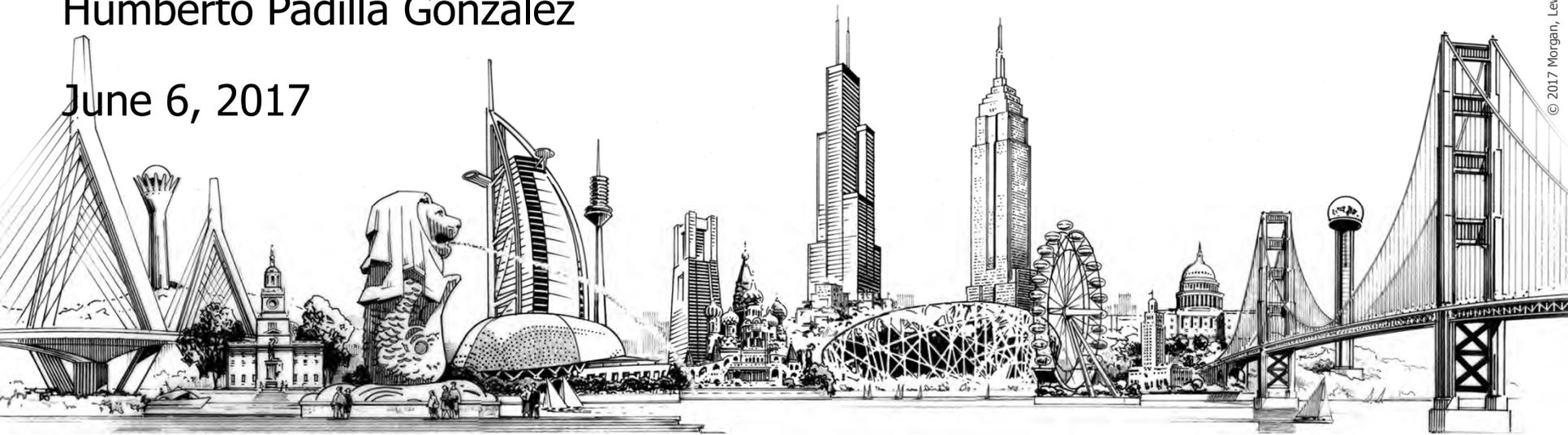


**Morgan Lewis**

# **CONDUCTING CROSS-BORDER INTERNAL INVESTIGATIONS**

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# Case Study Part 1: The Allegations

- SqueakyCleanCo is a multinational manufacturing company headquartered and listed in New York. It has offices worldwide, including in Mexico City, Dubai, Shanghai, and London.
- SqueakyCleanCo receives a report from an employee in London through its whistleblower hotline that contains the following allegations:
  - Mr. Cash, a SqueakyCleanCo Senior Vice President based in Dubai, has been paying bribes to public officials in the PRC and “turning a blind eye” on similar behavior of the sales team in Mexico.
  - When based in Dubai, Mr. Cash regularly “turned a blind eye” to his team selling material nonpublic information to a select group of clients in order to develop relationships.
  - He placed great emphasis on financial performance and only promoted men on the team.
- Mr. Cash is currently employed on dual contracts in Dubai and the PRC. He is a British citizen. He splits his time 50/50 between Dubai and the PRC and frequently travels to Mexico, London, and New York on business. Prior to June 2016, Mr. Cash was based in London rather than Dubai.

What issues might these allegations give rise to in Dubai, the PRC, the United States, Mexico, and the United Kingdom?

What should SqueakyCleanCo think about while planning its investigation?

# Dubai – Initial Issues and Planning

- United Arab Emirates Anticorruption System
  - Criminal liability and financial penalties
  - Call into question all activities undertaken by manager in Dubai?
- UAE Employment Law?
  - Visa and residency issues
- Preservation of Information
- Access to Information
- Reporting Obligations

# US – Initial Issues

- United States Foreign Corrupt Practices Act
- Dodd-Frank whistleblower concerns
- Maximize protection afforded to investigation – privilege
- Insider trading laws

# PRC – Initial Issues and Planning

- PRC Anticorruption System
  - Criminal liability and financial penalties
- PRC Employment Law
  - Local employment protections
  - Discrimination

