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PARTNER OF CAREY ATTENDED THE FIRST LATIN LAWYER ANNUAL LABOUR AND EMPLOYMENT CONFERENCE

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Posting staff around the world is a necessity for many multinational companies, but it can be a highrisk endeavour. Although globalisation has made mobility inevitable, the problems employers encounter from overlapping, contrasting or simply unclear labour legislation can be daunting. At Latin Lawyer's First Annual Labour and Employment Conference, lawyers considered some of the common stumbling blocks that can arise from sending employees abroad.

Isabel Rivera, Oscar Aitken, Marco Durante Calvo, Alejandra Flah and Juan Carlos PróRísquez

A panel steered by Isabel Rivera, corporate counsel of construction equipment manufacturer Caterpillar, saw panellists Alejandra Flah, director and associate general counsel for Latin America at Citibank, Carey's Oscar Aitken from Chile, Costa Rica's Marco Durante of BDS Asesores (a member firm of Littler Global) and Juan Carlos PróRísquez, of Norton Rose Fulbright in Venezuela offer solutions to three familiar scenarios that often pose problems for multinationals in Latin America when moving staff around the region.

Ultimately, says Rivera, companies facing these situations must be careful not to cause themselves a "selfinflicted wound", whereby their response has longterm detrimental and unintended results.

Notwithstanding the problems that global mobility can throw labour lawyers' way, the practice remains more beneficial than it is detrimental, particularly as a means of entering new markets. As Latin America's multilatinas continue to gain ground it is something lawyers will have to continue to get their heads around.

Punishing bad behaviour abroad

The scenario

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John Smith works for Acme, a company headquartered in Brazil. Based on his good performance record, Acme decides to send John to Mexico on a fiveyear assignment. While there, his Brazilian employment contract is suspended and he is contracted under Mexican law. Once in Mexico, John befriends Peter Supply, who starts winning a suspicious number of goods supply and service contract bids held by Acme. The company hires a private investigator and discovers that John manipulated the bids in return for a new car. By accepting Peter's bids, which were less competitive than others on offer, John caused Acme to lose out on US$5 million. Understandably, Acme wants to terminate John's employment contract, but under its expatriate severance policy he is entitled to receive US$1 million in cash and stock as compensation if he is terminated for cause. Acme wants to avoid making a pay out at all costs, not least to deter similar situations with other employees.

The solution

Getting rid of John without making a hefty payment is easier said than done and Acme and its lawyers will need to take various issues into account, territoriality and the matter of John's right to privacy.

Acme will want to pursue John for gross misconduct uncovered in the initial investigation into his actions, but its lawyers should alert the company to the fact that any information collected by delving into private communications would be unusable in most Latin American jurisdictions because it would be a violation of John's constitutional right to privacy. Instead, the company would need to use publicly available evidence of misconduct to support its case.

An early hurdle the company will encounter is that of territoriality, which remains a largely grey and complex area because the principle "is having trouble adapting to the global village of the modern world," says Aitken. Territoriality refers to the application of jurisdiction, which can be difficult to ascertain when parties are drawn from different countries – opening the door for various different and possibly contradictory sets of laws to apply. Whichever jurisdiction prevails will determine the course of the case.

Employees sent on assignments abroad tend to stay on their original employment contract if the assignment is shortterm, but John's fiveyear stint represents a more longterm

arrangement, which is why his contract is under Mexican law. If John's actions were to take place in a jurisdiction where they were not grounds for dismissal, it would be vital that Acme establish a link between John and Brazil, where his behaviour does constitute gross misconduct. The good news is that although the Brazilian agreement was suspended for the duration of his time abroad, there is still scope for Acme to show that his behaviour breached that contract too. Acme can argue that although John was not performing services for his Brazilian employers (and therefore

was not being paid by them), certain parts of the employment contract remained intact. In most Latin American countries, an implied obligation exists in employment contracts concerning loyalty and good faith between the employee and employer. For example, Acme's commitment towards anticorruption still has to apply even while John is in Mexico; in other words, the Brazilian employment contract contains elements besides payment for services that were not suspended, which means there is room for Acme to dismiss John in both Mexico and Brazil.

To sidestep issues of jurisdiction, companies can opt for the "one employment contract" principle, which is based on the idea that there is only one contract since all employees report to the same company headquarters regardless of where they are based. That approach can backfire, however, as it gives employees a way of making claims for expensive labour benefits in line with legal requirements in the jurisdiction of the company's HQ and demanding a share of profits outside of the jurisdiction in which they are based. "I would only use the one employment rule if that was the only way we could get this employee out," says Flah.

