

The thing about ...

Kyle Wombolt

Recently ASIAN-MENA COUNSEL's Publishing Director Patrick Dransfield, armed with his trusty Leica M2, caught up with Kyle Wombolt, Global Head of Corporate Crime and Investigations of Herbert Smith Freehills, in Hong Kong. Wombolt shared his perceptions of the historical, cultural and legal challenges facing general counsel responsible for operations in China specifically, and Asia generally, from a perspective that encompasses compliance investigations and projects in over 40 countries.

ASIAN-MENA COUNSEL: You first began working in Asia almost 15 years ago and have seen many changes in the market. How has the legal market developed in that time?

Kyle Wombolt: There have been a significant number of developments in the multi-jurisdictional white collar space. When I first started working in Asia, the practice area was in its infancy. I simply did not see other lawyers who were doing what I was on a regular basis. What you had in Hong Kong was a handful of criminal and financial services regulatory lawyers who had similar skill sets, but their practices were very localised. The only disputes partners in the region who were focussed on international work were arbitration lawyers, but the majority were focussed on the construction industry. So really in the space of 15 years, we have seen the practice come into existence and begin to develop. I think it's probably still in its infancy, though it has probably grown too quickly and needs to shake out a bit.

AMC: What led to the development of the market for white collar or corporate crime and investigative work?

KW: Large-scale enforcement actions related to conduct that took place in Asia. These were generally driven by regulators and prosecutors in the US, and they began to significantly increase in number a little more than a decade ago. The primary driver of that growth was probably the enactment of a piece of legislation in the US in 2002 called the Sarbanes-Oxley Act.

AMC: Why was that such a distinctive turning point?

KW: Under Sarbanes-Oxley, any organisation that files reports with the Securities and

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Kyle Wombolt in the conference room with members of his team: Michelle Yu, Geng Li and Siyu Zhang.

Photo: Patrick Dransfield

Exchange Commission is required to include an assessment of their internal controls in their annual report. In conducting the evaluations necessary to make these assessments, many organisations uncovered violations of the FCPA or federal securities laws at their foreign operations. Some of those organisations, in turn, chose to self-report to the US authorities with the hope of receiving credit for their cooperation. This led to a spike in enforcement actions, particularly FCPA enforcement actions, and increased sensitivity to issues arising across Asian jurisdictions. Around the same time, the US enforcement authorities increased their resources and began to focus on extra-territorial enforcement.

AMC: How has your practice changed and do you think Asia will continue to be a ‘hot spot’ for corporate investigations?

KW: I think it would be more accurate to say my practice has evolved rather than undergone any significant change. When I first began working over here, the paramount issues almost always involved the application of US law and enforcement by US authorities.

The Asian markets have matured, particularly in the last five years. Today, local regulators and enforcement agencies are every bit as active, and important, as their peers in the US. This is why the large corporate matters are frequently referred to as “multijurisdictional” enforcement actions. You have to be sensitive to different, sometimes inconsistent, rules and the various approaches taken by regulators. It can be very interesting and very complex. Our teams understand this dynamic. I think it’s the key factor that distinguishes us from our competitors. We’ve had a significant regulatory/litigation presence in Asia for more than 30 years. We have unmatched experience in dealing with the local issues that can have a significant impact on any investigation. When you add to this our knowledge of local business cultures, the languages and business practices, this becomes a highly compelling proposition for clients.

AMC: Obviously you experienced first-hand the dramatic changes that China has undergone over the past 15 years. Can you describe some of these developments?

KW: The most dramatic change has been the sheer magnitude of investment and the number of Western companies that have entered this market. China is the hub of Asia – it drives everything about business across Asia including the development and shape of legal practices across the entire region. You often hear comments to the effect that the opening up of China to the world has changed not only China, but also the global economy. The same is true of the corporate crime and white collar spaces. It’s also completely changed our practice.

I guess a more practice-specific change has been the evolution of Chinese enforcement agencies. In less than 20 years, the Chinese government has developed a regulatory framework where very little existed before. The next phase of China’s development in this space will be very interesting – as the regulatory and enforcement bodies become more sophisticated, will they take an active part in shaping the markets, not just in China, but in regulating the growing number of Chinese companies that are investing offshore? I suspect we will continue to see a lot of change on this front.

AMC: What are the most significant challenges for a Western company operating in China?

KW: The most significant challenge is the fact that the Chinese legal system is still evolving, and evolving rapidly. If you look at how business relationships are defined in a Western jurisdiction, the fundamental basis of the relationship always rests on a legal construct. A contract will define the commercial relationship. This contract is underpinned by the ability of either party to seek redress in court in the event of a disagreement. In other words, the contract governs the relationship.

In China, the reverse is often the case. The commercial environment in China does not have a strong historical legal foundation. Rather, it is personal relationships that shape the basis of any commercial relationship. While this is obviously changing, the historical emphasis upon a personal, as opposed to a legal or contractual relationship, remains deeply ingrained. It can also present some challenges. Specifically, the need to maintain or develop strong personal relationships often gives rise to the desire to provide individualised benefits to employees of an organisation. This clearly has the potential to create issues with Western anti-corruption laws.