# Mexico – Initial Issues and Planning

- New Mexican Anticorruption System
  - Criminal liability and financial penalties
  - Temporary disqualification for public work
  - Indemnity obligations (damages and lost profit) to Mexican treasury (SHCP)
  - Temporary suspension on commercial activities (three months to three years) for legal entities
  - Mandatory dissolution of the legal entity
- Mexican Industrial Property Law
  - Trade secret?
    - Contained in tangible format?
    - Confidential, economic or competitive advantage; sufficiently protected?
  - Criminal liability and financial penalties
- Mexican Employment Law?
  - What constitutes employment?
  - Termination with and without cause

# UK – Initial Issues and Planning

- UK Bribery Act implications
- Privilege
- Position of UK whistleblower?
- Is Mr. Cash subject to the protections of UK employment law?

# Case Study Part 2: The Investigation Plan

- An investigation team is assembled with members in Dubai, Shanghai, Mexico, and London. The investigators are drawn from the Legal and Compliance department. The investigators decide to interview the members of Mr. Cash's teams in Shanghai, Dubai, London, and Mexico.
- Before the interviews, the investigators have a number of concerns:
  - They are worried about team members colluding and telling an “agreed-upon” story;
  - They are proposing to conduct the interviews in English so that the head office in New York can read the notes, but wonder if this gives rise to any issues—approximately half of the team are Chinese and many are native Spanish speakers; and
  - They are worried about team members covertly recording the interviews.

How would you respond to the investigators' concerns?

# Dubai – Investigation Plan

- Preservation of information
  - Imaging of laptops
  - Access to phones
  - Secure all data
  - Consider applicable data privacy rules
- Business Continuity Plan
- Access to information
- Small team of investigators
- Fact-finding issues (no conclusions)

# PRC – Investigation Plan

- Execute quickly – concerns over collusion
- Can preliminary “disciplinary” measures be taken?
  - Expatriates v. local nationals
- Location and language of interviews
- Recording of interviews

# Mexico – Investigation Plan

- Can preliminary/temporary “disciplinary” measures be taken?
  - Very tricky
  - Internal regulation needs to be registered
  - Pro-employee nature of Mexican labor and employment law and courts
- Where should interviews take place?
- In which language should the interviews be conducted?
- Can interviews be recorded?

# UK – Investigation Plan

- Suspend all employees in Mr. Cash's team?
- Forbid suspended employees from contacting other employees?
- Prohibit recording of interviews in United Kingdom
- Ensure compliance with company's whistleblowing policy

# Case Study Part 3: The Interviews

- The investigators conduct interviews in Shanghai, Dubai, London, and Mexico.
- Those interviewed deny all personal involvement but say that a former team member had a close relationship with a key group of clients and they would not be surprised if nonpublic information was shared, although they had no evidence of that.
- They all commented that Mr. Cash was pretty much hands off with this individual. The individual was a star performer and no one wanted to upset him, including Mr. Cash.

Should further inquiries be made? If so, what?

Is forensic analysis needed? What are the legal implications?

Should SqueakyCleanCo report these findings? To whom?

# Dubai – The Interviews

- Denial – does the documentation tell a different story?
- Look to the clients of SqueakyCleanCo
- Verify the information
- Focus on the allegation

# PRC – The Interviews

- Credibility test
- Forensic review of documents/smartphones
  - Access issues
  - Data protection issues
- Pro-employee labor arbitration and courts
  - Circumstantial evidence holds little weight without more

# Mexico – The Interviews

- Analysis of forensic data (and other supporting information)
  - Data privacy concerns?
    - No interception of private communications (e.g., the unlawful accessing of personal email accounts)
      - Court precedents imposing criminal liability to the interception of private email communications without a court order or the consent of the email account owner
    - No unlawful use of personal data
    - Personal data inadvertently captured through that forensic review is treated in accordance with privacy laws
  - Preemptive measures
    - Employment Agreement
    - Data Privacy Policy and Notice
- Is injunctive relief available if misuse of confidential info is discovered?
  - Limited (flight risk) and difficult to obtain
    - Danger that the claimant's rights may be impaired by the lapse of time
    - Presumption of the legal basis of the request
  - Mostly granted only to preserve status quo (preservation of assets)
  - Bond requirements (cover potential damages of defendant)

# UK – The Interviews

- Forensic analysis of computers of Mr. Cash and the former employee?
- Data protection issues
- If misuse of confidential information discovered – injunction application?

