

THESE ARTICLES ARE PART OF A SERIES
provided exclusively to **GIR** by members
of the *International Academy of Financial
Crime Litigators*.



Gold mining
to save the
planet?
It just doesn't
happen.

– Mark Pieth

Mark Pieth is Professor of Criminal Law at the University of Basel and author of a new book, Gold Laundering: The dirty secrets of the gold trade – and how to clean up.



TA

Gold trade compliance standards are weak, says Mark Pieth

07 October 2019



Gold has profoundly influenced the course of world history, including the conquest of Latin America and the development of the modern banking system. Trading figures are immense. On an average day in August 2019, over 4,000 transactions involving gold with a notional value of over US\$36 billion took place between the five members of the London Precious Metals Clearing Limited clearing system alone. In total, approximately 4,500 tons of gold are processed each year worldwide, with most of it – around 3,000 metric tons – newly mined.

Where, in this picture, is the responsibility for making sure that gold today is mined to minimise social and environmental impacts? The surprising answer is nowhere. The reason has something to do with the honest statement in 2016 by Dr Jürgen Heraeus, whose family business owns the high-profile Swiss refinery Argor-Heraeus, that “in this industry it is not possible to refine clean gold.”

Arguably the biggest challenges relate to the 20% of the world's gold that is mined by small-scale miners. I have witnessed the effects of some of these personally. Over 5,000 metres high in the Peruvian mining shanty town of La Rinconada, men and women amalgamate gold with their bare hands using mercury before burning the highly toxic element off into the air. Over 4,000 Peruvian and Bolivian women are estimated to have been forced into prostitution in La Rinconada alone, and the miners work under an informal labour system known as *cachorro* – 27 or 28 days per month without pay in order to be granted a couple of days to mine for gold for themselves. Conditions have not changed much since the days of the Incas and the Spanish conquistadores.

Child labour and conflict are other major risks in small-scale mining; estimates suggest that one million children are working in mines worldwide. The Democratic Republic of the Congo and Sudan offer sobering examples of how gold fuels conflict in war-torn areas, with official armies and rebel groups financing their war efforts with looted gold.

Confronted by these human rights and environmental challenges, some companies in the gold supply chain – such as Swiss gold refinery Metalor – have opted for a risk-averse approach by imposing a blanket ban on all gold from small-scale mines. Yet if refineries and other players further down the supply chain believe that using gold mined only by giant multinational industrial companies will keep them out of trouble, they are wrong.

Large mines are vulnerable to major environmental problems such as the pollution of drinking water, the production of thousands of tons of waste making the landscape uninhabitable, and the creation of “acid mine drainage” – when disused underground mines flood and release contaminated water into rivers and farmland.

Social problems add to the environmental ones. Central governments often hand out mining licences for huge concessions covering the traditional farmland of indigenous communities. These licences may be acquired through corruption: there is clearly a nexus between companies, including multinational mining enterprises, trying to obtain licences at any cost and local elites ready to sell the riches of their country for private gain. Conflicts between mining companies, authorities and private security on the one hand, and the local population on the other, are likely to result in serious violations of the human rights of indigenous populations – as at North Mara mine in Tanzania, operated by London-based Acacia Mining, which is majority owned by Canadian gold-mining giant Barrick (Acacia and Barrick deny responsibility).

Corruption is not the only reason why commodity-rich countries such as the DRC, Nigeria or Venezuela frequently end up with poverty-stricken populations. The so-called resource curse is also a consequence of profit-shifting from the location where the value is generated to low-tax jurisdictions and offshore financial centres.

Sourcing only from industrial mines, therefore, allows gold refineries and traders to tick the compliance box and pass some perfunctory audits, but it does nothing to mitigate the risks of social and environmental abuses. Moreover, it promises to destroy the livelihoods of the 13 million small miners – and the estimated 100 million or so individuals in total – who rely on the industry. I describe all this because a major function of the law is to protect vulnerable people in all countries from abuses by more powerful players. Where there are competing interests at stake, people are at risk and it is clear that only binding regulations, enforced consistently and internationally, are strong enough to afford proper protection.

The main instrument governing the global gold trade is the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Adopted in 2011, the guidance was sparked by the final report of the United Nations Group of Experts on the Democratic Republic of the Congo, which documented how mining of gold and other precious metals had fuelled conflict and human rights abuses in eastern Congo during the country’s protracted civil wars.

