



The Guide to Corporate Crisis Management

Editors

Sergio J Galvis, Robert J Giuffra, Jr
and Werner F Ahlers

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Introduction: Effective Crisis Management in Latin America

Sergio J Galvis, Robert J Giuffra, Jr and Werner F Ahlers¹

Around the world, business leaders regularly face crises that can severely disrupt or even threaten their companies' very existence. These crises may arise from an acute threat to the personal safety of employees, the fallout from an industrial or environmental accident, government investigations into compliance failures or financial distress leading to possible insolvency. In Latin America, a region that remains one of tremendous promise and opportunity for investors and corporations, these situations can present particularly complex and multifaceted challenges for leaders managing a crisis owing to the region's diverse and often shifting political landscapes and operating environments.

The realities of some of these challenges have been at the forefront of many corporate leaders' agendas in the past few years, as companies doing business in Latin America have seen a series of crises topple politicians and wound companies. Perhaps the most wide-ranging crisis arose from the *Lavo Jato* bribery investigations in Brazil and related investigations, where several executives have been sentenced to prison and companies have been subject to hundreds of millions of dollars in fines from authorities in countries in and outside the region, including Switzerland and the United States. Far-reaching anti-corruption investigations have extended to unrelated matters in many of the region's other largest economies.

Beyond the area of compliance, the region's leading corporations have faced challenges ranging from environmental or industrial accidents, such as spills or dam failures, which have more recently affected companies in extractive industries or hydroelectric power production, to significant renationalisations or expropriatory actions by governments, such as Argentina, Ecuador and Venezuela.

¹ Sergio J Galvis, Robert J Giuffra, Jr and Werner F Ahlers are partners at Sullivan & Cromwell LLP.

As executives and their counsel who have confronted these events have learned, the legal expertise and other multidisciplinary capabilities needed to address these sorts of events are tremendously varied. But crisis situations tend to share common elements. All are typically unexpected or develop in a manner that may take leaders by surprise; all require critical decision-making and communications with key stakeholders under intense time pressure; and all present the possibility of grave consequences if not managed effectively.

To develop and implement any effective crisis management strategy, responsible boards and senior executives must understand how to navigate the specific local contexts in which these challenges unfold and be prepared to put together, on short notice, the right teams that can best advise them to make critical decisions under intense time pressure. While advisers with the right experience in the region can help clients anticipate, manage and resolve crises across all their complex dimensions, decision-makers must also be able to recognise on their own, often under conditions of stress, many of the multifaceted issues that may arise so that they can make best use of these advisers' skills.

This guide is designed to assist professional advisers and key corporate decision-makers – board members, chief executives, chief financial officers, general counsel or compliance officers – in effectively planning for and managing crises affecting companies in Latin America. There is no comprehensive guide or playbook for dealing with every type of crisis. But this guide gathers contributions from some of the leading practitioners from around the world to examine some of the most important crisis-related issues that have affected businesses in Latin America, and discusses how crisis managers have effectively confronted those challenges. Because of the central role that lawyers play in helping corporate leaders navigate crises, by limiting liability and mitigating their most far-reaching effects, most of the contributions come from legal practitioners, including internal corporate counsel and lawyers from leading law firms practicing in the region. Because almost all effective crisis response requires a multidisciplinary approach, we have also included insights from global leaders in public relations, international risk management and private sector diplomacy.

We would like to sincerely thank each of our contributors for their time and expertise. Their credentials and accomplishments – which are listed in Appendix I – show that these professionals are among the most accomplished in their fields and in providing critical advice to corporate leaders facing potential crises across the region. We also note that all contributions to this volume, including those made by the three of us who have had the opportunity to serve as its editors, reflect the authors' own views and not necessarily those of their firms or their clients.

