Tackling international commercial crime

A magnet for global controversy, white collar crime has been in the spotlight as never before since US scandals transformed the fraud landscape at the beginning of this decade. In a world of electronic transactions and globalised business, insider corporate crime has become a predicament of immeasurable magnitude, and provisions for its prevention and punishment are similarly troublesome.

Corporate crime rears its unsightly head in a multitude of forms across the globe. For underdeveloped nations, corruption and fraud can be a daily and unlegislated custom, whilst European and Western governments continue to grapple with ever more elaborate scheming despite mixed efforts to crack down.

The most historically groundbreaking developments in commercial crime were the unmistakable marks left by both the Enron and Worldcom debacles, and 9/11, which triggered sweeping US legislation supposedly designed to protect America from the pain and shame of similar events in the future.

The long arms of both the US Department of Justice (US DOJ) and the US Securities and Exchange Control (US DOJ) have clamped down, in an arguably aggressive manner, upon worldwide corporate misdemeanours attached to American companies. New legislation passed allows the US to seize the assets of any company based abroad with an operation in the US.

The US SEC is also infamous for descending on jurisdictions worldwide to investigate the activities of US corporations, but more sensitive and headline-grabbing still have been the ramifications of extradition laws introduced post-9/11. These anti-terror measures have spilled into the US fight against white collar crime, raising human rights questions over the indictment and extradition of non-US citizens associated with the Enron scandal.

One of the most publicised cases relating to the UK implicated the NatWest Three; disgraced bankers found guilty in February of stealing over $7 million in an Enron related fraud. They were flown to the US two years ago to face their charges, and have now been sentenced with 37 months in different US prisons.

Some commentators argue that the three are poor instances of the US extradition controversy, pointing to businessmen like Jeremy Crook, whose extradition was fast-tracked without the need for any prima facie evidence, as better examples of potentially human rights-breaching US actions.

Whatever the media controversies raised however, the influence of the US has provoked a wide range of responses from global policy-makers. Many jurisdictions have seen the US debacles and consequent legislation as a prompt to introduce tighter regulations on their own territory.

Greater transparency and accountability have emerged throughout offshore jurisdictions worldwide, many being anxious to clear their names having been used to hide the proceeds of international offences. Both European jurisdictions and emerging economies have also followed suit in many cases, seeing the threat from commercial crime as greater and more sophisticated than ever. To many, these ructions have been a necessary step in charging corporates worldwide with greater social responsibility; a so far incomplete task that was long overdue.

On the level of the individual, tougher regulations have turned directorial responsibility into a somewhat poisoned chalice in these times, and the spectre of criminal investigation looms if the new legal rigours are not adhered to.

The following pages take the issues surrounding white collar crime within a wide variety of jurisdictions into far more detail. The daily undertaking of a fraud lawyer in the BVI or the Cayman Islands is entirely different to that experienced by a practitioner in Nigeria.

Though many European advisers find themselves advising clients on how best to tackle US charges, others are dealing with antitrust issues on a daily basis. Elsewhere, lawyers in emerging economies are regularly arbitrating potentially fraudulent M&A activities whilst Eastern European firms confront the difficulties of endemic corruption in their territory.

The fact remains, however, that commercial crime in its many forms is everywhere, and developments in technology, financial sophistication, and the unprecedented economic power of the BRIC countries will only complicate the fraud landscape yet further.

CorporateINT
whitecollarcrime

Belgium

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The quantity of fraud legislation in Belgium has increased over recent years, partially following in the example of stricter US legislation, and anti-fraud measures have seeped into almost every field of business law, including financial, corporate, IT, transport and tax legislation.

Meanwhile, the quality of the legislation and therefore the definition of criminal offences has been on the decline. The gap between 'theoretically' chargeable offences and offences that remain vulnerable to suing by the public prosecutor's office has opened up, effectively damaging the very principles of Belgian legal security.

The application to join proceedings as a civil party is sometimes criticised, for it is not always too difficult to point out a criminal offence committed by a competitor. In the present state of Belgian criminal procedure, this procedural facility thus remains a powerful weapon in the hands of anyone who claims to have suffered adverse consequences of such activities.

In addition to redressing the problems presented by this situation, a number of other developments are expected to impact upon Belgian fraud in the coming years. The international financial scandals that have occurred in recent years are expected to trigger new 'preventative measures' which will include compliance, whistle-blowing, the implementation of internal codes of conduct and internal anti-fraud schemes.

The influence of the US Department of Justice remains indirect in my experience though. It's only though the internal discipline that is now respected by US listed companies doing business in Belgium that changes tend take place. The best examples of this are certainly the whistle-blowing policies, and even they can prove difficult to implement with regard to the requirements of the Belgian privacy commission.

A more general trend to take place in Belgium will be continued efforts to fight money-laundering, which remain high on the government's agenda. According to the latest yearly report from the Belgian Financial Intelligence Processing Unit, 1,685 files are currently being processed, signalling a significant increase in money-laundering cases compared with the year previously.

The fight against money-laundering has expanded to 'serious fiscal fraud'. The government's struggle to reach a budget in equilibrium is certainly one of the reasons why this criminality is being addressed with increased force.

Furthermore, the growth of electronic payments and data transmissions, that implies the storage of sensitive data will probably seduce a growing number of hackers to put in place more sophisticated techniques aiming to obtain these data for fraudulent purposes.
It also seems that Belgian courts have recently begun applying criminal sanctions related to environmental legislation with a good degree of harshness. An increased demand for expertise in this field of law is thus to be expected.