Annex I of the guidance recommends a sensible and practical five-step framework for risk-based due diligence throughout the mineral supply chain:

1. Establish strong company management systems.
2. Identify and assess risk in the supply chain.
3. Design and implement a strategy to respond to identified risks.
4. Carry out an independent third-party audit of supply chain due diligence at identified points in the supply chain.

5. Report on supply chain due diligence.

The guidance was followed a year later by the OECD's Gold Supplement, which translates the five-step framework into great detail for each level of the gold supply chain and describes red flags for enhanced risk assessment.

Together, the two documents represent the global standard on responsible sourcing of minerals, including gold. But they are not legally binding.

"Regulation" of the gold trade is currently left to a cluster of trade associations, namely the London Bullion Market Association, Responsible Jewellery Council, World Gold Council and Dubai Multi Commodities Centre. The associations have all developed their own sets of industry standards based loosely on the OECD texts, but with some major weaknesses.

In brief, the industry standards mainly focus on providing assurance to downstream clients and stakeholders. They do not compel refineries, or other companies dealing in gold, to conduct comprehensive due diligence upstream along the chain of suppliers to where the human rights abuses and environmental damage take place. Audits, where they are performed, are little more than an exercise in paperwork, and transparency is severely lacking.

For me, a fundamental question is: how can an association set up to promote the gold trade be credible in also supervising it?

The US at one point seemed to be leading efforts to introduce more transparency into the minerals supply chain. Section 1502 of the Dodd-Frank Act obliged US companies dealing in potential conflict minerals to implement a compliance programme and file reports on their compliance efforts to the Securities and Exchange Commission each year. Key parts of the Dodd-Frank Act, including section 1502, have unfortunately since been repealed by the Trump administration.

The Conflict Minerals Regulation, when it comes into force in 2021, is a noteworthy attempt to translate the OECD Due Diligence guidance into European law. EU importers will be subject to detailed reporting obligations and the European Commission will maintain a list of "global responsible smelters and refiners". Furthermore, member states must designate competent authorities to carry out "appropriate ex-post checks".

As long as it is properly enforced, the EU's Conflict Minerals Regulation will show that mandatory regulation and supervision by public entities of due diligence requirements in the mineral supply chain is perfectly possible. It is, however, the only example of hard law in this area and it only applies to EU countries. The other international standards are voluntary, and there is nothing to compel major gold-refining countries – Switzerland, the US and the UAE – to conduct proper due diligence on the source of their gold or to report on it.

Across the world, well-meaning individuals and organisations are attempting to supplement this soft-law picture to help clean up the dirtiest parts of the gold supply chain. Certification for fairly mined gold, such as the Fairtrade or Fairmined labels, can help raise standards and salaries for small-scale miners. In my home country of Switzerland, there are efforts to help small-scale mines access global markets directly to avoid being exploited by middle-men.

Laudable as they are, these initiatives have a marginal effect and are implemented patchily across the world.

So, who is responsible for mitigating the social and environmental risks in the gold supply chain and answering to abuses in a court of law? I place a lot of responsibility on the gold refineries as the point where the gold is "laundered" and loses the traces of its problematic past. The refineries, I argue, are the gatekeepers to the nice world of clean gold – the world of jewelry, big finance and reserve banks.

Yet it is also true that without binding international laws making supply chain due diligence mandatory right back to the source of the gold, and without transparency and strong reporting requirements, the refineries are gatekeepers without any gates.

Mark Pieth is Professor of Criminal Law at the University of Basel and author of a new book, Gold Laundering: The dirty secrets of the gold trade – and how to clean up.

This article is part of a series of articles provided exclusively to GIR by members of the International Academy of Financial Crime Litigators, a collaboration between public- and private-litigation professionals and the Basel Institute on Governance to expand worldwide access to solutions in cases of economic crime.

Amped-up
use of foreign
agents registration
law won't hike
compliance.

