# MANAGING LEGAL AND ETHICAL RISKS IN CROSS-JURISDICTIONAL TRANSACTIONS

**Background – The "Panama Papers" Leak**

In 2016, an anonymous source released 11.5 million client files from what was then the fourth-largest offshore services firm in the world, Mossack Fonseca & Co (a Panamanian law firm), in an incident now known as the "Panama Papers" leak.[1] The incident revealed that Mossack Fonseca helped many rich and powerful individuals set up offshore entities in obscure arrangements to, *inter alia*, reduce their tax liabilities[2] – as a partner of the firm noted in a leaked memorandum, "ninety-five per cent of our work coincidentally consists in selling vehicles to avoid taxes."[3] The Panama Papers were followed by the "Paradise Papers" in 2017, another large-scale leak of similar information from the law firm Appleby and other offshore services providers.[4]

Eventually, the Panama Papers led to investigations that recouped US$1.2 billion of back-taxes and fines as of 3 April 2019.[5] The Panama and Paradise Papers also cast a spotlight on the offshore services industry and the large network of intermediaries, or middlemen, whose activities supported this ecosystem. Mossack Fonseca was one such party that liaised and transacted with other middlemen (such as law firms, accountants, banks, and trust companies).[6]

The firm could be instructed to set up a shell company in a "tax haven" jurisdiction and open a corresponding bank account for as little as US$1,000, and provide a nominee director to sign off on all documents for the shell company's transactions.[7] This shielded the identity of the true owner or beneficiary of these transactions.[8] Although Mossack Fonseca claimed that it had carried out due diligence on its clients,[9] the firm could not identify the beneficial owners of up to 75 per cent of the Panamanian and 70 per cent of the British Virgin Island companies that it administered even two months after it became aware of the leak.[10]

**The IBA-OECD Report Released in May 2019**

The Panama and Paradise Papers provoked a serious inquiry into the role of lawyers in such transactions. What were lawyers being asked to do, and what did lawyers know about their clients? Had lawyers considered the legality and ethics of the larger context of the transaction that they were involved in?

To answer these questions, the International Bar Association (**IBA**) and Organisation for Economic Cooperation and Development (**OECD**) convened the IBA-OECD Task Force on The Role of Lawyers and International Commercial

Structures (**the Task Force)** in late 2016 to carry out an international survey of bar associations and law societies. The survey was based on seven questions in the Task Force's terms of reference (**Terms of Reference**) about the role of lawyers in detecting and preventing illegal conduct in international commercial transactions. The Task Force's findings were published in the "*Report of the Task Force on the Role of Lawyers and International Commercial Structures*"[11] (**Report**) in May 2019.

In preparing its findings, the Task Force recognised that lawyer-client confidentiality was coming under greater scrutiny by society and government, which raised questions such as:[12]

- Are clients attempting to hide behind lawyer-client confidentiality to get away with questionable acts?
- Are clients following the letter of the law, exploiting gaps and oversights, without considering the spirit of the law?
- Are lawyers taking responsibility for their role in the funding of corruption, terrorism, arms trafficking, mass drug addiction and other illegal conduct financed by the transfer of illicit funds?

To address these questions, the Task Force produced a Statement of Principles consisting of eight principles, which "are not designed as formal obligations or rules", but "are framed as a broad statement of a principled approach to how lawyers and law firms should conduct themselves when engaging in or undertaking work associated with commercial structures, particularly of an international character".[13] These principles, which are directed principally to individual lawyers, but also apply to law firms where relevant,[14] are:

- Non-facilitation of illegal conduct;
- Misuse of the duty of confidence and privilege;
- Client due diligence;
- Action where client conduct is, may be or becomes illegal;
- Multi-jurisdictional risk;
- Use of illegally obtained information;
- Disclosure of beneficial ownership; and
- Advertising by lawyers on international commercial structures.

**Law Society's Seminar and Panel Discussion on 22 July 2019**

Shortly after the Report was issued, the Law Society was privileged to have the Chairman of the Task Force, Mr Robert Wyld, chair a seminar and panel discussion on the Report on 22 July 2019, together with panellists Mr S. Suressh and Mr Yeoh Lian Chuan of the Law Society's Anti-Money Laundering Committee. Attended by 43 members, the seminar and panel discussion provided many useful insights into the objective and scope of the Report.

Using a Q&A format, this article shares some of the key points made by **Mr Wyld at the Law** Society's seminar and panel discussion.

