

# Counsel<sup>to</sup> Counsel

*Connecting Corporate Counsel & Leading Law Firms*

## **Counsel to Counsel Forums 2005**

Key findings: Amsterdam, London, Mexico City and São Paulo



## A selection of the law firms and companies involved in the C2C programme in Europe and Latin America in the first half of 2005:

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## Introduction and Background

The LexisNexis Martindale-Hubbell *Counsel to Counsel* programme is widely recognised by senior corporate counsel from the world's leading businesses and financial institutions, as a valuable and highly effective way of sharing and validating management best practices and discussing topical issues facing themselves and their departments. Since its launch five years ago, almost 100 forums have been held worldwide bringing together corporate counsel and international law firms in Europe, North America, South East Asia, and Australia. The programme continues to build momentum and for the first time in 2005 events were held in Mexico and South America.



The *Counsel to Counsel* programme includes a bi-monthly magazine, distributed in the US with Corporate Legal Times and is available free to in-house counsel worldwide.

## First Summary Findings for 2005

The demands and expectations being placed on in-house departments today are greater than ever. These sessions provide an opportunity for in-house counsel to meet informally and share their experiences. By allowing themselves the time to attend *Counsel to Counsel* forums in their locality, delegates find themselves able to take away with them fresh ideas and solutions relevant to their markets and the regulatory conditions within those markets.

These Summary of Findings provide a snapshot of the key discussion areas covered and give some insight into the priorities and challenges uppermost in the minds of senior in-house counsel.

This paper summarises the findings from *Counsel to Counsel* forums held in:

Amsterdam - February 2005

London - April 2005

Mexico City - May 2005

São Paulo - June 2005

# Forums 2005

## **Amsterdam C2C Forums, February 2005**

***Bringing compliance and risk management to  
the business***



With 35 delegates gathering in Amsterdam from as far a field as Europe, Australia, South Africa and India, two sessions were held to discuss the local and international challenges of introducing corporate compliance programmes. Forum facilitators were Derek Benton, Director International Operations for Martindale-Hubbell, and Leigh Dance, President of ELD Project Marketing International.

The size and seriousness of the challenge were in no doubt. One delegate succinctly summed up the situation: *“There are not many risks that multinationals face that are as significant as this, where you can be fined 10% of your worldwide revenue due to the conduct of a small operation in a Third World country or in Eastern Europe. That can bring you down. You have to get the (compliance programme) message out far and wide.”*

If the experiences of delegates in Amsterdam is representative, there would appear to be no simple template for putting in place a compliance programme. Counsel at the forum had had a mixed time of it, but of those who said their legal departments shouldered extra responsibility, none felt particularly positive about this as the time it took put pressure on small and often over stretched teams. A few had been able to share responsibility for compliance across their business. Those succeeding in this respect felt the policy was leant more credibility hearing the message from the head of their own department, one delegate commented: *“The same message from the legal team could be seen as just the lawyers trying to tie their hands again.”*

For multinationals operating in countries with widely varying regulatory and cultural issues, creating a workable and inclusive code of conduct is a real challenge. In developing countries corruption can be common place and the situation is not going to change overnight. In some cultures what could be seen from the outside as a bribe to those within that particular country it would not – in Japan, for instance, where presenting a large gift is simply seen as good business manners. One delegate proposed that companies with cross jurisdictional interests would do well to concentrate on a value-based approach to compliance rather than introducing detailed rules, so beyond the core principles there could be flexibility at a local level.

However, a colleague from one such organisation disagreed with this level of flexibility. One set of rules for all, rigorously upheld at all levels, is key to his company’s code of conduct, he said. Those breaching the code are fired, even though differences in local employment laws had resulted in some cases ending up in court action.

### **Getting the message through**

Training is a real challenge. Computer-based programmes where people can access training from their own desks are popular because they are quick to roll out, although, some delegates complained that even when bought in, these packages still involve a lot of work for the compliance team in gearing the training to their specific audience.

It is a continuous process which needs to be under constant review. One attendee described his company's annual 'health checks', whereby senior management works with the compliance team to highlight the compliance risks they expect in the next year, such as new legislation and consumer group lobbying, which are then filtered through the entire business.



Delegates agreed, the best way to ensure employees take the policy seriously is a combination of instruction and incentive to change (carrot and stick). Some of the companies represented have built compliance into a compensation and benefit strategy, so if there are breaches employees lose out financially at the very least, though if sufficiently serious they could risk losing their jobs.

