Anti-Corruption Law: Corporate Defences, Imputed Liability and Claim Fustration

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Current Trends in “North-South” Anti-Corruption Investigations: How Can Internal Investigation Help?

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Why Internal Investigation in N-S Perspective?

- Intl Trade about 30% in OECD (with EU around 50% of GDP)
- A growing body of international law aimed at companies
  - UN Convention against corruption
  - Council of Europe Criminal Law and Civil Law conventions
  - OECD Conv. ABFOIBT (whew)
  - COE convention on money laundering (Conv LSS&C PC)
  - FATF guidelines
- Growing law enforcement co-operation in practice
  - sharing of intelligence, customs data, financial data
  - (3rd pillar)
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Internal Investigation to Reduce Regulatory Risk

- 58 counts of breach of trust
- Imputed liability + respondeat superior
- Corporate liability vs. personal liability
- Int. Invest causes failure of "aggregation test"

**Slush Funds**
- Italian accounts
- Swiss accts.
- Innsbruck, Austria - Raiffeisen acct.
- Dresdner Bank (Zurich)
- Kuwait

**Shell Companies**
- Tetre Inc. (Puerto Rico)
- 3 US companies
- Krhoma (Vienna)
- Caribbean shell companies

**Assistance with defence**
- (lower prob. of harsh convictions)

**Prosecutorial forebearance?**
- Acct-ing fraud offences

**Due diligence?**
- Liability as accessory?

**$500m “out of control”**
Internal Investigation: Defense Against Increasing Criminal Action?

- **Criminalisation of legal persons**
  - companies may hold criminal liability even in jurisdictions without leg. def. criminal liability?
  - Internal invest defeats “one mind” doctrine?
  - Part of “due diligence” and defence against *ex-post* complicity?
  - Est. defence based on extortion and coercion?

- **As part of risk-based internal audit**
  - defeats “inchoate offences”? 
  - reduces liability for accounting weaknesses? (under art. 12 UNCAC)

- **Clearly the future: Shifts reg. burden onto private sector...**

*Ceux qui s’accuse, s’excuse (ou excusé)*...
Internal Investigation: Mitigates Civil Liability?

- Exciting (and under-applied) area from public policy point of view
  - criminal bias in intl conventions
- Big risk area for businesses and law enforcement agencies alike
  - huge payments in recent days (Russia)
- Implementation of “approved” anti-corruption programme
  - as defense against negligence claims?
  - as method of recouping damages in case corp is liable?
  - IRONY: tax deduct for corrupt to tax deduct for anti-corrupt?

Does “Making Whole” Have a Dissuasive Effect in non-US jurisdictions?
Regulatory Risk related to “Third Generation Legal Instruments”

- **2.5 gen. instruments: SOX and move to regulatory remedies**
  - anti-corruption invading business law (SOX and Biz Law instruments)
  - banking law (know your customer, suspicious transactions reports, etc)
  - Amendments to Political Party finance laws, asset disclosure laws etc increase risks of paying bribes
  - emergence of “negligence fines”?  
  - process as important as result?

- **Article 63 of UN Convention -- “illicit gains”**
  - assets held by company staff
  - assets by company govt counterparts
  - “hook” for criminal investigation
  - tide toward reversal of burden of proof?
  - will this include confiscation of corp assets?

**Final shot: Will qui tam encourage denouncements along supply chain for $$$?**