**Are the principles in the Report intended to be best practices only?**

Yes, Mr Wyld explained that the Principles were designed not as definitive laws or ethical standards, but non-binding "best practices" to raise awareness of different legal perspectives while respecting the laws and ethical standards of each jurisdiction. This is also set out in paragraph 2.2 of the Report.

**What is the objective of the Report?**

Mr Wyld explained that the Report aimed to raise awareness and promote reflection among lawyers of the potential risks in cross-jurisdictional transactions. With this risk awareness, lawyers would be able to guide clients away from engaging in illegal conduct, should the need arise during the course of the retainer.

However, Mr Wyld also acknowledged that in practice, the highly competitive market for legal services could discourage a lawyer from asking what a client might consider to be "too many questions" about a brief. Some clients could even decline to provide the information necessary for the lawyer to carry out due diligence processes. The Report aimed to prompt lawyers to reflect on what they would do in such situations.

**Principle 1 states that a lawyer should not facilitate illegal conduct and should undertake the necessary due diligence to avoid doing so inadvertently. In what ways could a lawyer facilitate illegal conduct?**

Mr Wyld gave the example of a lawyer being put on notice of a client's illegal conduct, but failed to inquire further into the matter for fear of offending the client and losing business. He emphasised that by turning a blind eye to a client's illegal conduct, a lawyer risked being an accessory to such conduct, which would have its own legal consequences.

**Can legal professional privilege and solicitor-client confidentiality be used to conceal a client's illegal activities?**

Principle 2 advises that privilege and confidentiality should not be used to shield a client's wrongdoing. Mr Wyld noted that on the one hand, the solicitor-client relationship is characterised by solicitor-client privilege and confidentiality, which enables lawyers to give their clients the best possible legal representation.

On the other hand, lawyers should guard against abuse of the solicitor-client relationship: if a lawyer is aware, or has reason to believe, that the professional relationship is being used to mask illegal conduct, he/she should consider ceasing to act for the client.

**How much due diligence should a firm carry out on its client?**

According to Principle 3, a lawyer should undertake and document all reasonable and proportionate inquiries to, *inter alia*, identify and verify a client and satisfy him/herself of the legality of the transaction in the lawyer's jurisdiction.

Mr Wyld explained that there was no universal standard for the level of due diligence to be carried out on a client, as the appropriate level of due diligence would depend on factors such as the nature of the transaction and the relevant jurisdiction(s) and domestic regulations. Further, while arrangements to reduce tax liabilities are common and often legal, lawyers should be aware of the tax consequences of the transactions they are involved in.

**What should a lawyer do if his/her client is doing something illegal?**

According to Principle 4, a lawyer should advise his/her client of the potential consequences of the course of action and recommend alternative and legal means of achieving the client's desired outcome. As with Principle 2, due consideration should be given to terminating the retainer if a client persists in the illegal conduct. A client's illegal conduct may also trigger reporting/suspicion transaction report (**STR**) obligations, depending on the jurisdiction.

On this point, Mr Wyld noted the importance of stepping back to assess the situation if a lawyer sensed something was amiss during the course of the retainer. He emphasised that a firm's hard-won reputation could be irreparably damaged by its lawyers' involvement in the client's illegal conduct.

**What should a lawyer do when (s)he becomes aware of a client's (potentially) illegal conduct in an overseas jurisdiction?**

Principle 5 advises checking if the client has taken expert advice on the law of the overseas jurisdiction in which the suspected illegal conduct is taking place. The client should be advised to seek such advice if this has not already been done. Mr Wyld explained that Principle 5 was developed to encourage lawyers to take a wider view of their legal advisory role in such situations, instead of restricting themselves to advising on only laws that they are qualified to advise on.

However, if the client persisted in the suspected illegal activity after taking foreign law advice, the lawyer should give due consideration to terminating the retainer. The lawyer should also consider if any reporting obligations have been triggered under the applicable domestic laws.

**What if the client gives the lawyer evidence that was obtained illegally?**

Principle 6 advises lawyers to strongly

discourage clients from obtaining evidence illegally, since a client might be exposed to criminal liability in doing so. While the admissibility of such evidence was a matter to be decided by domestic laws, Mr Wyld noted that the practice of obtaining evidence illegally (and using it), if encouraged, would reflect poorly on lawyers, who also have a role to play in upholding the rule of law.

**How much beneficial ownership information should be obtained on a client?**

Principle 7 advises lawyers to not only obtain up-to-date beneficial ownership information on their clients, but also maintain up-to-date information throughout the retainer. Mr Wyld noted that certain clients might be reluctant to fully disclose such information in practice, such as companies controlled by a small and highly private group of individuals (e.g. family-controlled MNCs).

