in time, resources and money. But, the response and its quality will make all the difference to the outcome.