Getting management on board can sometimes be trickier. Some delegates reported much more acceptance of responsibility at board level, others felt it was still crisis-driven and that the only people in the boardroom talking about risk management were the lawyers, though one corporate counsel made the dry observation: *"All this business of criminalisation of cartel activity has served to concentrate the mind somewhat."*

### **Best laid plans....**

Even companies with sophisticated compliance programmes can be taken unaware. Dawn raids should be viewed as probabilities rather than possibilities in a climate of increasing regulatory intervention.

Be prepared, was the clear message. Stimulating raids allows companies to see how 'the manual' stands up to the rigours of such an exercise. Getting experienced, independent outside counsel to act the part of the regulator adds to the element of surprise, and their contribution during the post exercise wash-up is often found to be constructive. Everyone agreed that to be successful a mock raid had to involve not just the board but those in the front line – gate-keepers, such as receptionists and security guards play a crucial role as they can often raise the alarm - since the first 10 minutes are critical.

In concluding each *Counsel to Counsel* session, delegates are asked what particular discussion points they would be taking away with them.

### **'Take-aways' and key findings**

Delegates in Amsterdam concurred that setting up a compliance code of conduct is without doubt a difficult and complex process, but it is an issue companies are increasingly focused on. Training and regular reviews are key to its success.

With a range of different experiences discussed, it was felt that getting compliance out of the legal department and streaming it through the business is the best way to share the burden of work and responsibility.

Creating a 'one size fits all' compliance programme is not always possible. To do business internationally you have to play by the local rules to an extent, but draw a clear line beyond which you are not prepared to cross.

## **London C2C Forum, April 2005**

### ***Damage control: Corporate counsel's role in reducing and containing corporate crises***

Having tackled risk management at the Amsterdam session, the next in the series of *Counsel to Counsel* forums considered the challenging subject of corporate crisis management.

Facilitator Leigh Dance opened proceedings in London by listing those potentially out for a fight in a world where disputes 'crop-up' in the business pages every day: regulators, governments, competitors, business partners, employees, customers, company executives, special interest groups and shareholders.

The session was taken through a crisis situation faced recently by one of the companies represented, where four people were killed in an explosion at one of the companies facilities operated by an outside contractor.

The appointed and well-drilled crisis response unit swung into action immediately. However, two potential problems immediately presented themselves – the outside counsel the company had expected to work with had already been instructed by the contractor, and the press had got to the site ahead of the legal team and interviewed union leaders. Fortunately, despite it being a public holiday another law firm was swiftly instructed, and thanks to the company's high-profile risk recognition programme, those employees interviewed told the media the organisation cared about safety and so coverage was sympathetic.

A criminal investigation and litigation is ongoing, and an eight-month safety review has been carried out at 120 locations with similar equipment.

Knowing how much you can safely say to the press in such a tragic situation was up for debate by the delegates. One delegate felt people should be put before reputation. *"If you say, 'We messed up here and we are responsible', you will do less damage to your corporation than if you hide behind the lawyers."*

But a fellow counsel felt this was going too far and that a balance should be struck. *"It has got to be factual, in neutral language – not saying too much, but giving people enough so that they can feel some sort of comfort."*

### ***Who's in charge?***

While all the companies represented at the forum have a crisis management procedure in place, who is involved and who takes ultimate responsibility varies widely from company to company.

For some general counsel, their role is minimal, advising purely on the legal issues with the media handled by the publicity department and all the decisions made at executive level. In the US, the general trend is for lawyers to play a more prominent role counselling the business people. As one delegate put it: *"Overall you should be able to help the management actually make a decision in the light of the legal situation and to be able to present options which are applicable."*



### ***The biggest threat***

For many companies, the greatest crisis threat is not an accident but regulation and its potential escalation to civil litigation. A recent survey showed that product liability cases in Europe have increased by 175% – and this before the Sudan food additive crisis.



The session heard about what was previously the UK's largest recall incident, when fizzy drinks were found to have been contaminated with benzene, (this being from the perspective of the outside counsel participant). They had to deal not only with immediate recall crisis but the aftermath – a class action brought by customers, an insurance coverage dispute and massive claims from supermarkets and other manufacturers, which have continued for several years.

The external lawyers used their standard early case assessment methodology, a common approach to ensure all the right issues are addressed from the beginning. Being able to work closely with the company and understanding how the changing commercial objectives fitted in with their legal advice was vital. First they agreed a clear strategy and the best route to achieving that, then budgeting and cost control and finally the best practical outcome, since they were clearly not going to defeat all the claims.