Brazil

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Although international efforts to tackle transnational commercial crime have been substantially improved in recent past, the levels of cooperation between different law enforcement authorities remains full of obstacles. Success stories in combating fraud and obtaining the recovery of illicitly diverted assets may depend on the ability of the private sector to work together with law enforcement authorities, combining the available mutual legal assistance with multi-jurisdiction litigation.

According to a PwC survey of last year, companies experiencing changes in operational processes, systems and personnel were more susceptible to fraud than those operated in a stable environment. With M&A generating unprecedented upheaval in the business spheres of emerging economies, it is essential that tailored fraud risk management programmes are established with rigorous due diligence on M&A deals. The current set of fraud legislation does provide a quite ample framework to prevent and persecute fraudulent behaviours. The main problem in Brazil is improving the investigation of economic crimes and money laundering in particular.

Traditionally, crime fighting efforts in Brazil have for the most part been focused on the arrest of criminals, while money laundering activity and the recovering of misappropriated assets had been considered a secondary issue. In recent years, Brazilian law enforcement agencies and the financial system have sensibly improved their ability to identify and trace suspicious fraud activities, making it easier for defrauded companies and entities to trace and recover their damages.

Perhaps surprisingly, Brazil's regulatory framework has avoided the seismic repercussions from US scandals early in the decade which affected many other jurisdictions, partly through pre-emption. The Brazilian Securities Commission (CVM) introduced regulations in 1999 which anticipated similar legislation passed by the US in the wake of the Enron collapse.

The Sao Paulo Stock Exchange introduced special listing segments in 2000 in order to encourage companies to voluntarily migrate to higher levels of corporate management, but despite these developments, the Brazilian Public Prosecution Service and the Securities Commission have this year decided to establish a cooperation program aimed at improving the prevention and prosecution illicit activities in the stock market.

The image of large corporation CEOs in handcuffs, leaving the courthouse to serve long sentences in jail after the Enron and WorldCom scandals, was definitely a strong message to the rest of the world, however. This certainly will have increased the wariness of white collar crime around the world. There is a clear trend among law enforcement agencies globally to follow the US example, including in Brazil.

British Virgin Islands

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Greater transparency has appeared in the British Virgin Islands (the BVI) since the beginning of this decade, after criticisms over the relative opaqueness of offshore companies and their wider operations. Nevertheless it remains the case that tax-free and historically under-regulated offshore jurisdictions do not provide to greater opportunity for alleged criminals to either commit fraud or launder the proceeds.

Whilst jurisdictions like the BVI have placed heightened protections over confidential information regarding the affairs of business people involved in the use of banking, company or offshore trust services, serious reforms have taken root in most leading offshore jurisdictions, including this one, since the knock-on effects of 9/11.

Indeed, here at Martin Kenney & Co. we think anti-terrorist laws that came to overlay anti-money laundering law following those events had a larger impact on the BVI than the Enron and Worldcom fiascos. In the late 1990s and early 2000s, the BVI was subject to criticism from the Financial Action Task Force (the 'FATF') and the OECD in respect of the high incidence of offshore companies domiciled in the BVI under arguably opaque circumstances.

The identities of directors and registered shareholders were difficult to discern or establish, and the FATF, OECD and other international quangos have had a greater impact than the aggressive extra-territorial criminal investigations emanating from the US Department of Justice. In many cases, however, opaqueness still exists amongst Jersey domiciled companies and criticism continues.

Nonetheless, what has transformed is the way in which offshore financial services communities operate, following similar vilification of this sector. Modern anti-money laundering laws have been introduced and meaningfully enforced which require, for example, the compilation of objective data regarding the ultimate beneficial owner of an offshore company. So such criticisms have certainly led to reforms in this area in the BVI.

Commercial crime still punctuates legal life in the BVI today, with investor frauds constituting up a good majority of the criminal activity taking place. Frauds on financial institutions come a close second, alongside government corruption, which regularly flows from abuse of power by dictators in third world countries.

In order to limit the impact of such crimes whilst sustaining the future of the BVI as an attractive location for international funds, a balance must be struck. On the one hand, the requirements of the offshore financial services communities to provide their services to legitimate consumers and business people must be met. On the other, there is a need to control or ferret out those who would abuse these services through unethical or unlawful behaviour.

The BVI government has been a leader in trying to strike this balance.

Cyprus

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As an international business and finance centre, Cyprus is home to myriad holding companies for businesses operating across the globe. Cyprus law provides an effective framework to protect the victims of fraud, and perpetrators are liable to both criminal and civil investigation.

Cypriot commercial crime tends to concentrate itself in certain key areas, namely the fraudulent transfer or sale of shares and other assets and the misappropriation of funds, as well as unauthorised changes in the articles of association or holding EGMs in companies in order to retrospectively ratify fraudulent or illegal corporate decisions.

The harm done by such crimes is limited by Cyprus's status as a mature and well-regulated financial and business centre that observes and keeps abreast of commercial and legal developments throughout the world. Its primary influences as regards commercial and legal developments are European Union norms and English case-law. Significant impact has been felt following the entry of Cyprus to the EU, which has altered the competition landscape for the Cypriot business community.

"Cyprus law provides an effective framework to protect the victims of fraud and the perpetrators are liable to both criminal and civil investigation"

Competition law has become an ever-present feature in the corporate transactions we undertake, as Cyprus law in this area is fully harmonised with EU norms. In addition to the direct applicability of Articles 81 and 82 of the EC Treaty in Cyprus, a national law on the protection of competition similar to the EC Treaty Articles is in force, supplementing the EC rules which essentially cover instances whereby there is no effect on intra-community trade (i.e. where Articles 81 and 82 of the EC Treaty may not be applicable). A Commission for the Protection of Competition has also been established to investigate suspected breaches of competition law either on its own initiative or following a complaint.

