ARTICLES

International Forensic Investigations—Local Laws and Regulations

By Alexander Walther, Robert Gray, Melissa Ho, and Emma Cecil – February 29, 2016

Note: This is the first of a three part series of summary articles from the American Bar Association (ABA) White Collar Crime Subcommittee of the Commercial Business Litigation Committee that will address some of the key issues when offering forensic investigation services that arise in providing services to clients with international operations (or who may be planning an international expansion). Over the next three months, this series will touch on items to consider in relation to:

- Local Laws and Regulations affecting forensic investigations;
- Cultural Differences between Countries; and
- Offering an Effective Project Team for International Forensic Investigations.

Recently we have seen an increase in the demand for corporate/special investigations (also known as "forensic investigations"). With the recent volatility in the worldwide stock markets and energy prices, it is readily apparent that today's world is more deeply interconnected than ever before. The effect of events occurring in Asia, Europe, the Middle East, and elsewhere are often felt worldwide. With this interconnected world and increased globalization over the last couple of decades, having an understanding of international laws, regulations, and cultural differences is vital for law firms who assist U.S. clients that have international operations (and those with aspirations to expand internationally). In particular, it is critical for law firms to be a ready global resource to provide forensic investigations and other services in this growing market.

Local Laws and Regulations

While this series will comment at a high level on common issues, extensive research should be performed for the country (or countries) at issue in order to determine the relevant laws and regulations that apply.

As many readers are probably already aware, every country has different laws and regulations, especially in terms of the rights of employees and their privacy. What may be acceptable in the United States may be discouraged or even illegal in other areas of the world. For example, individual and corporate background checks are routinely performed in the United States on prospective employees. However, this is not always allowed without the prospective employees consent or employee union's consent in foreign countries. For example, in China, a company cannot perform a criminal background check unless they obtain a written consent letter from the employee or prospective employee. Additionally, criminal background checks can only be performed at the Ministry of Public Security Bureau (PSB) or the local police station. Alternatively, the company can request the employee or prospective employee to obtain a Certificate of No Criminal Record from the PSB or the local police station. Although instructions for obtaining the certificate are typically in Mandarin, the Canadian government has provided a

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summary in English of the process for China citizens at this website. *Table 1* below highlights some of the key issues that arise in international operations (with a focus on employees and international forensic investigations).

Table 1: Comparison of Issues U.S. v. International Activities

Issue	Activity in United States	International Activity
Background checks	Allowed and typically easy to obtain. Best practice is to notify employee and obtain written consent. Not allowed to obtain medical or genetic information.	Typically allowed but may require disclosure or employee's consent (e.g., China).
Interviews of employees/agents and others as part of a forensic investigation	Allowed but may need to check union bylaws to determine if special rules exist. Also should consider any representation right provided by state laws.	Varies greatly by country. Many countries (e.g., France) require employee representation be present (e.g., union representatives or legal counsel).
Ethics hotlines	Required for public companies.	Many countries in Europe require government (e.g., France) or even employee consultation/approval (e.g., Germany).
Analyses of employee email accounts and company-owned personal devices	Easy to access as long as proper disclosure is made (e.g., notice in the Employee Handbook).	Difficult to access. Some countries (e.g., China) may even view the analyses of an employee's company email account as violating the employee's rights per a 2013 ruling in the Guangdong Foshan Intermediate People's Court involving a termination case that had evidence taken from an employee's work email. See an English summary of this case here.
Computer forensic procedures	Generally easy to perform (with qualified resources) as long as proper disclosure is made (e.g., notice in the Employee Handbook). Note that some states may require a private	Difficult to perform. Employee files, even though saved on company servers, are generally viewed as being unavailable to the employer (e.g., China). Some countries allow an

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	investigator license unless they are exempt *(*e.g., attorneys and CPAs).	employer to search employee files if the employee willingly consents to the search.
Employee's right to legal counsel	Generally not required but may be required in some circumstances (e.g., when interrogating employees who may be implicated in allegations).	Some countries allow or require legal counsel to be present if an employee may be charged with a criminal offense (e.g., most of the European Union).
Whistleblower investigations	Conducted anonymously without the knowledge of the accused.	Some countries (e.g., Hungary) require disclosure of the investigation to the accused.
Involvement of regulators and local authorities	National or local authorities typically not involved until charges are filed. If charges are filed, authorities will use internal investigation as a starting point.	Some countries require local authorities to conduct internal investigations and forbid non-law enforcement personnel from performing an investigation. For example, in China, private investigators, such as those often utilized in the United States, are prohibited by the Ministry of Public Security. Consultants can be utilized, however their activities are regulated by the State.
Availability of experts (i.e., forensic accountants)	Widespread availability of experts and consultants.	Developed nations such as those in Western Europe typically have a wide range of experts available. Developing countries (e.g., China) have limited options.

Note: *Table 1* is not meant to be all inclusive of key issues that may arise. There are many other areas of local laws and regulations to consider when operating internationally or performing an international investigation.

The issues noted above only scratch the surface of relevant items that may arise when a company operates internationally. The bottom line is that what works and is allowed in the United States will not always work in international venues. If a company or law firm does not do the proper homework and does not fully understand the local laws and regulations of the countries in which its client operates, complications and penalties may arise down the road. As such, it is imperative that you adequately research the international issues that may arise when providing services to clients who operate internationally. Engaging forensic accountants who have proven investigative experience/credentials is also helpful. Additionally, due to the complexities and vastly different regulations across the globe, it would be wise for outside counsel to work with

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their clients to proactively develop a plan to address internal investigations should the need arise (e.g., similar to a disaster recovery plan). Having a plan in place will assist your clients in understanding the complexities and result in a more efficient and effective investigation should the need arise.

The next installment in this series will discuss cultural issues commonly encountered when assisting a client in an international capacity. That installment will provide you with relevant examples of common cultural differences encountered (with a focus on China) and tips on how to approach these differences to effectively address the needs of your client.

Keywords: commercial & business, litigation, international investigation, corporate investigation, forensic analysis, U.S. versus international investigation, whistleblower complaint

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