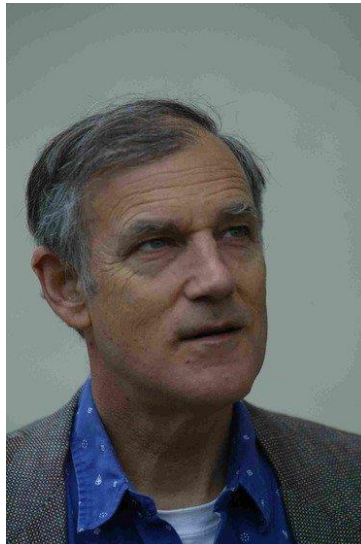
– *Bruce Zagaris*



TA

US Justice Department acts to increasingly enforce FARA while practitioners call for clearer rules

13 August 2019



Bruce Zagaris

Bruce Zagaris at Berliner Corcoran & Rowe in Washington, DC argues that the increased enforcement of the Foreign Agents Registration Act along with enhanced enforcement tools and no significant clarification of the ambiguous provisions of the law will produce more enforcement actions and yet not more compliance.

As the US Department of Justice (DOJ) ramps up prosecutions for violations of the Foreign Agents Registration Act (FARA), professionals, academicians, and think tanks who may be in its crosshairs are increasingly seeking counsel on the potential applicability of the act. The law was enacted in 1938 to prevent covert foreign influence and ensure that the US government and the people of the United States are informed of the source of information (propaganda) and the identity of persons attempting to influence US public opinion, policy, and laws. Meanwhile, on 10 June, a bipartisan coalition of senators introduced S. 1762, the Foreign Agents Registration and Disclosure Act of 2019, which would amend FARA by giving the DOJ more tools and resources to improve FARA enforcement. Simultaneously, the National Security Division (NSD) announced that the FARA unit – which sits within the NSD's counterintelligence and export control section – intends to enforce, including by criminal prosecutions, violations of FARA. But the regulated community rightly complains about FARA's wide scope and its lack of clarity, challenging the best efforts to comply in some cases.

Globalisation and the emphasis on unprecedented and questionable uses of United States economic statecraft in the way of trade protection and unilateral economic sanctions require that foreign sovereigns and other foreign persons impacted by US economic measures need to increasingly seek professional advice to understand the impact of the new measures, as well as to challenge and/or seek licences. In many cases the professionals from which they seek advice will need to ascertain whether their work requires registration under FARA. The assistant attorney general for the National Security Division, John Demers, a political appointee, publicly announced the Justice Department's intention to make FARA a criminal enforcement priority on 6 March.

Until now the FARA unit has emphasised facilitating compliance with the law and providing guidance to regulated persons. When the unit identified an unregistered foreign agent, it typically worked with the agent to register and, sometimes retroactively, disclose its activities. Until the last year the few FARA prosecutions that occurred since FARA was amended in 1966 with an expanded focus on economic lobbying involved some other kind of egregious criminal activity.

A major concern for the regulated community that deal with foreign governments is that FARA includes vague and inadequately defined terms, which makes it difficult to know whether a person is exempt or must file. FARA does not have a threshold that would exempt incidental and *de minimis* activity. The interested community includes corporations, non-profits, law firms, lobbying firms, think tanks and others who deal with foreign governments and persons. A new problem for professionals seeking advice from the FARA unit is that it, until recently, readily gave informal advice. Now they are more reticent to give such advice, fearing that, unless callers put their facts in writing and seek formal opinions, the callers may misuse the informal advice. Due to the time and cost of seeking formal opinions, the result is that callers do not obtain any advice. While FARA exempts certain activities, such as normal legal advocacy, the line between normal legal advocacy and "political activities" may not be clear. Even one meeting with the US government (eg, pre- or post-litigation or administrative proceeding) that exceeds the bounds of the legal exemption may trigger a registration requirement.

Another grey area is that FARA exempts persons whose activities are of a purely commercial nature or solely of a religious, scholastic, academic, scientific or fine arts nature. However, some businesses or academic organisations may have a sovereign ownership or control and they in turn may have a US subsidiary. If the sovereign is Chinese or Russian, and the US subsidiary is preparing to engage in activity that may arguably include persons from the US executive or legislative branch or the activity may influence a segment of the US public, then the question arises whether the US persons helping them are potential agents who should register notwithstanding that the activities are of a purely commercial nature or are solely of an academic nature. In particular, the US government has expressed concern about Chinese scholars at US universities and the potential they may steal intellectual property of a sensitive nature.