As a result of these developments, our recent activities have covered the entire spectrum. At the preventative level, we have given legal advice at the drafting stage of agreements so that they conform with EU and national competition law, as well as providing notification of mergers to the Commission for the Protection of Competition and subsequent negotiations. At the other end of the scale, we have acted for defendants and plaintiffs in court cases concerning alleged abuses of dominant positions or agreements or practices that allegedly restrict competition.

One recent case of particular interest was our successful application to the court on behalf of a major conglomerate for interim orders prohibiting the unauthorised parallel importation of goods in the common market (Cyprus) from third countries. Moreover, we have advised a prominent union on proposed changes to the taxation of shipping activities with reference to the applicable EC guidelines on state aid in the sector.

Finland

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The vast majority of commercial crime in Finland involves accounting offences, tax offences and debtor offences. More elaborate forms of fraud are on the rise, however, and insider trading has recently been in the spotlight. Finnish anti-fraud legislation is well developed, and corporate criminal liability is something to be particularly wary of – a company in whose operations an offence was committed can be left open to fines ranging from €850 to €850,000.

Fraud is defined relatively broadly in Finland. The basic fraud criminalisation is divided into three degrees of seriousness - petty fraud covers for minor offences, fraud is punishable by fine or imprisonment for two years and aggravated fraud can result in a four year term. As a rule, if the amount of the fraud exceeds €10,000, a charge of aggravated fraud is brought and alongside imprisonment or fine, the court may also order the proceeds and instruments of the crime to be forfeited to the state.

Although not as significant in terms of the number of individual offences, one notable type of recent white collar crime has been insider trading. Due to a few well publicised cases in Finnish courts insider trading has received much attention, but issues of trademark, patent and other intellectual property rights infringements, as well as the misuse of business secrets and trusted positions have become increasingly important. Our firm has vast experience of advising clients in all these types of matters.

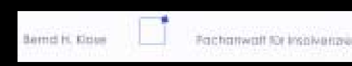
Another area of Finnish commercial crime in vogue at present is the private enforcement of competition law. Both 'stand-alone' and 'follow-on' private actions by business undertakings to recover damages caused by violations of competition law are specifically mandated by law. A claim for damages can, in principle, be made in relation to every kind of competition distortion within the Competition Act's general scope of application.

Private antitrust claims for damages are tried by the general courts. Such claims have, until recently, not been subject to litigation to any significant degree, but this trend seems to be turning and it is expected that antitrust litigation in Finland will increase during the years to come.

On a more global note, The US Department of Justice is now perceived across Finland as a very active operator, both within the US and internationally. Finnish advisers on competition law have increasingly drawn attention to the internationalisation of cartel investigations, and in particular extradition and discovery issues in connection therewith.

In general, the Enron and Worldcom scandals have increased public interest in commercial crime across Finland, and a greater alertness to white collar crime now exists. Finland has police investigators and prosecutors who specialise in the white collar domain, and recent court proceedings relating to high profile crimes have raised awareness yet further.

Germany



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At the moment the public in Germany is very much aware of commercial crimes related to corruption. The big scandals of Siemens, Volkswagen and Daimer/Chrysler are seen as the tip of the iceberg. However, the field of white collar crime is very much broader – including crimes of counterfeiting, insolvency related crimes, employee fraud, investment fraud, and tax fraud (especially VAT fraud) and espionage.

The fraud legislation in Germany meets the international high standards. However, the system used is different from the Common Law system in shifting the proof of the crime and the asset tracing and recovery to the Public Prosecution. The remedies available to the victim therefore can be characterised as annexes to the remedies available to the Public Prosecution.

Surprisingly enough the victims' approach against white collar crime has changed recently. Whereas the Public Prosecution is still the driving force against white collar crime, the victims start to initiate legal proceedings against the criminals on the basis of civil law remedies.

In recent years the lawmaker has also strengthened victims' rights. In addition the EU influences on the national law led to the introduction of remedies known in the Common Law system as "Norwich Pharmacal/BankersTrust Orders" in the laws concerning intellectual properties.

It is foreseeable that in the future the EU influence will introduce similar remedies into other laws. In addition the German Federal Court held in 2007 that, even under the auspices of the Civil Proceedings, a victim might be entitled to actions against the defendant in order to obtain documents only available to the defendant. As such the German jurisdiction seems to adopt influences from the Common Law system in order to improve the victim's standing at court and to give a fair chance to obtain evidence in a broader way.

With regard to anti-competitive behaviour, on May 21st of this year the Federal Government passed the draft for the implementation of the EU Directive 2005/29/EG, which is expected to come into force early 2009. Measures to crack down on anti-competitive behaviour are in place by the Law against Anti-Competitive Behaviour (UWG) and others laws. The Law against Anti-Competitive Behaviour has been in place since June, 1909. However it has been amended and modernised several times, most recently in July 2004, in order to keep up with the developments and with the requirements of the EU Legislation.

I have been and am still involved in a case of the world's largest manufacturer of software against copyright infringements committed in Germany and Europe. This case demonstrates the need for a global approach and global cooperation of all authorities involved in order to fight back the attacks of the fraudsters who use the possibilities of a global market for illegal purposes.

Gibraltar

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Marrache & Co is a company commercial law firm that specialises in commercial litigation and, through its membership of Fraudnet, in the recovery of assets for defrauded claimants.

The legislation in Gibraltar is based on English Common Law and equity, Acts passed by the local Parliament, and EU Regulations and Directives. Gibraltar Law in operates on a number of levels. First is prevention: The EU money laundering Directive, the equivalent local legislation coupled with the emphasis on KYC is designed to prevent the jurisdiction from being used as a money laundering haven.