# Case Study Part 4: Suspension and Compensation

- After interviewing Mr. Cash and the members of his team, the investigators decide that it would be appropriate to suspend Mr. Cash for the remainder of the investigation. They are worried that he might tamper with evidence or interfere with witnesses.
- SqueakyCleanCo's HR team notice that a large tranche of Mr. Cash's deferred compensation from the previous year is due to vest soon. They are reluctant for him to be paid while under investigation for serious misconduct.

Can Mr. Cash be suspended from his employment in the PRC and Dubai?

What is the position in relation to Mr. Cash's deferred compensation?

What if the plan is governed by English law?

# Dubai – Suspension and Compensation

- Suspension pursuant to UAE labor Law
- No disciplinary action
- Residency visa issues
- Travel ban
- Cooperation
- Government oversight

# PRC – Suspension and Compensation

- Suspension – with full pay
- Terms of policy dictate availability of forfeiture

# UK – Suspension and Compensation

- Whether the deferred compensation can be withheld depends on the wording of the plan documentation.
- If the company has discretion as to whether the deferred compensation should be withheld or not, it must operate its discretion rationally and not capriciously.

# Case Study Part 5: Document Review

- The investigators decide to undertake a review of Mr. Cash's emails for any evidence of bribery. The investigators conduct key word searches. The volume of data that comes back is too big for them to review every email. They fail to notice that one of their key words is contained in SqueakyCleanCo's email footer.
- The investigators also access SqueakyCleanCo's instant messaging system. Historic records of instant messaging chat are stored on a server in London. The London team reviews the messages. They ignore anything written in Chinese or Spanish because they cannot understand it.
- The investigators also look through SqueakyCleanCo's accounting records in Dubai and Shanghai to see if there is evidence of suspicious payments. There are many references to corporate hospitality and travel expenses. The investigators ignore these as being part of normal business activity.

What should the investigators have done differently?

# PRC – Document Review Issues

- Volume and language of review
- IT: Where is the server(s) located? Who owns the phones/computers?
- Data protection issues: State secrets and trade secrets
- T&E expenses: Cultural unawareness; significant area to find issues; break down of expenses customary

# Case Study Part 6: External Advice and Privilege

- Before the investigation concludes, the investigators in Dubai decide to take external legal advice on the allegations and the potential implications for SqueakyCleanCo.
- The investigators want to share the privileged advice with the members of the investigation team in the United Kingdom, Dubai, and the PRC. The investigators are concerned about preserving legal privilege.
- The investigators also decide to get a second opinion on the accounting records from SqueakyCleanCo's external accounting firm. Unhelpful statements are made in an email provided by the accounting firm. The investigators are worried that the report might not be protected by privilege.

What are the implications of sharing the advice with the investigators in the PRC and Dubai?

Is privilege lost when the advice document leaves Dubai?

Is the accountant's report privileged? What could have been done differently?

# Dubai – External Advice and Privilege

- For the purpose of UAE courts and UAE government regulatory investigations, there is no concept of privilege
- Although legal privilege is not recognized in Dubai, it can still be important to proceed as though legal privilege exists (e.g., by maintaining confidentiality) to maximize the prospects of the communication being covered if transferred to a jurisdiction that does recognize privilege (e.g., London)

# PRC – External Advice and Privilege

- No concept of legal privilege
- Proceed as though legal privilege exists (i.e., US regulatory concerns)

# Case Study Part 7: External Advice and Privilege

- The investigators in Shanghai decide to take a similar step and they also seek local legal advice on the allegations and the potential implications for SqueakyCleanCo in the PRC.
- The PRC investigators want to share the advice with the investigation teams in the United Kingdom, Dubai and Mexico.

Will the advice be protected by privilege in the United Kingdom?

Are there privilege concerns in Mexico?

# Mexico – External Advice and Privilege

- Privilege concerns/Professional secrecy
  - Weak disciplinary provisions – community service
  - Discovery in Mexico (burden of proof)
  - Indirect engagement

# UK – External Advice and Privilege

- The legal advice will be privileged in the United Kingdom if it satisfies the legal advice privilege test:
  - confidential communications
  - that pass between a client and the client's lawyer
  - that have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context
- The accountant's report will not be privileged

# Case Study Part 8: Conclusion and Retaliation

- The investigation concludes.
- The allegations of bribery and corruption against Mr. Cash (and his team in Mexico) could not be substantiated and are not upheld.
- The head of SqueakyCleanCo's business in Shanghai emails his counterparts in Mexico, Dubai, and London. He complains that the investigation has been a "distraction" and "by and large a huge waste of time." He suggests that SqueakyCleanCo should dismiss the whistleblower, whom he refers to as a "troublemaker."