In its September 2016 audit of the enforcement and administration of FARA, the DOJ's Inspector General recommended that the NSD consider the value of making advisory opinions publicly available. To address the uncertainty, the FARA unit published 50 advisory opinions on its website on 8 June. FARA and its accompanying regulations do not allow anyone other than the requester to rely on a FARA advisory opinion. Since its longstanding past practice is to not release opinions publicly, it is unlikely that the FARA unit originally drafted these opinions with the intent that they would serve as guidance both for the requester and for the conduct of other similarly situated entities. However, the FARA advisory opinions also lack important contextual and factual background in many cases. This is because the DOJ has not posted the request letters that correspond to the opinions (unlike the Federal Election Commission), and the identities of the requestors and foreign entities involved are redacted from the opinions. In some opinions the available record does not contain all the facts that were material to DOJ's conclusions.

Law firm Skadden Arps Slate Meagher & Flom has been a target of FARA enforcement as a result of the special counsel investigation overseen by Robert Mueller. In February 2018 Alex van der Zwaan, a former Skadden lawyer, pleaded guilty to making false statements. Van der Zwaan was involved in the dissemination of an unflattering report on then Ukrainian Prime Minister Viktor Yanukovich's political rival written by Skadden as part of the work of Paul Manafort, a former presidential campaign manager for Donald Trump, for the then-Ukrainian president. The special counsel's office accused

van der Zwaan of lying about his communications with Rick Gates, a partner of Manafort, and Konstantin Kilimnik, a long-time business associate of Manafort.

Skadden entered into a settlement agreement resolving its liability for FARA violations in January. The agreement relates that Skadden acted as an agent of the government of Ukraine within the meaning of FARA by participating in a public relations campaign directed at select members of the US news media in 2012. The DOJ alleged that in 2012 and 2013, in response to multiple inquiries from the FARA registration unit about its role in that campaign Gregory Craig, then a partner at Skadden, made false and misleading statements to the FARA unit.

Thereafter, the FARA unit concluded in 2013 that the firm did not have to register. In fact, Skadden was active in the public relations aspects of the report but misled the FARA registration unit in that regard.

When more facts were known, Skadden should have been required to register in 2012, and ultimately the firm registered retroactively.

Skadden agreed under the settlement to pay the US Treasury more than \$4.6 million, which it received in fees and expenses for its work with Ukraine, and to ensure that it has formal, robust procedures for responding to inquiries concerning its conduct from any federal government entity and ensuring FARA compliance as to its engagements on behalf of foreign clients.

Skadden has taken substantial steps to comply with the terms of the settlement agreement and has cooperated extensively with the DOJ in its investigation, including with the special counsel's office and the National Security Division in relation to the settlement. Skadden has strengthened its internal procedures and processes.

Meanwhile, Craig has been charged with making false statements and concealing material information about his activities on behalf of Ukraine during the Presidency of Viktor Yanukovich from the FARA unit. Craig has said the allegations against him are "unprecedented and unjustified."

In another recent FARA case, US District Court Judge Robin L Rosenberg ruled on 13 May that a Florida-based company, RM Broadcasting, was acting as an agent of a foreign principal and must register as such under FARA. The DOJ argued in a civil counterclaim that RM Broadcasting has been acting as an agent of the Federal State Unitary Enterprise Rossiya Segodnya International Information Agency (Rossiya Segodnya), a Russian state-owned media enterprise created by Vladimir Putin to advance Russian interests abroad. The litigation marked the first civil FARA enforcement action since 1991. The enforcement action exemplifies another formerly exempt area of FARA which now the DOJ has decided to remove. Section 611(d) provides "(t)he term 'agent of a foreign principal' does not include any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication ..." However, the DOJ has decided that, notwithstanding the exemption in the law, RM Broadcasting must register because Rossiya Segodnya is not independent of the Russian government.

Demers' announced intention to enforce FARA, the Skadden settlement, the Craig indictment, the recent convictions for FARA-related violations of Manafort, Gates and former national security adviser Michael Flynn, and US lobbyist Samuel Patten may well cause other law firms and organisations with significant international practices to modify their client intake and training procedures.

Meanwhile, S. 1762, the bill to strengthen the implementation and enforcement of FARA, will permit the DOJ to bring civil enforcement proceedings and broaden civil discovery authority. It will enable DOJ to compel material or testimony it requires to assess if a person must register. At present, the DOJ can only ask persons to volunteer this information. The proposed law increases the ceiling on criminal fines for wilfully making a false statement or material omission from \$10,000 to \$200,000 and introduces civil penalties for faulty registrations, as well as for failing to file a timely or complete FARA statement.