Both the legislators and the professional Regulators place a responsibility on terms practicing in the financial service field a responsibility to be vigilant and pro-active in supporting the initiatives and guidelines governing this area. Another level exists with certain remedies, available under local law, which allow claimants to pursue those who perpetrate a fraud and to use freezing and disclosure orders in order to try to secure and trace assets.

"It is possible to obtain the same remedies for claims that have been brought outside the EU through the use of Common Law remedies"

As part of EU legislation, Judicial cooperation permits a claimant to seek interim measures in other EU countries in support of any claim being made in Gibraltar. Conversely, a claimant in another EU jurisdiction, who traces assets in Gibraltar, can use the legislation to freeze those assets in support of a claim in that jurisdiction.

It is also possible to obtain the same remedies for claims that have been brought outside the EU through the use of Common Law remedies. There is a possibility that a trend is now emerging which is important to bear in mind if you are acting for a Defendant, of a crossover of actions by authorities utilising both criminal and civil litigation under the auspices of both Brussels Regulation and the mutual assistance treaties.

In one recent case, Marrache was involved in a Hedge Fund Fraud involving five jurisdictions, United States, the BVI, Switzerland, Spain and assets found in Gibraltar. The Claimants were EU and United States citizens, the Fund was based in the BVI, the principle office of the fund operators was in Spain and the US, and the banking facilities were provided in Gibraltar.

In Gibraltar we were able to obtain a freezing and disclosure Order to assist the proceedings in Spain, the purpose of which was to freeze the Hedge Fund accounts in Gibraltar and obtain disclosure from the Banks and the Corporate Services Provider. This enabled us to trace further bank accounts in the BVI and the United States from which we were able to trace who was the ultimate beneficiary of the fraud. Using the common law remedies we were also able to launch a similar action in the BVI in order to look behind the bearer's shares, thus showing also the identity of the fraudster.

Greece

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The classic concept of fraud in Greek legislation and case law is narrow, as it does not cover a wide array of potentially fraudulent behaviour. Criminal fraud requires deliberate misrepresentations, whereas creating false expectations or entering into a transaction in bad faith do not constitute per se fraud in Greece but may justify civil claims.

Around this classic narrow notion of fraud a number of other more flexible offences are provided for in various special statutes such as tax and customs fraud, EC subsidies fraud, securities fraud, creditors fraud etc. These cover a significant part of fraudulent market practices.

Commercial crime is set to continue being a major issue in legal and political debate in Greece, and tends to concentrate itself in three distinct areas. Firstly, Corruption practices in connection with business activity are a top target of contemporary crime policy around the world. States strive to strengthen their legal instruments in order to tackle sophisticated corruptive practices by private entities and government officials, which distort market competition.

"The current loan market crisis will raise issues of fiduciary duties and breach of the same towards investors who will seek compensation in commercial and criminal litigation"

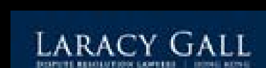
Anti-competition practices create another set of serious problems in crucial areas of business activity. Along with other efficient instruments, criminal sanctions shall be used to crack down on anti-competitive schemes. In recent years an independent agency, the Competition Committee has been established in Greece, whose task is to supervise the market and investigate into and sanctioning of anti-competitive practices.

Financial sanctions can be severe, as recent examples in the oil and food sectors demonstrate. The Competition Committee's harsh approach has raised serious criticism and sanctioned companies have been successful in court proceedings seeking to annul or suspend the execution of fines. On the other hand, criminal sanctions for anti-competitive practices are provided for in outdated special statutes which need to be overhauled.

Another typical area of Greek commercial crime is Securities fraud and other abusive practices, which are expected to initiate growing reaction including criminal proceedings against perpetrators. The current loan market crisis will raise issues of fiduciary duties and breach of the same towards investors who will seek compensation in commercial and criminal litigation.

In one current instance, we are representing Marfin Investment Group (MIG), a leading group of companies in the bank, financial, health, food and other sectors, in a criminal defamation case against leaders of opposition parties. They accused MIG of abusive practices in relation to the privatisation of the (partly) state-owned main telecommunications provider in Greece in a deal with German Deutsche Telecom. Our client maintains that MIG acted in full compliance with EU and domestic competition rules.

Hong Kong



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Hong Kong has a mature and sophisticated economy derived from a long and venerable history of international trade: the jurisdiction has accumulated both an enviable wealth of business acumen and an attraction for those who perpetrate fraud commensurate with such achievements.

While there have inevitably been rogues and heros along the way, by and large for every problem Hong Kong has eventually identified a practical or legislative solution to the needs of the moment.

The creation of new law in Hong Kong has historically been more responsive than proactive, and has traditionally followed in large part the legislation of the old British regime, but with necessary adoptions and variations to accommodate Hong Kong's particular domestic needs. Any perceived gaps have generally been filled in by the creativity and ingenuity of the judiciary and practitioners alike, or by remedial legislation in the fullness of time.

Unlike its fraud legislation, Hong Kong has traditionally adopted a non-interventionist approach to anti-competition, but this is set to change. Hong Kong is contemplating its first significant tranche of anti-competition legislation. After much discussion and public consultation, proposed legislation has now reached an advanced stage, with the Hong Kong Commerce and Economic Development Bureau having published a consultation paper which seeks to prohibit cartel style anti-competition practices and to curtail abuse of dominant market positions.

The proposed changes demonstrate the continued commitment of Hong Kong and its legislature to demand high standards of market discipline, and to caution that where necessary it will be backed up by a suitably robust regulatory framework, and sanctions.