* * *

Part I of this guide starts with the recognition that each corporate crisis develops within a unique political context. Any significant crisis requires deft management of relations with government agencies and other state actors who are likely to assert themselves as key stakeholders. With the benefit of decades of experience in the region, Thomas F McLarty III, the chairman of McLarty Associates, one of the world's premiere private diplomacy advisory firms, emphasises the importance of a comprehensive, disciplined and proactive

approach to government relations in Latin America. Advocating a ‘fire marshal’ model, he urges organisations to recognise risks in advance, so that they can develop preventative government relations strategies that can help avoid crises or, critically, limit the damage when they hit.

Other contributors to Part I share their experiences advising clients on the difficult decisions they must make when confronted with the dire consequences of political instability or violence, including the need to exit a jurisdiction where the political situation has created an untenable operating environment. Fulvio Italiani and Carlos Omaña of the Venezuelan law firm D’Empaire Reyna Abogados discuss their experiences advising clients managing corporate crises in that country under circumstances of a continually unfolding political crisis. Jack Devine, the founding partner and president of the crisis management firm The Arkin Group LLC, and The Arkin Group’s senior director Amanda Mattingly, focus on more acute circumstances and draw from their years of experience in intelligence and risk management in the region to share strategies to effectively confront some of the security challenges faced by corporations that choose to continue pursuing economic opportunities in environments with heightened risks of violent crime.

In Part II, contributors explore the critical role that communications plays in all crisis response strategies. Jeremy Feigelson, a Debevoise & Plimpton LLP partner, and his colleagues, discuss the central role of communications in designing and implementing incident response plans in the areas of data privacy in cybersecurity. With the extraterritorial reach of the European Union’s General Data Protection Regulation and similar legislative efforts in other jurisdictions, privacy breaches can quickly balloon into a legal, as well as reputational, crisis, and the authors stress that compliance professionals across Latin America should be thinking about these risks.

Effective communication can also play a vital role in avoiding crises, serving a key role in laying the groundwork for the development of sensitive and capital-intensive projects. Luis Carlos Rodrigo Prado of the Peruvian law firm Rodrigo, Elías & Medrano Abogados considers the case study of the successful management of mining projects in Peru, where the law protects indigenous communities by requiring socio-economic impact studies and prior consultation with those communities.

In any context, a company’s leadership must establish effective coordination between those involved in legal problem-solving and public communications. This is the central message conveyed by Paul A Holmes, the CEO of North American operations at the global communications firm Finsbury, along with Finsbury director Eric M Wachter. The two share the principles and best practices that have helped them successfully partner with corporate counsel around the world to ensure that legal and communications strategies align in a crisis.

In Part III, the guide turns to a category of corporate crises in Latin America that has dominated headlines and arguably had the largest impact on that region’s business and political environments: anti-corruption investigations and enforcement. Breon Peace of Cleary, Gottlieb, Steen & Hamilton LLP moderates a panel that analyses *Lava Jato* and related investigations. The roundtable participants, based in São Paulo, Lima, New York and London, apply their diverse perspectives as lawyers, former government officials and global

risk consultants to discuss how the investigations have affected commercial life in several of the region's major economies.

The phenomenon of the *Lavo Jato* investigations can be seen as both a consequence and accelerator of some key trends in the enforcement environment in the region. Lessons for practitioners and corporations seeking to mitigate risks in this new environment are presented by four Morrison & Foerster LLP lawyers: James Koukios, Ruti Smithline, Gerardo Gómez Galvis and Julian N Radzinski. While the anti-corruption risks across the region vary, the authors note that legal regimes are increasingly standardising their laws and increasing cooperation between their enforcement agencies. Familiarity with these trends can help practitioners design and properly prioritise the implementation of robust, risk-based compliance programmes as the best strategy to avoid a corruption-related crisis.

The remaining two chapters in Part III provide technical guidance and practical advice on matters that corporate leaders often have to confront in anti-corruption investigations that could develop into a crisis. For example, executives based in Latin America can face significant personal risks under a US regulatory or criminal investigation because of the extra-territorial reach of applicable US laws. Andrew J Levander and some of his Dechert LLP colleagues survey the key issues for counsel who are considering and advising on these risks. Daniel Sibille, Oracle do Brasil's compliance director for Latin America, on the other hand, reviews some of the key practical considerations that general counsel or compliance officers should keep in mind in structuring and conducting an effective internal investigation.

