From Enron to Hong Kong: A Litigator Learns to Tackle Global Corruption

What U.S. companies need to know as Asia’s biggest superpower expands its anticorruption rules

MCC INTERVIEW: Timothy W. Blakely / Morrison & Foerster LLP

Tim Blakely relocated to MoFo’s Hong Kong office in 2011 in the midst of a successful career as a U.S. litigator focused on securities class actions and other complex litigation and regulatory matters. Below, he provides his unique perspective on global anticorruption enforcement. His remarks have been edited for length and style.

MCC: How did your background prepare you for what must have been a challenging transition in moving to Hong Kong?

Blakely: I spent my early career in New York doing Enron-related litigation when that was the scandal of the day. That was terrific exposure to high-pressure, complex litigation and enforcement matters. When I moved to San Francisco to be near my wife’s family, I continued to focus on complex security litigation and enforcement matters, notably the landmark JDS Uniphase security fraud trial in Oakland where we won a complete defense victory in a case where the plaintiffs were seeking $20 billion in damages. Again, I was working with terrific teams tackling very difficult problems in complex, high-stakes litigation.

Over time, more of my work touched China, including a trial in Los Angeles with allegations of fraudulent transactions. There was also an increase in Foreign Corrupt Practices Act (FCPA)-related work as awareness of anticorruption issues and concerns about liability accelerated. Given those developments, it made sense for the firm to invest in a litigator in the region to serve our growing client needs. Coming to Hong Kong was a pretty easy decision for me. The firm had a strong and longstanding presence in China, and the Hong Kong office had a market-leading
technology practice and a strong corporate practice. That was a solid foundation for my work and provided me with a great opportunity to step up to new challenges in a new culture and legal system. I was thirsty to do it, and I was blessed with strong support from my wife, who was open to exposing our children to new opportunities and the excitement of living overseas.

**MCC:** China's anticorruption rules have been expanding, including a heightened focus on individual culpability. Tell us about the current landscape, which some observers say has caused a high level of uncertainty among senior managers and directors of multinationals.

**Blakely:** You're absolutely right that the current environment has increased concerns among multinational businesses and key employees responsible for those businesses, especially in challenging jurisdictions. Worldwide enforcement of anticorruption laws is accelerating. Last year was a record-breaking year for the FCPA, with four of the 10 largest corporate resolutions of all time. Some of those involved high-profile matters that impact our clients in China and touch on core issues such as hiring employees and bringing on interns, competing for business and making charitable donations. These are daily issues for our clients. The Department of Justice (DOJ) has made clear that it intends to combat corporate misconduct through individual accountability. The concern is that paying massive fines to resolve bribery allegations can't just be treated as a cost of doing business. To deter corporate misconduct more effectively, the DOJ has recognized that individuals must be held accountable.

The DOJ has taken concrete steps in that direction. These include the issuance of the Yates Memorandum, which makes clear that cooperation credit for companies seeking resolution with the DOJ is conditioned on their providing relevant facts about the individuals involved in any misconduct. The DOJ’s Fraud Section, which enforces the FCPA, last year issued an enforcement plan and guidance in a pilot program intended to encourage voluntary reporting. That policy document also focused on individual liability for corporate misconduct by emphasizing that mitigation credit would be available to companies that disclosed relevant facts about individuals.

Beyond that, the sense of uncertainty and increased risk is driven by growing international cooperation in enforcement. For example, last year one of the largest resolutions involved Teva Pharmaceutical, which ended up paying more than $500 million to resolve alleged FCPA violations based on conduct in Mexico and elsewhere. In announcing the resolution of the case, the DOJ went out of its way to acknowledge the assistance of the Mexican attorney general’s office. Other resolutions last year involved the payment of significant fines in multiple jurisdictions following coordinated law enforcement efforts. We're seeing that kind of international cooperation across the board, along with increased interest in building the relationships that stimulate that type of cooperation.

Another good example of multi-jurisdictional risk is the GlaxoSmithKline (GSK) case, which saw GSK pay a penalty of approximately $500 million to the Chinese government in connection with allegations of bribery in its China-based operations. Those allegations also led to investigations in the UK and U.S., and GSK ended up paying a further $20 million penalty to resolve FCPA charges brought by the U.S. Securities and Exchange Commission. The fact of the matter is that it’s more difficult than ever to localize the effects of misconduct, which has increased the risk profile in this space.

**MCC:** The Chinese anticorruption campaign has created a bull market in compliance advice and counsel. What do companies need to know about crafting an effective anti-bribery and anticorruption compliance infrastructure?