In 2003, partially in response to the Enron and Sarbanes Oxley debacles, the Hong Kong Securities and Futures Commission conducted a thorough overhaul of the laws governing securities fraud and market manipulation, which in turn led to the enactment of the amended Securities and Futures Ordinance.

The Ordinance replaced and/or consolidated ten or so other ordinances governing market practices, and regularised the recognised forms of market misconduct into a significantly more manageable form. The legislation is an example of how Hong Kong seeks to answer problems created by a rapidly developing and increasingly complex global financial market with regulations and penalties of equal measure.

Problems in corporate America have obviously been vilified by the US department of justice, and acknowledged by the rest of the world. In an understandable desire to prevent a replication of the difficulties these scandals have led to, and to hold wrongdoers of similar acts accountable, Hong Kong has responded with legislation through revisions to its Securities and Futures laws. As a consequence, corporate governance is no longer an item conspicuous by its absence from the Board Meeting Agenda.

Ireland

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Fraud legislation in Ireland is based principally on the Criminal Justice (Theft & Fraud) Offences Act 2002 and its amendments. Obviously other legislation from employment and anti-money laundering is also relevant. The position in relation to anti-money laundering legislation arose principally in the wake of the 1995 murder of crime journalist Veronica Guerin. Three pieces of legislation were added to the Irish Statute Book to augment the anti-organised crime regime. The Financial Action Task Force (FATF) has recognised that Ireland has put in place a comprehensive and very solid legislative scheme for combating money laundering which meets almost all of the FATF requirements.

The recent Enron and Worldcom debacle resulted in the United States Securities and Exchange Commission (US SEC) and the United States Department of Justice (US DOJ) casting their net much further afield and in particular to European countries. The reach of the U.S. from both the civil and criminal perspective is extremely wide, for example, one of my clients, who returned to Ireland in 2002 with his family after a short two-year secondment in the U.S., was subsequently indicted in 2005 for events that occurred in a very short period in 2001. The case involved revenue recognition issues and despite the fact that we would have succeeded in preventing his extradition back to the U.S., he wanted to face his accusers and went to trial in the U.S. at the end of 2006.

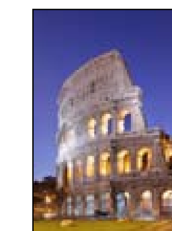
Our client was charged on five counts and the jury found him not guilty of one and, despite the fact that the jurors were 11-1 in favour of acquitting our client for the remaining four counts, the US DOJ subsequently re-indicted him again. We filed a Speedy Trial Act motion in the U.S., which applies when the defendant is prejudiced by delay from the US DOJ due to the legal costs and/or people forgetting issues etc. These motions are rarely granted and in actual fact it has a 90% failure rate but the U.S. Federal Court decided in our favour. We also filed a Double Jeopardy motion to strike out the current U.S. indictment and we await the decision from the U.S. Federal Court on that point.

Whilst our client continues to waive his extradition rights in order to clear his name the extreme financial cost of the U.S. litigation is ongoing and a new trial has now been rescheduled for October 2008. For the U.S. prosecutors, the whole process seems to have generated in to a case of having to win at any cost.

Another Irish client of mine, who never lived or worked in the U.S. but who was working for a U.S. subsidiary of a U.S. parent in which the U.S. parent had a revenue recognition issue, is facing a lifetime ban on being a Director and will face a US SEC civil trial in late 2008 / early 2009.

My advice, as a result of first hand experience in dealing with the US DOJ and US SEC, is that Europeans becoming Directors of U.S. subsidiaries need to seek very strong independent legal advice concerning their responsibilities. Directors can get themselves into situations in which they do not know what the parent is doing and the next moment they are being charged for wire fraud etc and become a target of the US SEC, or worse still, the US DOJ.

Italy



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Italy's fraud legislation can be seen as too theoretical and not practical for addressing the new forms of commercial crime, particularly serious frauds found in the financial markets. What will really be on the increase over the coming months is the number of bankruptcy crimes as a result of the credit crunch.

The Enron and WorldCom matters were in fact of little relevance to Italy, which has had its own share of scandals with the Cirio and Parmalat cases. As a consequence of these two groundbreaking cases, legislation relating to the financial markets has been reviewed and there has been a significant increase in the applicable punishments for this kind of crime.

However, the true problem here in Italy is not the severity of the punishment, but whether or not the punishment is an effective deterrent. Current legislation does not adequately punish crimes such as market manipulation and insider trading.

"On many occasions, as a result of our efforts during the investigative phase, criminal proceedings have not been commenced"

Meanwhile, we continue to be affected by legislation in the US, whose anti-fraud measures are characterised by hypocrisy. Many multinationals have not changed their behaviour as a result of the DOJ's actions - they now simply try to hide their actions abroad and claim local managers acted autonomously, shifting the blame away from themselves.

Astolfo Di Amato & Associati is considered one of the leading Italian firms in defending business crimes and investigations. We have advised corporations and individuals in the defence of investigations and prosecutions involving all forms of fraud, tax evasion, insider trading, bribery, kickbacks, counterfeiting, public corruption, money laundering, embezzlement, economic espionage and trade secret theft.

Clients include high level corporate officers, government officials, targets and witnesses. Our attorneys are experienced in handling all stages of defensive investigations and proceedings and specialise in managing parallel matters including civil litigation. On many occasions, as a result of our efforts during the investigative phase, criminal proceedings have not been commenced.

Our practice is among the most sophisticated in Italy. We regularly represent high-profile clients in cases requiring the utmost discretion. Often these matters require immediate and constant attention, and we are prepared to step in without delay. And, as these types of investigations and proceedings are usually disruptive, we work closely with the client in order to assist them in preserving a semblance of order and to allow their business operations to continue, to the extent possible. The team is also well placed to assist corporations with sensitive internal investigations.