FARA's enormous breadth, its ambiguous definitions, the lack of meaningful guidance and the political nature of FARA, enable opponents of think tanks, non-profits, and others working with foreign

governments, and persons, to increasingly file complaints with DOJ to trigger investigations of their opponents.

With increased enforcement of FARA, Washington lawyers are fielding many inquiries from the persons dealing with foreign governments about whether they need to register under FARA. Many persons hesitate to register under FARA, especially for foreign governments or persons who possess less-than-stellar reputations, because they fear it may sully their firm's reputation. Foreign principals may hesitate to have their agents register because the FARA filings are available to the public. Many foreign principals are wary of having their political strategy available to the public. Nevertheless, the spirit of the legislation is that, when in doubt, persons potentially covered should register or at least try to obtain guidance or even a formal opinion from the FARA Unit.

Since FARA requires registration for political activities and those activities may be advice or the preparation of a press release that impacts a small segment of the US public (e.g., a municipal or regional segment), many foreign persons and US professionals may not realise that their activities require registration and nevertheless may violate FARA.

The recent FARA prosecutions, the warning from Demers about the prioritisation of enforcing FARA, the lack of clarity of the law and the inability to easily obtain informal advice, portends new legal skirmishes about the application of the law.

This article is part of a series provided exclusively to GIR by members of the International Academy of Financial Crime Litigators, a collaboration between public- and private-litigation professionals and the Basel Institute on Governance to expand worldwide access to solutions in cases of economic crime.

Beware
doing internal
investigations
abroad: Local
rules can trip
you up.

– *Frederick T. Davis*



TA

How national and local professional rules can mess up an international criminal investigation

Frederick T Davis
17 June 2019



Fred Davis of Debevoise & Plimpton

Debevoise & Plimpton's Frederick T Davis examines the problems lawyers can experience if they pay insufficient attention to local rules when conducting internal investigations abroad.

Financial and many other crimes these days do not respect national borders. Many – such as money laundering, bribery and terrorism, to name a few – are becoming “international” in at least two senses: the evidence relating to them may often be found in more than one country; and the prosecutors of more than one country may pursue the same set of criminal acts. A cadre of internationally savvy white-collar criminal lawyers, including specially trained teams in large multinational firms, have stepped up to address the challenges of multi-jurisdictional prosecutions. There has been renewed interest in well-known criminal procedures such as extradition and treaty-based cross-border evidence gathering. We are also seeing the emergence of new problems, such as the impact of multi-jurisdictional investigations formally organised in joint investigative task forces; getting access to data no longer physically found only on local servers but now often stored in the Cloud and away from sovereign regulation; and the increased use of blocking statutes.

Less obvious, and infrequently analysed, is the effect of professional rules relating to lawyers, and how differences among those rules affect transnational and multi-jurisdictional criminal investigations. While crimes (and the evidence of them) ignore borders, professional rules do not. Lawyers often bring with them the professional rules of their home jurisdiction and then confront the rules applicable to the places where the investigation is taking place. The differences among these rules – and more importantly, among practices in each country – can create subtle but important problems.

This article will offer an overview of these challenges, and suggestions of how they may (if not appropriately addressed) lead to unanticipated difficulties and suboptimal outcomes. Some issues noted here are matters of local procedure and professional rules that can be researched, but this article also argues that more subtle – and essentially cultural – differences in lawyers’ roles must also be understood.

Practice of law

Countries (or their subdivisions) have rules licensing those allowed to practise law within their borders. Violations of these rules may lead to penalties imposed on the lawyer but also to repercussions that affect a client, such as a finding that a communication considered protected by professional privilege was in fact not. Few lawyers would be crazy enough to take publicly visible acts as an attorney – such as attempting to appear in court – in a country where he or she was not authorised to do so. In less visible activities, such as conducting an internal investigation, however, one often sees lawyers licensed to practise in one country informally interviewing potential witnesses in another. Doing this is not without risk. Internal investigations are increasingly common outside the United States, but in some countries their conduct is vigilantly watched by the local bar to ensure that members of the profession respect the rights of interviewees and comply with professional standards. In France prior to 2016, for example, there was considerable doubt over whether a French lawyer (*avocat*) could conduct an internal investigation at all. A Paris Bar opinion issued in March 2016 and subsequent guidelines provide that conducting such an investigation is acceptable – but emphasised the professional responsibilities inherent in doing so, strongly implying that the Bar would supervise the practice and intervene if a complaint were brought to its attention. I believe that a lawyer conducting even informal interviews in a country where he or she is not licensed runs a considerable risk if the local bar learns of this. Further, prosecuting authorities in many countries are more sensitive than in the United States to defence lawyers interviewing potential witnesses – often concluding that the purpose is to tamper testimony. Local lawyer participation in interviews, and advice on whether to conduct an interview, is essential.