In such a situation, the issue would be whether the information provided by the client was sufficient to meet the lawyer's KYC requirements.

**How should I advertise my legal services relating to international commercial structures?**

Principle 8 is a reminder that as with all legal services, services relating to international commercial structures should be advertised accurately and truthfully. Mr Wyld noted that it was not uncommon for firms in "offshore" jurisdictions to specifically advertise their expertise in services relating to commercial vehicles. While there was nothing wrong with this, firms should refrain from making claims to expertise which they do not have.

## The Position in Singapore

To a significant extent, the principles in the Report are encapsulated in Singapore's domestic laws and regulations, including those specifically governing the Singapore legal profession. Set out below are some brief pointers that lawyers practising in Singapore should be mindful of:

- Non-facilitation of illegal conduct (Principle 1): Lawyers have been disciplined for facilitating illegal conduct. For example, in *The Law Society of Singapore v Leong Pek Gan*,[15] the respondent lawyer was suspended for 2½ years[16] for, *inter alia*, failing to lodge an STR in respect of a suspected illegal moneylending transaction that she had facilitated.[17] The Court of Three Judges found that Leong had instead "unquestioningly tendered advice for the [illegal] Transaction even though she knew or had reason to believe that it involved unlicensed money**lending" even though she had t**he professional responsibility "to be alert to the glaring irregularities in the Transaction".[18]

- Misuse of the duty of confidence and privilege (Principle 2): Under Singapore law, communications made in furtherance of any illegal purpose are not protected by legal professional privilege in judicial proceedings.[19] Similarly, material showing serious misconduct may also not be protected by Singapore's laws on confidentiality.[20]

- Client due diligence (Principle 3): Lawyers' obligations to conduct client due diligence may be found in, *inter alia*, the Legal Profession Act (Cap. 161), the Legal Profession (Prevention of Money Laundering and Financing of Terrorism) Rules 2015 (AML Rules) and the Law Society Practice Direction 3.2.1 on Prevention of Money Laundering and Financing of Terrorism (PD 3.2.1).

- Action where client conduct is, may be or becomes illegal (Principle 4): Legal practitioners are prohibited from engaging in and/or assisting in illegal conduct under various rules in Part 3 of the Legal Profession (Professional Conduct) Rules 2015 (LPPCR), such as Rule 10(5) and Rule 10(6)(b).

- Use of illegally obtained information (Principle 6): Under the Evidence Act (Cap. 97), illegally obtained evidence is admissible in judicial proceedings as long as the evidence is "relevant" and not specifically expressed to be inadmissible.[21] However, the court retains a residual discretion to exclude such evidence when its prejudicial effect exceeds its probative value.[22]

- Disclosure of beneficial ownership (Principle 7): Lawyers' obligations to obtain and update beneficial ownership information on their clients are found in, inter alia, the AML Rules and PD 3.2.1.

- Advertising by lawyers on international commercial structures (Principle 8): Generally, while not targeted specifically at advertising of services relating to international commercial structures, Rule 43 of the LPPCR requires a legal practitioner to ensure that for publicity of legal services within Singapore, any claim to expertise or specialisation can be justified. For publicity outside of Singapore, Rule 48(2) of the LPPCR requires a legal practitioner to ensure that publicity conforms to the laws of the overseas jurisdiction.

## Conclusion

Lawyers who engage with international counterparts in their practice should bear in mind that the laws of other jurisdictions can vary widely, and significantly from Singapore law. Transactions involving cross-border transfers of assets between commercial entities may involve not only jurisdictional risk, but may also trigger the need for a careful assessment of the larger context of the transaction and the client's background, motives and *bona fides*. As a set of "best practice" guidelines, the Principles are a helpful checklist of key points to note for the Singapore lawyer who wishes to adopt a prudent and principled approach to his or her international transaction practice.

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**Endnotes**

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12. Ibid. at p 8, para 3.5.
13. Supra n 11 at p 3, para 2.2.
14. Supra n 11 at p 3, para 2.4.
15. (2016) 5 SLR 1131
16. *The Law Society of Singapore v Leong Pek Gan* (2016) 5 SLR 1131 at (19).
17. *The Law Society of Singapore v Leong Pek Gan* (2016) 5 SLR 1091 at (92). The respondent in Leong Pek Gan was also found to have placed herself in a position of conflict of interest, hence the more severe penalty of suspension.
18. *The Law Society of Singapore v Leong Pek Gan* (2016) 5 SLR 1131 at (16).
19. Section 128(2)(a) of the Evidence Act (Cap. 97).
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