**Blakely:** Every business needs to understand that there’s no one-size-fits-all approach. Every company lives in its own business environment, has its own business culture and has its own risks inherent to how it operates its business. The first step in establishing an effective compliance program, and developing the policies to implement that program, is to conduct a risk assessment so that the company can understand where the risks of bribery are in its operations. That may mean understanding better who your business partners and agents are, and who you are working with in various jurisdictions to bring products and services to market.

We’ve looked at FCPA resolutions over time. In 90 percent of the cases or more, the misconduct occurs through third-party intermediaries such as agents or perhaps through joint-venture partners. A big challenge for our clients and other companies in this space is assessing and understanding the risks imposed on them by their business partners. It is important for a company to address these risks in deciding how to implement its own policies and compliance programs. The ultimate goal needs to be to target policies and training to the right personnel within the company, and sometimes to business partners as well, so that key constituencies understand the company’s expectations around these issues.

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MCC: Are companies now facing parallel or piggyback Chinese anticorruption and U.S. FCPA proceedings? How do you counsel clients on this?

Blakely: The primary focus of the Chinese anticorruption campaign is on corrupt officials, not necessarily businesses. That said, it’s still quite possible to get caught in the crossfire of that campaign.

For example, if you’re a multinational company doing business in China, it is conceivable that one of your sales employees in a certain province may be detained to “assist” in an investigation. The focus of that detention will be gathering evidence against the particular official who is being investigated, but that process may bring to light issues that could affect the company. That will require the company to conduct an investigation, and if there’s potential FCPA exposure, that means conducting an investigation with an eye toward not just the local allegations and China-related issues but also toward any potential FCPA liability and the possibility that U.S. authorities will be looking at this at some point.

It is more important than ever for companies to keep in mind that there may be parallel inquiries. In managing that type of an investigation, it’s very important to have advice from international counsel who can coordinate those efforts with an eye toward the ultimate audiences making determinations about the conduct and the potential liability.

One thing I enjoy in my work here is the ability to provide high-level advice around U.S. enforcement-related issues, in collaboration with my U.S.-based colleagues such as Chuck Duross and James Koukios who are former senior prosecutors from the DOJ’s Fraud Section, with an appreciation of what’s going on in a cultural and legal sense here in China, which is critically important. I also have quite enjoyed building strong relationships with accomplished local People’s Republic of China lawyers who can help companies navigate those difficult local issues as well.

MCC: As a solicitor, you’ve been dealing with contentious proceedings and regulatory investigations in Hong Kong. Give us a sense of what it’s like to practice in the litigation and arbitration trenches in Hong Kong. Has it changed your perspective on dispute management and resolution?

Blakely: The biggest difference between the U.S. litigation landscape and that of Hong Kong is that Hong Kong has a split profession. It has solicitors and barristers, with solicitors working up cases and dealing with clients, and barristers appearing in court before the judges. For high-profile regulatory and court proceedings, this has provided me with a fantastic opportunity to collaborate from a strategic and execution perspective with specialist senior counsel in Hong Kong. It’s a very different approach to advocacy and hearings than in the United States, with a much greater emphasis on oral submissions to the court rather than the written submissions, which are comparatively more important in U.S. proceedings. We may have hearings that last two or three days in Hong Kong where the senior counsel will very patiently and methodically take the judge through the evidence and arguments in a process that is quite different from a proceeding in front of a U.S. Article III judge, where if you can get an hour or two of their time that may be it. It’s an approach that brings new opportunities for collaboration to achieve client goals, which has been fun.

In the arbitration space, my training as a trial lawyer gives our clients an advantage because generally we handle our own advocacy in arbitrations rather than bringing in senior counsel or a barrister to conduct the hearing at the end of the day. That allows us, from the early stages of a dispute proceeding, to map out how it is going to be resolved in the context of the arbitration hearing, then execute that strategy all the way through.

Another thing that has been interesting and educational for me is the multicultural aspect of the proceedings. Virtually every case here involves parties from different countries, and sometimes from different legal regimes. It’s not uncommon – in fact, I’d say it’s typical – to have parties from a civil law background and parties from a common law background in the same dispute. That gives rise to all sorts of challenges for the arbitrators in meeting the parties’ expectations about how a proceeding can fairly resolve their disputes expeditiously and efficiently.

It’s been fun to be part of a different legal culture and environment. The training that I had as a young lawyer in trial and enforcement-related work has given me a perspective that adds value for our clients as we navigate issues in Hong Kong and China.