Jersey

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Commercial crimes with their roots elsewhere in the world will tend to use an offshore trust to hide the proceeds, meaning a Jersey lawyer's role generally involves locating the offshore assets. But whilst commercial criminal activity in Jersey differs significantly from that experienced in the UK, anti-money laundering legislation in both jurisdictions is largely the same.

The sheer volume of commercial criminal activity involving Jersey trusts is unusual, and the price of hidden assets located there is extraordinarily high in many cases, and as a result of its potential vulnerability to such extremes, the financial controls are extremely severe.

Millions of pounds is pretty much run of the mill here, and litigation often involves billions. Before anyone can set up a trust or open an account there's a huge amount of due diligence that goes on. Prior to putting your money into a bank or trust, the relevant advisers must be satisfied that your money is legitimate.

"Jersey is trying to show the rest of the world that it's not an offshore tax haven"

Not only do you have to have proper confirmation of where the money has come from, you must have independent verification of that, along with passports, bank statements and all other relevant documentation.

The rigorousness of these checks is necessary to limit the attractiveness of Jersey as a location for criminal funds, and allows those institutions with valid intentions to set up there. In fact, Jersey has proved somewhat a beacon to the rest of the world for the legitimacy of offshore trusts.

There are a lot of very good and very legal reasons for having a trust. Jersey is trying to show the rest of the world that it's not an offshore tax haven. It is, however, a place which does a huge amount of perfectly legitimate financial business. The restrictions and regulations we have are designed to send that message across.

In spite of thorough legislation, the threat always remains from those seeking to cheat the system, and Jersey lawyers are as busy as ever. Jersey housed assets belonging to Enron when that scandal came to light, and the US Department of Justice appointed Jersey lawyers to recover the proceeds, freeze them, and send them on to be allocated according to litigation in the US.

One recent case that I worked on exemplified the distinctive position of offshore fraud lawyers within multi-jurisdictional commercial crime. Pell Frischman vs. Bow Valley involved allegations of fraud by a British engineering company against a Canadian oil company in relation to a Middle East oil well.

That litigation was conducted in Jersey because the Canadian oil company did its oil processes through a Jersey subsidiary. The case involved millions of pounds, and was a classic example of criminal activity happening elsewhere and being litigated in this jurisdiction.

Leichtenstein

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In its capacity as a highly developed industrial centre, Liechtenstein is a leading global player. As a financial centre with a tradition extending back many decades – in currency union with Switzerland – Liechtenstein has won international trust through its exacting quality standards. It has implemented very strict due diligence and anti-money-laundering legislation, and together with the European-standard anti-competitive-regulations, state of the art measures to crack down on anti-competitive behaviour are in place.

The legal system of Liechtenstein contains elements drawn both from Austria as well as from Switzerland. In addition, following the Principality of Liechtenstein's accession to the European Economic Area (EEA) in the year 1995, corresponding European directives have been implemented on an ongoing basis, which means, that the current legal system, notwithstanding certain unique features, is broadly comparable with those of the surrounding jurisdictions.

"FraudNet provides a new, innovative way to tackle fraud and track down and take action against the offenders using the combined strengths of a global network"

To secure our long-term reputation at Lampert & Schächle and consequent economic success, the firm's partners and associates take an approach which is tailored to the individual requirements of the respective clients, and render the required services promptly and with the maximum professionalism.

The firm serves a broad range of national and international, public and private, corporate and also individual clients. The main focus of our activities lies in business and company law in the broader sense, as well white collar crime. Our specialist area of practice, next to general commercial law, is asset recovery for victims in areas of international fraud, money laundering and corruption.

We are a member of the ICC's FraudNet, an exclusive society of attorneys-at-law which specialise in the prosecution of white collar crime and asset recovery for injured parties. FraudNet provides a new, innovative way to tackle fraud and track down and take action against the offenders using the combined strengths of a global network.

We handle major civil and criminal proceedings and high profile cases in many fraud and corruption matters with a link to this jurisdiction. In addition to this, we have assisted several national governments in issues related to white collar crime. We are currently for example working on a large scale corruption case on behalf of the Republic of Nigeria to recover assets stolen by its former Dictator Sani Abacha and his family, and we do represent right now also the state of Liechtenstein in the largest ever claim of public liability, a 200 million law suit.

USA

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US anti-fraud legislation has undergone significant changes in the last 10 years. Many parts of today's regulatory scheme would be unrecognisable to many practitioners operating before the collapse of Enron and the subsequent tidal wave of corporate crime investigation and prosecutions. The fall of Enron, combined with the events of September 11th 2001, have led the United States to implement a sweeping series of legislation designed to expand the government's powers to detect and affect financial transactions worldwide that it considers improper (e.g., furthering corporate crime or terrorist activity against the United States).

At the same time, however, there has been a slow but noticeable retrenchment of the aggressive sentencing policies that had been implemented during the 1980s. During the 1980s, the United States passed a series of laws to toughen criminal sentences, in the wake of widespread concern about lenient treatment for narcotics trafficking offenders. After sustained publicity concerning some of the unintended and unjust outcomes in individual cases that resulted from the sentencing scheme implemented after the 1980s, in recent years, both the courts and Congress have begun building in greater flexibility and opportunity for leniency into the sentencing scheme.

We currently expect to see a continuation of the high levels of enforcement activity by the US Department of Justice against conduct occurring outside the United States. Various legal changes originally intended to implement the U.S.'s post-September 11, 2001 anti-terrorism policies have been used by various law enforcement agencies to expand the scope of their international jurisdiction, and this trend appears to be continuing.

