



4 Pitfalls to Avoid When Conducting Cross-Border Investigations of Shareholder Demands

Even the most experienced corporate directors and counsel should understand the nuances of cross-border independent investigations, as it is important to avoid potential pitfalls. Strategically navigating these pitfalls is critical because the business judgment rule does not protect a board or a company from violations of some foreign laws.

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Corporate directors and their counsel should understand the nuances of cross-border independent investigations, which can create pitfalls for even the most experienced corporate advisers.

Stringent data privacy laws may govern documents.

Many investigations start with documents, often emails rife with personal data. Broadly defined laws often restrict the storage, use and transmission of such personal information. The EU General Data Protection Regulation (GDPR) that recently took effect, for example, imposes multimillion-euro fines for improperly using EU citizens' personal data, even if that data may be stored elsewhere. And while the GDPR is increasingly well known, many Asian jurisdictions, such as Malaysia, Singapore and Korea, have stricter data privacy laws that impose even harsher penalties.

Failure to conduct certain investigative steps overseas can lead to practical obstacles and legal liability.

Although U.S. lawyers might prefer to review data collected overseas in their U.S. offices and conduct interviews remotely, on-the-ground investigation teams can bring valuable language skills and cultural awareness. Moreover, moving data across borders can risk violating the broad restrictions that some jurisdictions impose. China, for example, has a broad state secrets law that prohibits the "export" of several categories of information, which may require that the investigation be done by lawyers on the ground in mainland China at the risk of significant civil — or even criminal — liability.

The privilege may not protect certain communications.

Even in wholly U.S. investigations, certain types of communications by counsel retained by a board (or a special committee thereof) during the course of its investigation may not be privileged. Typically, however, carefully defining the investigation's scope, structure and output with this in mind can minimize the risk of unexpected disclosure. But outside the U.S., the privilege may never attach to communications that an American lawyer would normally expect to be protected. For example, just recently the German Constitutional Court declined to protect documents seized by prosecutors in a raid of investigating counsel's office, and recent UK court decisions have narrowed the application of privileges in investigations. Moreover, some civil law jurisdictions, such as China and Korea, do not recognize the privilege at all, providing only the barest aid to lawyers seeking to protect their clients' information.

Certain types of reporting can subject investigative materials to third-party discovery.

Because plaintiffs often try to obtain investigative reports and supporting documentation, independent counsel must carefully consider how it reports the findings of its investigation to the board. For example, although the data laws discussed above might tempt counsel to only report orally on a cross-border investigation, a written report may more likely protect underlying documents, like attorney notes and interview memos, from shareholder discovery. Striking this balance is a delicate task for the board and its counsel.

Although these risks are common to many types of cross-border investigations, they can be unexpected for corporate advisors whose primary experience is U.S.-based. Strategically navigating these pitfalls is vital because the business judgment rule does not protect a board or a company from violations of the foreign laws discussed above, which can subject a company to civil and even criminal liability separate from the underlying shareholder demand.

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About Kobre & Kim's Shareholder Disputes Team

Kobre & Kim is an Am Law 200 firm focused exclusively on disputes and investigations. Our lawyers have significant experience representing multinational corporations and their boards in high-stakes deal litigation, shareholder disputes, and independent investigations, often involving multiple jurisdictions. We primarily act as special advocates in sensitive situations requiring independence and conflict-free advocacy.