Professional privilege – the status of the interviewer

In some jurisdictions, the central role of lawyers in investigations is considered normal, and well protected: either in-house counsel or a lawyer in professional practice can conduct interviews, gather evidence and discuss strategy with little fear that the fruits of that process can be compelled for production without consent. These activities are firmly considered to be protected by attorney-client privilege, and often by work-product privilege as well. As long as common-sense (but vigilant) protocols are followed, both attorney and client can rest assured that interviews, their product and any discussion relating to them will remain secret. This may not be the case in other countries. In Europe generally, in-house counsel are not considered capable of generating a professional privilege, and often may not even be allowed to be (or remain) a member of the bar; such a person’s communications (even consisting of legal analysis) may not be protected if disseminated internally within the corporation. Further, professional secrecy rules in countries around the world simply vary far more than many people realise. For example, in some countries a communication from one lawyer to an adversary – which would normally be considered unprotected by an attorney-client privilege in the United States – is protected in the sense that neither can pass on that communication to a third person nor use it in litigation. In short, lawyers who assume that their communications will be treated like they would be in their own jurisdiction may be surprised.

Professional privilege– the circumstances of an investigation

Even if a set of interviews (or another aspect of an investigation) is being conducted by a local attorney, care must be taken to ensure that the conduct of the investigation complies with local professional requirements necessary to protect its product from possible compelled disclosure.

In some countries, for example, a lawyer advising or representing a corporation must consider the “client” to be restricted to senior corporate officers who seek legal advice on behalf of a corporation, and are authorised to act on it; communications with officers or employees not in this core group may fall outside of a professional privilege.

In other countries a professional advice privilege is considered applicable only if it is objectively clear that the client is in a situation requiring the advice of a lawyer. An investigation conducted when there is no objective likelihood of adversarial or prosecutorial threat may not be protected.

These and other concerns that may arise under local professional rules must be carefully explored at the outset of any investigation, in close consultation with a local expert. In most situations, risks can be diminished or eliminated by developing careful protocols relating to client communications and making a record of the circumstances generating the need for the investigation.

Professional conduct

Local professional rules may also provide guidance on how interviews and other forms of investigation take place. The US Supreme Court decision in *Upjohn Co v United States*, which held that an investigation conducted by an attorney (including in-house counsel) is normally covered by the attorney-client and work-product privileges belonging to the corporate client rather than to the person being interviewed, led to the salutary practice of giving *Upjohn* warnings to interviewees, informing them that the lawyer owes no professional obligation to the interviewee. Local bars are developing variants of this approach that need to be followed carefully. Some provide clarity on potentially difficult issues such as whether an attorney must advise an interviewee of the need to get independent professional advice and whether the interviewee may review notes of the interview, among other things.

Using the product of an investigation

Conceptually, professional privileges in the United States are viewed as belonging to the client. It follows that the client has every right to waive applicable privileges and permit (or direct) an attorney to share otherwise protected information with an adversary, including a prosecutor. Such is often the case where the product of an internal investigation is turned over to a prosecutor when negotiating a guilty plea or a deferred prosecution agreement, for example. The professional freedom of an attorney to do this cannot be automatically assumed in other countries. In France, for example, a client cannot waive professional secrecy, the rough equivalent of the attorney-client privilege, in the sense that an attorney cannot be authorised (or even directed) to share protected information with an adversary. There may be workarounds possible in such countries; the important point is not to assume that one's "home" principles apply to communications outside of one's own jurisdiction, and to get local professional advice and participation.

The role of lawyers in negotiating criminal outcomes

Differing views of the appropriate role of a lawyer in negotiating a criminal outcome may be the most culturally sensitive – and the most consequential – distinction addressed in this article.