A better option, she says, would be to argue that the employee has breached Acme's global employment policies, which are in line with national and international rules on fraud and corruption. The risk is that parts of the global policy may breach local legislation, which could result in litigation between John and Acme. However, even though there is a good chance the company could lose the lawsuit, Flah still believes that outcome would be preferable to settling with John. "We need to show that there is no culture of impunity and that type of behaviour cannot be allowed to happen – we don't want John to get anything under the expatriate policy and show that due to his gross misconduct he is not eligible for stock or cash," says Flah.

At arm's length

The scenario

In smaller economies it is not always viable for multinationals to open offices and hire personnel. For example, Acme does not have a presence in Costa Rica, but would like to provide services under an alternative to the traditional labour and employment model.

The solution

Acme can choose either to hire independent contractors or to outsource. Regulation of outsourcing remains largely unclear in Latin America, but that has not stopped the practice from being tightly sanctioned. For that reason, Acme would do better to pursue an independent contractor for its Costa Rican endeavours; however, that route also poses its own risks and the company would need to avoid slipping into the regular labour and employment model. Companies which choose this option often either purposely or inadvertently end up converting the relationship into a traditional labour and employment contract, meaning that what starts as an independent contractor is eventually subordinated. At the end of the day, the multinational is left with a

contractor that has the same legal contingencies, such as severance payments and social security contributions, as a regular employee. "My first suggestion would be to keep an eye on their activity, making sure the minimum rights of employees are covered by them because otherwise you will be considered jointly responsible," warns Durante. If Acme is desperate not to end up liable for its independent contractors, there are several ways it can steer clear of subordination, nearly all of which revolve around making sure its relationship with its contractor is not exclusive, which in practice means rotating personnel, keeping them outside of company property and not supplying them with company equipment.

The test of whether a contractor is being subordinated is difficult to define but the general consensus is that, unfortunately for Acme, if a contractor wants to find evidence of subordination it will likely be able to, largely because the law governing the practice remains so unclear. Because it is not as heavily sanctioned as outsourcing can be, it is a marginally better option, but a potentially tricky one nonetheless.

Double dipping

The scenario

Jane Smith used to work for Acme in Peru, but has since been relocated for a fiveyear assignment in Venezuela, where the company has a subsidiary. After a couple of years in Venezuela, Jane develops a gambling habit and falls heavily in debt. Since her labour and employment contract is with Acme's Venezuelan subsidiary and she has so far only been paid from Peru, she sees a window of opportunity to repay her debts by suing Acme Venezuela for lost earnings.

The solution

According to Venezuela's constitution, Jane would only be entitled to receive a salary and benefits from the jurisdiction that offers her the most favourable deal, not both. Nevertheless, it is still important that companies avoid Acme's mistake of not accounting for the gap in payment structure between the Venezuelan and Peruvian companies and draft two clearly defined employment contracts, which would have prevented Jane from making her claim.

Under Venezuelan law, foreigners working in the country need a work permit listing a local entity as their employer, which is why Jane is employed by Acme Venezuela rather than Peru. In contrast to the rest of the continent Venezuela's constitution enshrines the idea that in cases such as Jane's, the employee is eligible to receive compensation from whichever jurisdiction (either Venezuela or the employee's home country) offers the employee the most favourable package. "If you can prove in court that the benefits she got from Peru were better than a local employee would get, then courts would dismiss the case," says PróRísquez. The rule is a deterrent against "double dipping", where employees attempt to secure the best of both worlds by obtaining whatever benefits they can from their host country, as well as their home state. The challenge arises, however, when it comes to comparing compensation packages from different countries, which will likely have differing benefits schemes and are measured in different currencies – in Venezuela in particular, where the currency exchange rate is so variable depending on which rate you use, this is made extra complicated. There is no cut and dry rule of what constitutes a salary and whether benefits, which can include healthcare provisions, school tuition for the employee's children, housing etc, should be included or discarded from the final

figure.

Flah says Citibank has encountered the problem numerous times and thinks one of the most difficult parts of a comparison of salary benefits across jurisdictions is that cases need to take into account the three different legal systems at play: that of the host country, in this case Venezuela, the employee's home, here Peru, and the expatriate agreement, which is governed under law in the US in this example. At any rate, Venezuela's approach to award the most favourable package is in line with Citigroup's line of thinking, and is often the way things turn out in other countries after prolonged legal wrangling anyhow: "We recognise that the most favourable system will probably end up applying as we will be sued for it anyway."