What issues arise in the PRC and Dubai in relation to the proposal to dismiss?

Are there any concerns from the UK perspective if SqueakyCleanCo takes steps to dismiss the whistleblower?

# Dubai – Conclusions and Retaliations

- No whistleblower protection
- Common-sense approach to avoid retaliation may be to relocate whistleblower

# UK – Conclusions and Retaliation

- The whistleblower is protected under UK law from retaliation (dismissal or other detriment) if the reason or the principal reason for the retaliation is the fact that he or she blew the whistle in relation to one of the specified types of malpractice
- Criminal activity is one of the specified types of malpractice
- The whistleblower will be entitled to uncapped compensation if he or she proves that the reason (or the principal reason) for the retaliation is the fact that he or she blew the whistle
- The whistleblower only needs to show that he or she held a reasonable belief that wrong-doing had occurred and that it was in the public interest for the disclosure to be made in order to be protected

# US – Conclusions and Retaliation

- Even if whistleblower is not protected under US law from retaliation (dismissal), what is the message to the regulator?
  - Anti-retaliation provision in the Code of Conduct
- Will dismissal encourage the whistleblower to go straight to the SEC for a bounty?
- Even if the bribery allegations are not substantiated, Dodd-Frank concerns remain
  - Was the investigation thorough and robust?

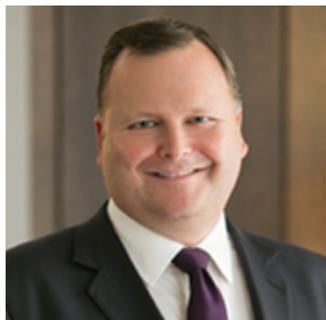
# Key Takeaways

- Consider any jurisdiction-specific requirements at an early stage – e.g., the need to conduct interviews in local language, the need to review documents locally.
- Where suspension and/or disciplinary action is a possibility, consider that in some jurisdictions there may be prescribed time frames for such action – e.g., Germany.
- In some jurisdictions (such as the UK) there can be a tension between the desire to cloak as much of an investigation as possible in legal privilege, and the need to provide an employee with all relevant information in order to effect a fair dismissal.
- Although legal privilege is not recognized in all jurisdictions (e.g., the PRC and Dubai), it can still be important to proceed as though legal privilege exists (i.e., by maintaining confidentiality) to maximize the prospects of the communication being covered if transferred to a jurisdiction that does recognize privilege (e.g., London).
- Put clear protocols in place at the outset of an investigation to avoid generating unhelpful paper trails that may need to be disclosed in future litigation or in response to a data access request.

# Privilege: Maximizing Protection

- Inform legal: get advice on privilege dos and don'ts
- If the matter is cross-border, put privilege protocols in place at outset
- What is privileged in England may not be privileged in the United States
- Try to assess whether an investigation is inquisitorial or adversarial
  - This will determine whether you have LAP only available (third parties) or litigation privilege as well
- Shut down email chatter
  - Much of it is unlikely to be privileged
  - Keep email chains small – delete irrelevant tails to the chains or start new emails
- Restrict/control what is put in writing (may not be privileged)
  - Be careful when emailing sensitive documents
  - Take care in all documents (wide definition): assume privilege will not apply; or, if it does, assume the document will come to light externally at a later stage
- If you are required to write an email or report on the incident:
  - Check with your legal advisers about whether you can benefit from privilege
  - Where appropriate, mark all documents and emails “privileged and confidential: prepared for obtaining legal advice”

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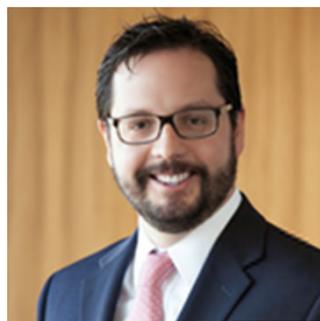


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# THANK YOU

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