**The regulators**

The trend in regulation towards criminalising certain business practices continues - examples being the new pan-European General Product Safety Directive, the Enterprise Act in the UK, which criminalises cartel behaviour and the proposed Corporate Manslaughter legislation.

The regulators maybe powerful, but they are also woefully under-resourced and, one delegate maintained, often hunt easy prey. If they turn their attention to your company, it is paramount to set up a clear communication channel, preferably with one dedicated person, and agree ground rules from the outset.

A couple of attendees reported they had even gone so far as agreeing with the regulator to use their own external counsel to investigate them. This meant they were in effect paying for the investigation for the benefit of the regulator, but it allowed them to set some of the parameters and know exactly what information was being provided.



In conclusion, it was agreed that every company has to tailor crisis management to best protect its most important assets. For a retail company, the biggest threat is to reputation; for an engineering or manufacturing company, it is the danger of injury or death. External lawyers need to be a part of this procedure, since by having a good prior knowledge of the client's business and what is of paramount importance to them, time will not be wasted exchanging such information should the worse happen.

When crisis does occur, the primary role of the lawyer and the importance of privilege must not be forgotten.

# Forums 2005

## **Mexico City C2C Forum, May 2005 and São Paulo C2C Forum, June 2005**

### **Best practices in managing the in-house legal function**

Mexico and Brazil hosted their first *Counsel to Counsel* forums this year, with delegates from leading public, pharmaceutical, commercial, publishing and industrial companies meeting in Mexico City and São Paulo to share their knowledge and experience.

Delivering and proving value were the recurring themes as in-house counsel gathered for the two *Counsel to Counsel* forums in Latin America. Facilitator Derek Benton, Director International Operations for Martindale-Hubbell led discussions on:

- Defining the legal department function, roles and performance standards;
- Approaches to managing a successful integrated in-house and external legal team;
- Connecting legal risk management to the company's business strategy;
- Demonstrating the value of the corporate legal department.



### **Defining the legal department function**

Delegates at the forums were given breakdowns of the structure of legal departments in a number of both local companies and multinationals with a presence in Latin America. While structures vary, all share one characteristic – they are independent business units within the organisation. This means they can be seen to be impartial in any internal disputes and offer the best advice to benefit the company as a whole.

For the financial services industry in Mexico, the new Ley de Transparencia (access of information rights) has brought significant changes in the use of information and privilege and has serious consequences for the function of the legal department. Indeed, one delegate in Mexico City, facing demands from the authorities for his utility company's client list – one of its most valuable assets said: *"There is no respect at all for confidential information since the Ley de Transparencia appeared."*

### **Relationship with external counsel**

Companies need to find a balance between having a large internal legal department or a large external legal structure. The former represents a fixed cost for the business while the latter is seen as a variable cost depending on the demand for its services. Both forums agreed that the current trend is for smaller internal legal teams, and as a result external law firms must demonstrate a significant understanding of their client's business so they can offer specific rather than generic advice.

To ensure this, one delegate in São Paulo explained how she has increasingly involved the external lawyers in her company's strategic decision making. She said: *"When you have a small legal department it is important to have as many hands and heads as you can and to ensure delivery of the best external advice it is important to have them involved in these discussions."*

External counsel on the forums agreed. *"For us the best client is the one who argues and discusses with us; the client who lets us know what his company wants and how they want to receive it,"* said one lawyer.



### **Legal risk management**

The business culture in the region is rapidly changing with the increased focus on corporate social responsibility affecting all areas of an organisation. Delegates in São Paulo agreed it is important to develop an internal client survey and use the results to develop projects to improve service delivery and provide the levels of response that the business units are looking for.

### **Demonstrating the value of the legal department**

To demonstrate value, in-house legal departments must have an in-depth knowledge of the company's business and a good working relationship with all areas of the organisation in order to maximise their performance. This increasingly requires flexibility in thinking from a commercial point of view as well as a legal one, something that has not traditionally been the case as the *Counsel to Counsel* sessions in Mexico City concurred.

As one legal director put it: *"In Mexico's system one of the things is you sit at a beautiful table but you never had any training in executive business. The longer you are in business the more pro-active and involved you get."*

But it was also agreed that there is change happening with better business training for young lawyers of particular importance.

In São Paulo, delegates talked about the need to hire personnel with complementary talents – for example, having some lawyers who are very diligent in negotiation and others who are technically excellent – and with values that match those shown by the company.