Guilty pleas and other negotiated outcomes have long been an accepted – even dominant – practice in the United States; very few corporations elect to go to trial on criminal matters. And many American lawyers have become highly skilled at a specific kind of professional advocacy: evaluating the best possible outcome for a corporate client, and then obtaining it through careful negotiation with a prosecutor. Because such outcomes are undeniably efficient, several other countries have adopted procedures first developed in the United States or are contemplating doing so. The United Kingdom and France, for example, have adopted regimes clearly inspired by the US DPA, and similar legislation is pending in other countries. The procedural differences among these regimes, and their relative efficacy in the countries that have adopted them, have attracted comment. Less subject to analysis, however, is whether the lawyers in those countries have developed the professional skills to optimise negotiated outcomes for their clients, and whether their professional regimes and traditions will permit them to do so.

A core issue is whether an attorney is even permitted to negotiate in a criminal matter, and further whether he or she feels comfortable doing so. In many countries outside the United States the answer to the first question is "maybe" and to the second a definite "no."

A somewhat exaggerated distinction may help explain this important, nuanced and complex issue.

A defence lawyer in the United States is, under formal professional rules, subject to a specific but limited duty of candour: she is never under an obligation to provide information harmful to the client's interest, and under no circumstances can volunteer it; but the lawyer cannot lie to an adversary, including a prosecutor. More broadly – and probably more importantly – lying to a prosecutor is, within the US system of negotiated justice, usually a pretty bad idea: an inaccurate, or even knowingly incomplete, version of facts is very likely to be discovered by a prosecutor and will lead to bad results, and in most situations the optimal outcome for the client depends crucially on establishing a viable level of trust together with a superior mastery of facts. A lying, or even a wilfully ill-informed, lawyer will simply be out-negotiated by a prosecutor. And at some early point in a corporate negotiation, one reaches what amounts to an “all or nothing” point, where telling a prosecutor “I want to negotiate with you, but I will not answer your questions” is no longer an option.

In contrast, in a number of countries in Europe there is open discussion of the “right to lie”. The phrase is generally exaggerated; its basis is probably that in most of Europe a suspect or trial defendant is under significant pressure to provide evidence but is not put under oath, on the principle that it is simply unfair to accuse someone of a crime and then potentially make denial of it a separate offence. More generally, there is a strong sense that under no circumstances can a lawyer ever be put in a position where he or she is expected to provide a prosecutor with accurate, reliable and complete information relating to the client – even if it is in the client's best interest to do so. Many European judges – who generally have a much greater role in signing off on such procedures than do their US counterparts – do not like the idea of “negotiation” in criminal matters at all, which strikes them as shady.

This mindset – hard to define, variable among countries, but unmistakably present in many places – can have important consequences. Prosecutors in the US, the UK and some other countries put heavy emphasis on self-reporting. Agonisingly for some, the decision to self-report is oftentimes constrained: much of the advantage will be lost if the prosecutor discovers the matter, and the door to an optimal outcome may totally close if a competitor self-reports first. Put simply, in many countries in Europe and elsewhere, it goes against the grain of lawyers' sense of their professional responsibility to advise a client to – as it often seems – instigate a criminal investigation when none exists. The recent history of criminal convictions of European corporations at the hands of US prosecutors (with huge payments to the US Treasury) occurred in significant part because of a professional reluctance to reach out to negotiate at a time when doing so could have resulted in much better results; by negotiating too late a number of European companies lost opportunities to obtain much better deals.

Even when negotiation starts, professional traditions remain key. As an example, some forms of a negotiated outcome (such as a DPA) require the parties to reach agreement on the relevant facts for which a company takes responsibility. In many countries facts are considered to be established by neutral inquiry. There is little tradition – and in truth an aversion to – private parties negotiating over facts and many lawyers are simply ill-equipped to do so.

Policies in Europe and elsewhere on negotiated outcomes may be changing in a thoughtful attempt to achieve some degree of parity with US prosecutions, and in particular to reach outcomes with national companies that will dissuade parallel efforts by the US Department of Justice. The success of these efforts may be limited, absent a clear understanding of the professional traditions that fostered negotiated procedures, and how those traditions may differ elsewhere.

This article is part of a series of articles provided exclusively to GIR by members of the International Academy of Financial Crime Litigators, a collaboration between public- and private-litigation professionals and the Basel Institute on Governance to expand worldwide access to solutions in cases of economic crime.