

## ACCOUNTABILITY AND TRANSPARENCY

Are Your Corporate Governance Practices Putting You at Risk?

### Protecting Yourself When Doing Business Internationally

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## Protecting Yourself When Doing Business Internationally

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### Panelists

- **Julie Lee**  
Foley & Lardner LLP
- **Neville Byford**  
Eversheds
- **Andy Moody**  
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- **Victor A. Vilaplana**  
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## Protecting Yourself When Doing Business Internationally – the China Perspective

Julie Lee  
Foley & Lardner LLP

## Understand the Cultural Differences in Business Dealings

- U.S. proverb: Early bird catches the worm
  
- Chinese proverb: The first bird in the flock is the first one to be shot

## Understand the Cultural Differences in Business Dealings (cont'd)

- Be patient when dealing with business people from a relationship culture
- Two important elements of enjoying a successful business relationship with a Chinese business:
  - relationship
  - mutual benefits
- In negotiations, recognize that “yes” may mean:
  - No
  - I do not understand, or
  - I hear you, but I disagree

## Chinese Regulatory Restrictions

- Procedural issues
  - Governmental approval is required for many transactions
- Substantive issues
  - Contract with the appropriate party
    - a transaction that is outside a Chinese company’s scope of business may be invalid
  - Foreign Investment Industry Guide Catalogue
  - Finding creative solutions when dealing with unfamiliar legal restrictions, e.g., escrow and holdback arrangement

## Special Considerations When Dealing with a State-Owned Enterprise (“SOE”)

- Commercial function v. governmental function
- Foreign Corrupt Practices Act issues
- Auction/approval process when an SOE divests interests in an entity

## Protecting Yourself When Doing Business Internationally

Neill Blundell, Neville Byford, and Andy Moody  
Eversheds

## What happens if the deal goes wrong?

- Negotiation between the parties
- Expert determination
- Mediation
- Arbitration – institutional or ad hoc
- Litigation

## What law will determine the parties' rights and obligations?

- Choose a governing law you understand and have confidence in.

## Where should the parties resolve any dispute?

- Place of arbitration/dispute
- Enforcement

## Consider How the Contract Will Work

- Think carefully about how to extract value – payment mechanisms, currency risk, passing of title/delivery, political risk
- Be practical – Live the Contract

## Consider deal structure/BIT protection

- If your transaction involves a foreign investment and it could be subject to expropriation or unwanted interference by the host State, Government (national or local), Regulators, Authorities, etc. then consider structuring the transaction to allow access to BIT/MIT arbitration.

## The Increasing Global Response to Bribery and Corruption: UK Bribery Act – An Update from Europe

### No prosecutions of companies to date but:

- Currently around 15 ongoing investigations by the SFO (re UKBA and pre Bribery Act legislation) against companies, including Rolls Royce, GSK and Barclays Bank
- SFO working with FCA, US DOJ and US SEC as well as other agencies to share intelligence and investigate
- SFO brought charges against 4 individuals (including 3 directors) at Sustainable AgroEnergy under UKBA
- SFO been given special “blockbuster” funding by UK Parliament on 20 January 2014 to pursue bribery case
- Deferred prosecutions agreements arrive in the UK – now in effect as of 24<sup>th</sup> February 2014



## The Increasing Global Response to Bribery and Corruption: Globalisation of US Enforcement

- Co-ordination between US and foreign counterparts has increased dramatically
- FCPA investigations where local law enforcement have also investigated include:

Country	Investigation	Date	Country	Investigation	Date
<b>Australia</b>	Alcoa	9 January 2014	<b>Italy</b>	Immuncor, Siemens	November 2008 15 December 2008
<b>China</b>	Siemens Morgan Stanley	15 December 2008 April 2012	<b>Korea</b>	IBM	March 2011
<b>Costa Rica</b>	Alcatel Lucent	27 December 2010	<b>Liechtenstein</b>	Siemens, Alcoa	15 December 2008
<b>France</b>	Halliburton Total SA Alcatel Lucent	25 July 2013 29 May 2013 27 December 2010	<b>Nigeria</b>	Halliburton, Siemens	February 2011 15 December 2008
<b>Germany</b>	Bristol Meyers Daimler Siemens Magyar Telekom Plc	28 September 2007 7 April 2010 15 December 2008 29 December 2011	<b>Norway</b>	Siemens, Alcoa	15 December 2008
<b>Greece</b>	Siemens	15 December 2008	<b>Poland</b>	Johnson & Johnson	8 April 2011
<b>Hungary</b>	Siemens Magyar Telekom Plc	15 December 2008 December 2011	<b>Russia</b>	Siemens	15 December 2008
<b>India</b>	Dow Chem	2007	<b>Switzerland</b>	Siemens, Alcoa	15 December 2008
<b>Israel</b>	Siemens	15 December 2008	<b>UK</b>	BAE, AON Smith & Nephew Parker Drilling Co Alcoa	February 2010 20 December 2011 6 February 2012 16 April 2013 9 January 2014

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## The Increasing Global Response to Bribery and Corruption: Worldwide



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## The Increasing Global Response to Bribery and Corruption

Transparency International  
*Corruption Perceptions Index 2013*

Country	Score (0 = highly corrupt, 100 = very clean)
New Zealand, Finland, Denmark	91
Switzerland	85
Netherlands	83
Germany	78
United Kingdom	76
United States	73
France	71
Italy	43
Greece	40

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## The Increasing Global Response to Bribery and Corruption

Transparency International  
*Country Enforcement of the OECD Anti-Bribery  
Convention, Progress Report 2013*

Level of Enforcement	Countries
<b>Active Enforcement</b> (adequate deterrent to foreign bribery)	Germany, Switzerland, UK, US
<b>Moderate Enforcement</b> (stages of progress in enforcement but inadequate deterrence)	Australia, Austria, Finland, Italy
<b>Limited Enforcement</b> (stages of progress in enforcement but inadequate deterrence)	Argentina, Bulgaria, Canada, Denmark, France, Hungary, Norway, Portugal, South Africa, Sweden
<b>Little or No Enforcement</b> (no deterrent whatsoever or very little deterrence)	Belgium, Brazil, Chile, Czech Republic, Estonia, Greece, Ireland, Israel, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Poland, Russia, Slovak Republic, Slovenia, South Korea, Spain, Turkey

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## Protecting Yourself When Doing Business Internationally

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Victor A. Vilaplana  
Foley & Lardner LLP

## No Substitution for Knowledge

- Know the Laws
- Know the Customs
- Know the Language – not just spoken

## Long and Sad History of Companies Getting into Trouble (“Road to Ruin”)

- Union Carbide – Bhopal India
- Walmart – Mexico
- McDonald’s – Russia

## Issues

Know regulatory framework (particularly sensitive area)

- Health and safety very important
- Environmental
- Labor Law

## Issues (cont'd)

Know the Customs

- What is permissible and what is not
- FCPA – Grease payments
- Local vs. US Law

## Issues (cont'd)

### Know the Risks

- Personal v. Corporate
- Civil vs. Criminal
- Trading while insolvent
- Foreign entity more likely to be target

## Issues (cont'd)

### Mitigate Risks

- Insurance
- Effective local counsel – its own risks
- Compliance programs – Code of Conduct