Of course, crises can emerge from regulatory or enforcement actions beyond anti-corruption investigations, which is the focus of Part IV. For example, some political developments can increase the possibility of aggressive and unpredictable enforcement action from state agencies across the board, creating a hostile business environment that requires deft management. Héctor A Mairal, partner at Marval, O'Farrell & Mairal in Argentina, focuses on this phenomenon by discussing the case study of Argentina during the Kirchner administration and offers effective strategies that corporate counsel may adopt to deal with political environments that lack a stable regulatory regime and consistent enforcement.

Sullivan & Cromwell LLP litigators Brendan P Cullen and Thomas W Walsh explain how, for issuers of securities in the United States, corporate crises in Latin America can lead to securities class actions in US courts, and explores effective strategies for defending against these claims. Aggressive enforcement by tax authorities in transfer pricing is another area of increasing concern for corporate compliance officers, and José Luis Fernández Fernández and César De la Parra Bello of the Mexican firm Chevez Ruiz Zamarripa examine the intricacies of effectively managing these proceedings in that country.

Finally, Part V explores some of the tactics and tools that corporations can use when facing existential crises of potential financial insolvency. Andrew Dietderich and Daniel Biller of Sullivan & Cromwell LLP explain how debtors based in Latin American jurisdictions can benefit from the extraterritorial reach of the US Bankruptcy Code, specifically how Chapters 11 and 15 of the Code can help debtors to actively manage international restructurings. Eugenio Sepúlveda of the law firm Galicia Abogados in Mexico then presents key lessons for navigating the challenges of an insolvency by focusing on aspects of the Mexican

legal regime that are most relevant to debtors in financial distress. Both chapters share a common message: the laws governing financial insolvencies offer powerful tools for effectively navigating this type of crisis, but if not properly managed, they can exacerbate a dire situation.

We have collected the knowledge and advice of leading practitioners across a variety of disciplines, jurisdictions, practice areas and perspectives, precisely because the types of crises that can arise in Latin America are tremendously diverse, and do not lend themselves to a single 'one size fits all' approach toward preparedness and effective response. At the same time, this survey of crises provides some common lessons that should benefit all corporate leaders.

First, while crises are by their nature unpredictable, executives must try to identify in advance where and how they might unfold and develop a familiarity with those political and legal contexts. This first step can provide the basis for conducting 'table top' exercises or reviews of how other institutions have dealt with similar crises. These exercises should include key questions: How does the company survive the first week of a possible crisis? How does the company manage relations with key stakeholders? What are the key risks from missteps in dealing with government agencies?

Crisis management plans that emerge from these exercises vary, but should start by defining the crisis and involving key decision-makers early. Companies need to determine the oversight and management roles played by top executives and key advisers, and how they will coordinate among themselves. A theme that recurs throughout this volume is the importance of defining the right team of both internal resources and external experts, and establishing effective coordination between those teams. It is also critical to define the proper oversight role of the board. Companies need protocols for when and how to involve their board and for defining its proper role in monitoring and oversight. In addition, once the company and its advisers have identified the areas of concern, the board's composition may have to be evaluated to determine whether it includes the necessary expertise.

Once a crisis is identified and a team is assembled, it is critical to maintain flexibility to respond properly to new information and to recognise and address reactions of key stakeholders. Adequately managing and reacting to the flow of information in a crisis is one of the most important functions of crisis management. A qualified crisis communications team ideally maintains a close partnership among investigators, legal counsel, public and government relations and other advisers. The company's leaders must empower this team to gather facts, contacts and timelines in an appropriate manner and as quickly as possible, and communicate with external stakeholders, including the relevant government agencies, employees, customers and the general public. Throughout this process, understanding cultural differences, as well as the relevant political and legal context, is key, and requires close consultation with the right advisers at every step.