With more onus being put on in-house counsel's involvement in the decision-making process the legal department's workload is inevitably increased. Attendees stressed that care needs to be taken to prioritise the demands made on them.

One general counsel summed up the situation: *"We are not a revenue-generating department; we need to demonstrate constantly that they actually need us. The most important thing is to keep good communication with the CEO. The secret of success is to be 100% involved with the business."*

As was evident in both discussions, the role of the legal department is becoming more and more important; the increase in responsibilities being directly related to its growing involvement in the whole business and its participation in key decision-making.

To undertake this role effectively, the legal department has to have a degree of independence, to provide impartial advice for the good of the company, not only for a determined department. The legal function is all about transparency and compliance and so the in-house team needs to set an example for the rest of the organisation.

And ultimately, the secret of success is good communication with the senior executive team and the rest of the business.

# Forums 2005

## **Counsel to Counsel Forums 2005**

The 2005 *Counsel to Counsel* programme continues with sessions in:

- Tokyo – 8 September
- London – 11 October
- Stockholm – 25 October
- Shanghai – 2 November

### **Discussion topics to include:**

#### **Tokyo - Damage Control: In-house Counsel's Role in Protecting the Company**

- Best practices to avoid and reduce damage to the corporate reputation;
- Approaches to identify troubled businesses and assist in restructuring;
- Pro-active efforts to avert and contain problems before they 'mushroom';
- Working with other corporate functions to better control problems.

#### **London - Best Practices in Identifying, Valuing and Defending Your Intellectual Property (session one)**

- Managing your IP assets as a global portfolio;
- Measuring the cost and benefits of IP protection by jurisdiction;
- Tools for effective collaboration among research, development, IP counsel and the corporate law department;
- Litigation strategies that strengthen the business without breaking the bank.

#### **London - Best Practices in Approaching Transatlantic Competition Regulations (session two)**

- How in-house counsel manage local and regional competition compliance across Europe and North America;
- Criminalisation of competition laws; keeping your executives out of jail;
- Anticipating competition law developments on both sides of the Atlantic;
- Practical approaches to managing multi-jurisdictional regulatory approvals.

#### **Stockholm - Balancing Local and Regional Laws in Business Today**

- How to proceed when local and regional laws overlap;
- Anticipating relevant regulatory developments and enforcement;
- Getting buy-in at the local level on compliance with local and regional laws;
- Information management.

#### **Shanghai - Best Practices in Corporate Counselling in China and the Asia Pacific (session one)**

- The role of corporate legal functions in ensuring China is a viable global business player;
- Improving corporate governance practices in Chinese companies;
- Practical approaches to compliance, commercial documentation, dispute resolution, enforcing judgments;
- Managing outside law firms to meet expectations and add value.

**Shanghai - Guarding the Jewels in Your Crown:  
Protecting IP in China and the Region (session  
two)**

- The role of corporate legal functions in ensuring China is a viable global business player;
- Improving corporate governance practices in Chinese companies;
- Practical approaches to compliance, commercial documentation, dispute resolution, enforcing judgments;
- Managing outside law firms to meet expectations and add value.

**How to participate in our Counsel to Counsel programme**

If you are interested in attending a *Counsel to Counsel* forum please visit <http://c2c.martindale.com> or contact Paul Chapman at Martindale-Hubbell International on +44 (0)20 7911 1947 or by email at [paul.chapman@martindale.com](mailto:paul.chapman@martindale.com)

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*The photographs presented in this brochure were taken at Martindale-Hubbell's Counsel To Counsel forums in Amsterdam, London, Mexico City and São Paulo. For more information see <http://c2c.martindale.com>*

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LexisNexis® Martindale-Hubbell®

Procter House  
1 Procter Street  
London WC1V 6EU  
United Kingdom  
Phone: +44 (0)20 7911 1920  
Fax: +44 (0)20 7911 1921

121 Chanlon Road  
New Providence, NJ 07974  
United States  
Phone: +1 908 771 7777  
Fax: +1 908 771 7792

123 Commerce Valley Drive East  
Markham, ON L3T 7W8  
Canada  
Phone: +1 800 668 6481  
(ext. 847 or 853)  
Fax: +1 905 479 4661

Calle Jose Gpa. Covarrubias 27  
Col. San Miguel de Chapultapec  
Mexico, DF 11850  
Mexico  
Phone +52 55 5273 0529  
Fax +52 55 5276 5514



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