The most deep-seated challenge, however, remains cultural differences, in particular the language barrier. The majority of the issues we deal with on a daily basis arise or otherwise develop because the language difference has led to a failure to adequately communicate.

AMC: What was the strategic thinking for Herbert Smith Freehills to make you the Global Head of Corporate Crime and Investigations in Asia?

KW: I’m not sure that there was any real strategic thinking to it. I was already based in Asia at the time I was named the Global Head of the practice.

But on a more serious note, I do think one of the key factors that makes our offering so unique is the fact that most of us have been working in Asia for many years. This is important for a number of reasons. To be successful in this space, you need to have a full appreciation of how local issues could potentially impact a large corporate investigation. This means being able to manage a situation involving multiple local jurisdictions and authorities, as well as US, UK or other foreign agencies, while being sensitive to the demands of local authorities and the rules that they will expect you to apply. Having a team that understands those challenges is obviously the key. Failure to appreciate the fundamental importance of this issue can complicate the investigation and hamper your ability to gather information. Worse still, it may expose your client to local enforcement action and liability.

AMC: What challenges do you face in managing a team and clients that are spread around the world?

KW: The main challenge is staying on top of legal markets that are changing almost daily and ensuring we are ahead of the competition. I spend a lot of time travelling, but that is important when you are running a global practice. More broadly, the critical challenge is for us is to build our presence in the US where we are still relatively new to the market. The US enforcement authorities remain the most

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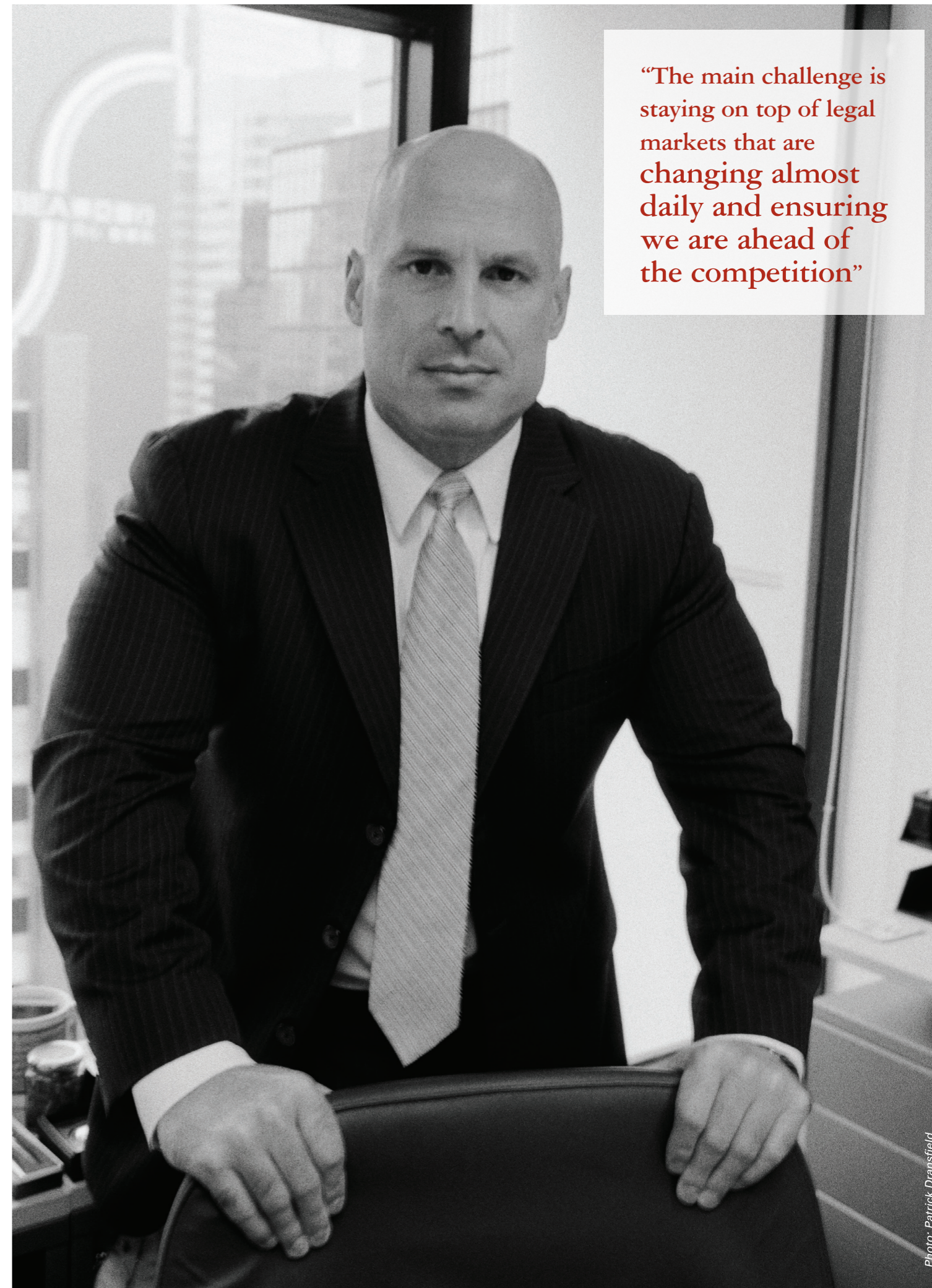


Photo: Patrick Dransfield

aggressive in the world and expanding our US offering is one of my key strategic goals for the coming year.