Areas where the U.S. Department of Justice and other government agencies have continued to increase international enforcement activity have included: Foreign Corrupt Practices Act (FCPA) violations; anti-cartel investigations; international asset forfeiture proceedings; and violations of prohibitions on doing business with various listed countries, embodied in the Department of Treasury's Office of Foreign Assets Control (OFAC) regulations and other legal restrictions on conferring economic benefit on sovereigns and groups considered by the United States as sponsoring terrorism.

Many believe that the U.S. Department of Justice sees itself as a 'world policeman', purporting to enforce against conduct that occurs largely or sometimes exclusively outside the United States. However, to a large extent, the U.S. Department of Justice's continuing aggressive campaign to assert jurisdiction in other countries is simply a reflection of the many legislative initiatives that were implemented after September 11, 2001. As with many legal reforms, the tools granted to the government have come to be used for many purposes that were perhaps not contemplated by the original architects, and the anti-terrorism laws in many cases are now used to pursue corporate criminal cases instead.

New Zealand

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Wilson Harle is an independent specialist commercial litigation firm with a major focus on commercial regulation. It is large enough to handle major disputes but its focus on litigation, and resulting size compared to large full-serve firms, means that it has fewer conflict issues and is usually able to mobilise at very short notice.

The major areas in which we are involved are the Commerce Act, which is concerned with anti-competitive behaviour, Fair Trading Act, which focuses on false and misleading conduct in trade, the Securities Act, which deals with breaches of securities market disclosure requirements and insider trading and Credit Contracts and Consumer Finance Act which is concerned with the regulation of consumer credit contracts. These statutes create a mixture of criminal sanctions, investigated and prosecuted by a regulator, and civil remedies available through private action.

The measures adopted to control anti-competitive behaviour are a mixture of punitive regulations and civil remedies. The Commerce Commission acts as both a regulatory decision-maker in some areas, and as an investigator and prosecutor of criminal offending under the Commerce Act and Fair Trading Act. In addition, the Commerce Act provides for civil remedies brought by private action by parties who have suffered loss from anti-competitive conduct or unfair trade practices. The remedies include compensatory damages and punitive damages, but do not include provisions such as an entitlement to treble damages.

"We are presently acting for parties in a series of international cartel investigations and prosecutions"

In terms of recent competition cases, we worked on the Koppers Arch cartel case, concerning the timber preservation market in Australia and New Zealand. The case resulted in the highest ever penalties imposed in New Zealand on both corporate and individual defendants, exemplifying the increasingly punitive approach to commercial regulation. We are presently acting for parties in a series of international cartel investigations and a series of international cartel prosecutions which exemplify the increase in international collaboration between regulators.

In addition to commercial regulation, we handle criminal fraud cases in a commercial context. This usually involves pursuing civil remedies for compensation, recovery of assets and asset freezing, obtaining evidence and liaising with regulators, investigators and liquidators.

We are the New Zealand member of FraudNet. The FraudNet network is a powerful weapon in the recovery of the proceeds of fraud which may be hidden in numerous jurisdictions. The network involves a number of individuals and firms who provide trusted expertise distributed internationally. The network allows sharing of information and rapid co-ordinated action in many jurisdictions at once to ensure that fraudsters are not alerted. Achieving the latter requires high levels of trust in both expertise and integrity among the members involved.

Nigeria

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Since gaining independence from the UK in 1960, Nigeria's anti-fraud legislation has remained rudimentary at best, and financial service frauds, as well as political scandals are still rife. The descent of American corporations on the country's oil sector has also generated investigations emanating from the US.

Nigeria has made legislative attempts at addressing its number one problem in white collar crime; governmental and political corruption. But the general failure of these efforts has spilled down into other areas of commercial crime legislation, the enforcers of which are inconsistent in practice.

The basic elements of the offences created by statute remain as they were in pre-independence days. This coupled with the inconsistencies of the agencies charged with the enforcement of the legislation makes it largely ineffective.

"Some of the biggest impact on commercial crime in Nigeria has come from the US Department of Justice, where US corporations have been held to account after investing in Nigerian oil"

Nigeria is also lacking in regulation of anti-competitive behaviour, and legislation to protect against antitrust is basically non-existent, making the system vulnerable to considerable exploitation. There has been no legislation in this field post-independence and there was no pre-independence legislation, as this was not a field that the British or its successor governments considered to be important.

About five or six years ago there was some talk of the government's privatisation agency promoting anti-competitive legislation as part of plans to privatise government monopoly corporations. However, nothing appears to have come from that, and there is still no significant legislation.

In fact some of the biggest impact on commercial crime in Nigeria has come from the US Department of Justice, where US corporations have been held to account after investing in Nigerian oil. One instance occurred when a US company was fined $32 million by the Department of Justice, after having agreed to pay bribes to Nigerian officials in order to secure contracts.

This was only one event in an ongoing series of cases emanating from US corporations. There are reports that the Department of Justice and the SEC have been engaged in at least 10 investigations in Nigeria over the past 12-18 months.

The interesting work in which we have been involved recently relates to US investigations of activities of US corporations in the Nigerian oil sector. We have not been engaged in any recent cases relating to Nigerian competition because there is no legislation to speak of.

The Netherlands

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In the last few years we have seen an unmistakable increase in the wariness of white collar crime in the Netherlands. Consequently there has been an increased political, budget and skills focus in this area. Some developments have been driven by events in the USA. In particular, the far-reaching influence of Sarbanes Oxley has been felt by Dutch companies.

However, we have also seen more autonomous and EU-driven developments in prevention and suppression of white collar crime. There has been tightening legislation, much of it from EU origin, in the field of administrative financial supervision, along with an increase in the budget for public watchdogs concerned with the financial integrity of companies. The introduction of Dutch legislation regarding class action proceedings for civil litigants and the tightening legislation on bankruptcy and management fraud have also been significant.