The chapters that follow provide a practical and valuable guide for decision-makers and their advisers as they develop their crisis preparedness plans for businesses in Latin America. While each company will confront its own unique set of multifaceted risks and challenges, these chapters will help business leaders and their advisers best position themselves to withstand and emerge strong when an unexpected crisis hits.

Appendix 1

About the Authors

Sergio J Galvis

Sullivan & Cromwell LLP

Sergio Galvis is a leading corporate lawyer in the United States who is known for his cross-border work, especially in Latin America. He joined Sullivan & Cromwell LLP after graduating from Harvard Law School and clerking for the Honourable Lawrence W Pierce, Second Circuit US Court of Appeals, and has been a partner of the firm since 1991. He is a member of S&C's management committee, oversees the firm's recruiting and administrative functions and leads its Latin America practice.

Sergio has worked with clients across more than 25 countries in Asia, Europe and the Americas on hundreds of significant matters in a broad range of practices, including crisis management, criminal defense and investigations, workouts and restructurings, corporate governance, sovereign financing, capital markets, M&A and project financing. He also regularly works on OFAC compliance and sanctions issues, especially as they relate to in Latin America situations.

Robert J Giuffra, Jr

Sullivan & Cromwell LLP

Robert J Giuffra, Jr is recognised as one of the leading litigators in the US. He is a member of Sullivan & Cromwell LLP's management committee, responsible for the litigation practice.

A fellow of the American College of Trial Lawyers, Mr Giuffra has represented Fortune 500 companies in some of the highest-stakes litigations and investigations of the past two decades, including those arising from the financial crisis, *Enron* bankruptcy and *HealthSouth* accounting fraud. He is currently US national coordinating counsel for Volkswagen in diesel emissions litigations and investigations and helped secure landmark US regulatory and consumer settlements. He also represents Fiat Chrysler in US litigation and investigations

over diesel emissions. He has represented leading Latin American companies, including Tenaris in securing the first SEC deferred prosecution agreement and Grupo Mexico in Delaware derivative litigation. He has won precedent-setting US court decisions, including limiting the extraterritorial application of US securities laws.

A graduate of Princeton and Yale Law School, Mr Giuffra clerked for Chief Justice William Rehnquist of the US Supreme Court and for Judge Ralph Winter of the Second Circuit. As Chief Counsel of the US Senate Banking Committee, he was a principal drafter of the Private Securities Litigation Reform Act.

Werner F Ahlers

Sullivan & Cromwell LLP

Werner Federico Ahlers is a partner in Sullivan & Cromwell LLP's general practice group, whose practice focuses on a wide range of cross-border mergers and acquisitions, joint ventures, private equity transactions and corporate matters. Werner advises on a variety of corporate, project and restructuring financing matters, and in the areas of corporate governance and crisis management. He is a core member of the firm's Latin America practice, and regularly acts on equity and debt investments for strategic investors based in and outside the region, private equity, pension and sovereign wealth funds, and bank and multilateral agency lenders. His practice spans diverse sectors, including mining and metals, power and energy, real estate, infrastructure, telecommunications, healthcare and financial services.

Werner has been repeatedly recognised for his cross-border advisory work by leading legal publications, such as *Chambers* (Global and Latin America), *Latin Lawyer*, *Law360*, *The M&A Advisor*, *The American Lawyer* and *The Legal 500* (Latin America and US). Werner serves on the executive sub-committee and as chair of the Latin America sub-committee of the Cyrus R Vance Center for International Justice and as a term member of the Council on Foreign Relations. He is a native speaker of Spanish and is proficient in Portuguese.

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Corruption investigations, expropriation, industrial accidents: corporate crises take many forms, but each can be equally dangerous for companies in Latin America.

Published by *Latin Lawyer*, edited by Sergio J Galvis, Robert J Giuffra, Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of 40 leading practitioners from a variety of disciplines, *The Guide to Corporate Crisis Management* is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region.

Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book provides guidance that will benefit all practitioners when an unexpected crisis hits.