AMC: During one of your workshops with in-house counsel you mentioned that many countries that are low on Transparency International's Corruption Perceptions Index have also been the headquarters of companies that have been subject to some notable anti-corruption enforcement actions. I think you went on to say that a country that scores well on the Corruption Perceptions Index does not necessarily have a comparably low percentage of its citizens paying bribes. Would you care to elucidate on this point as it does rather turn perceived wisdom on its head?

KW: This is an interesting issue and something I have discussed at a number of conferences over the past few years. The Transparency International Corruption Perception Index is a 'heat map' that identifies countries with perceived high levels of corruption. If you look at the index, most Asian jurisdictions, with the exception of Japan, Hong Kong and Singapore, have perceived high levels of corruption, while Western Europe and North America are generally perceived to have much lower levels. My key point is that the people allegedly paying the bribes in the Asian jurisdictions are not necessarily domiciled, or citizens of the country where the bribes are paid. All you have to do is look at the body of settled FCPA enforcement actions – the defendants are almost exclusively US and European corporates. So when you hear talk about perceived levels of corruption in a jurisdiction, in particular in situations involving corporate 'supply side' corruption, it is important to remember that the bribe payers in those cases are not always local citizens, but rather expatriate employees of Western organisations.

AMC: Given the market development in Asia in recent years has the role of in-house counsel changed? Specifically, does Asia present particular challenges for in-house lawyers?

KW: The short answer is "yes". The biggest challenge that I see regional GCs facing is the problem of often having very limited resources but being required to cover vast geographical areas, often at a time when their organisation is in expansion mode. There are some remarkable similarities to what we saw with the tech companies in Silicon Valley during the technology boom 16 to 17 years ago. You often had one person in the GC's office who was responsible for designing, implementing and running the legal department of a rapidly growing global organisation with only a few other people to assist. It was unbelievable – beyond the capability of even the most talented lawyer. I think that being a GC in Asia is probably the most challenging role that one can think of, regardless of the industry - whether it be in financial services, energy, consumer goods or manufacturing. I have a great deal of respect for GCs in Asia and the situations they have to manage on a daily basis.

AMC: What plans do you have for the global practice? Do you see future growth turning your attention to Africa or the Middle East, for example?

KW: We will obviously focus on maintaining our market-leading position in Asia. Looking further afield, the UK and European mar-

kets are both strong, and very busy for us, while the US remains key to our global strategy. We are one of a handful of UK firms to enter the US and be profitable from a very early stage. We have also been very fortunate in being able to make some targeted, very high quality hires. I expect to see further developments in the US over the coming year and this is an exciting prospect. Africa has traditionally been a strong market for us, and I am optimistic about the future. We run our Francophone practice from Paris while London manages Anglophone Africa. London and Paris often work alongside our Asia practice to advise Asian companies, in particular from China, South Korea and Japan, which are facing issues in Africa. I am bullish about the prospects for Africa in general and see a number of opportunities for us to work with our transactional teams, in particular energy, finance and infrastructure.

AMC: How do you manage your work in order to manage your personal time? How do you counsel your team to ensure they have work life balance?

KW: I don't always do this very well. The last year in particular has been extremely busy and I would have preferred to have spent a little more personal time at home in Hong Kong. On the other hand, it is good to be busy. I am generally more concerned about the team and making sure that they get some time off. The nature of our practice is such that we frequently have high pressure situations where people have been asked to work extremely long hours. I try to make sure we give that back and allow people to have a good balance. We are lucky to have a very talented group of lawyers who are, in my opinion, the best in the business. Naturally we do everything possible to show our appreciation, not only for the effort they put in, but also for the quality of their work.

Kyle Wombolt is the Global Head of Corporate Crime and Investigations at Herbert Smith Freehills. Based in Hong Kong, he has 15 years of experience in Asia and has led investigations and compliance projects in more than 40 countries worldwide. Wombolt focusses on multi-jurisdictional anti-corruption, regulatory, fraud and accounting investigations, as well as trade and sanctions issues involving multinational and major regional corporates. He has extensive experience in dealing with government agencies and regulators in key jurisdictions in Asia, Europe, Australia and the United States.

Wombolt also has broad range of experience implementing anti-corruption compliance programmes for a broad range of clients, including investment banks and other financial institutions and multinational companies. He regularly advises clients on corruption risks associated with a wide range of transactions, including IPOs, mergers and acquisitions and joint venture relationships.

Wombolt is admitted in Hong Kong, California and New York, and is a registered foreign lawyer in England and Wales. He speaks English and is conversational in Mandarin.