"Dutch courts also are increasingly willing to hold liable not only the principal offenders but also secondary persons and entities for their failure in the proper care or supervision"

In the Netherlands we have seen the increased global attention to white collar crime take the form of both criminal law and civil liability law. For example, the MDs of the multi-listed and multinational company Ahold NV were found guilty of financial reporting fraud by the Amsterdam criminal court. They have been punished with penalties and conditional prison sentences. The case and its punishments, though still under appeal, are unprecedented in Dutch criminal history. It is generally assumed that the development of this case would not have been possible without the context of the international focus on fraud, in particular that from the USA.

For deprived stakeholders, criminal prosecution may provide recognition and worthwhile fact finding. This can then lead to a possible civil proceeding in order to compensate damages. Parallel criminal proceedings may be helpful to civil litigation in specific kinds of cases, but more often than not asset recovery pursuant to fraud has its own autonomous dynamics.

Dutch courts also are increasingly willing to hold liable not only the principal offenders but also secondary persons and entities for their failure in the proper care or supervision. This may include supervisory directors, auditors, banks, and even public watchdogs such as the Dutch Central Bank.

Our firm has wide experience in fraud litigation, particularly in bankruptcy cases. Lawyers from our firm are regularly appointed as trustees in bankruptcy, and have wide experience in both investigation and litigation regarding (bankruptcy) fraud, both nationally and cross-border. Furthermore we represent, amongst others, joint creditors, shareholders and major financial institutions in national and multinational fraud litigation inside and outside bankruptcy.

UK

LG

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The inherent risks that all corporates and their directors face have increased over recent years, partly as a result of public law and private law remedies that are available to the authorities and others, including for example investors and shareholders who may seek to hold others accountable for their acts or omissions.

This includes corporate corruption where best practice is expected from corporates and those who manage them. In short, corporates now have to recognise good social responsibility, both in dealing with counterparties here and in other jurisdictions and in managing the conduct of their officers and employees. It is simply not acceptable to ignore bad practice and like every other aspect of a business, risk and the threat of corruption need to be effectively managed.

On the private law side, there has also been an increase in the number of so-called 'class actions'. It seems now that no incident that causes reputational damage and impacts on share price is immune from scrutiny and the potential of a claim by those who may have suffered a loss.

Our corporate fraud practice deals principally with fraudulent directors and employees who abuse their fiduciary duties. We have, for example been involved in the BCCI scandal dealing with the most extreme examples of employee corruption, which now includes multi-jurisdictional litigation and asset tracing. We also specialise in procurement fraud, including public procurement. In this area we act for the Government of Brazil and the Municipality of Sao Paulo in the civil claims against Paulo Maluf the former mayor of Sao Paulo who is alleged to have taken 'kick backs' of hundreds of millions of dollars on public construction projects.

"Corporates now have to recognise good social responsibility, both in dealing with counterparties here and in other jurisdictions and in managing the conduct of their officers and employees"

Both the BCCI case and the Sao Paulo case are examples of where we have project managed multi-jurisdictional fraud and asset tracing matters, sometimes where there is no litigation in London at all. Like New York, London is still seen as a centre of excellence for multi-jurisdictional fraud cases and it is always important to have someone in a co-ordination role to ensure that the legal team across various jurisdictions are aligned in their objectives and the approach taken.

Ukraine

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The fraud legislation in Ukraine is underdeveloped, it is riddled with contradictions, and is difficult to enforce effectively. Generally, transparency and independence is lacking throughout many state bodies which implement competition legislation, and international arbitration procedures are extremely immature.

Ukraine celebrated 10 years of independence in 2001 and this short period has not been long for it to overcome the legacy, including high levels of corruption, ingrained during the former USSR's existence. Corruption permeates much of Ukrainian life, and the country has been labelled as one of the most corrupt countries in the world, and is ranked 118th out of 179 countries in 2007's Transparency International index, on a par with much of the developing world.

A member of the New York and Brussels Conventions, Ukraine is not the easiest jurisdiction when it comes to international arbitration. Despite being a UNCITRAL Model Law country and a member of all major international arbitration treaties, Ukrainian jurisdiction does not offer an arbitration-friendly environment and may be presenting more practical problems than a practitioner would anticipate.

Generally, it would be fair to say that any nexus to Ukrainian jurisdiction could potentially present problems, many of which arise due to a general lack of law enforcement in the country. However, many of the nuances emanate from applicable secondary legislation, which often does not lie on the surface.

Competition law is indeed one of the victims of such a lack of law enforcement in Ukraine. In one recent case, a shareholders agreement contained a non-compete clause. The dispute was widely publicised and the non-compete clause was discussed on a number of occasions, but the anti-monopoly committee did not take any action to investigate, despite the fact that it does have the power to initiate such investigation.

At Magisters, we are honoured to have recently joined FraudNet, the world's leading association that combats the global problem of fraud and asset recovery. The firm hopes that our membership will bolster our arbitration practice.

Magisters has experience representing interests of the fraud victims using multiple litigation tools and techniques, and our membership in FraudNet greatly adds up to the depth of our expertise. FraudNet members are selected carefully using a strict set of criteria governed by the FraudNet Standards & Procedures Committee, and this ensures that only the best specialists like Magisters with a clear track record in this area are invited to join the network. Our associates have successfully handled complex disputes that involved fraud and commercial crimes; provided a full range of services, including data gathering, risk assessment, counselling on interaction with law-enforcement authorities. Magisters has also conducted internal investigations in various areas of potential prosecution and advice on best remedial actions.