

Choice of Law and Choice of Arbitration Institutions

Perspective for international companies doing business in China



Terence Wong
Partner
Shanghai and Hong Kong



Ben Bruton
Partner
Dubai

WINSTON
& STRAWN

Topics

1. Governing law of the contract?

2. Choice of Arbitration Institutions?

Some Basics



Mainland China

- Chinese law, or PRC law
- Civil law system

Hong Kong SAR

- Hong Kong law
- Common law system
- a “foreign” jurisdiction

1. Governing law of the contract?

Chinese Law

Home country
law

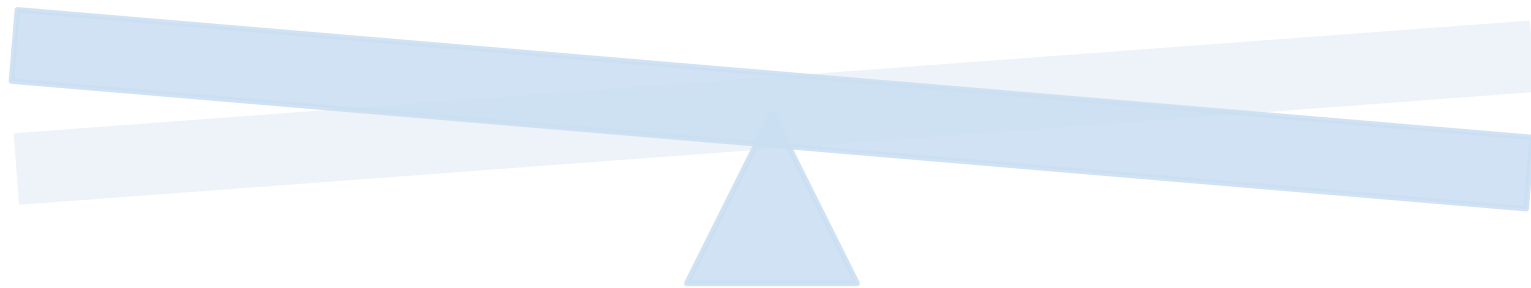
Law of neutral
places

1. Governing law of the contract?

Chinese Law

Home country
law

Law of neutral
places



1. Governing law of the contract?

Chinese Law

Home country
law

Law of neutral
places

2. Choice of arbitration institutions?

1. Should we go to arbitration or the courts?
2. Which arbitration institutions?
3. Quality of Chinese arbitration associations and Chinese courts


Choice of Law

A series of approximately 20 thin, white horizontal lines spanning the width of the slide, located in the lower third of the image.

WINSTON
& STRAWN

What should be the governing law of the contract?

Different types of governing law

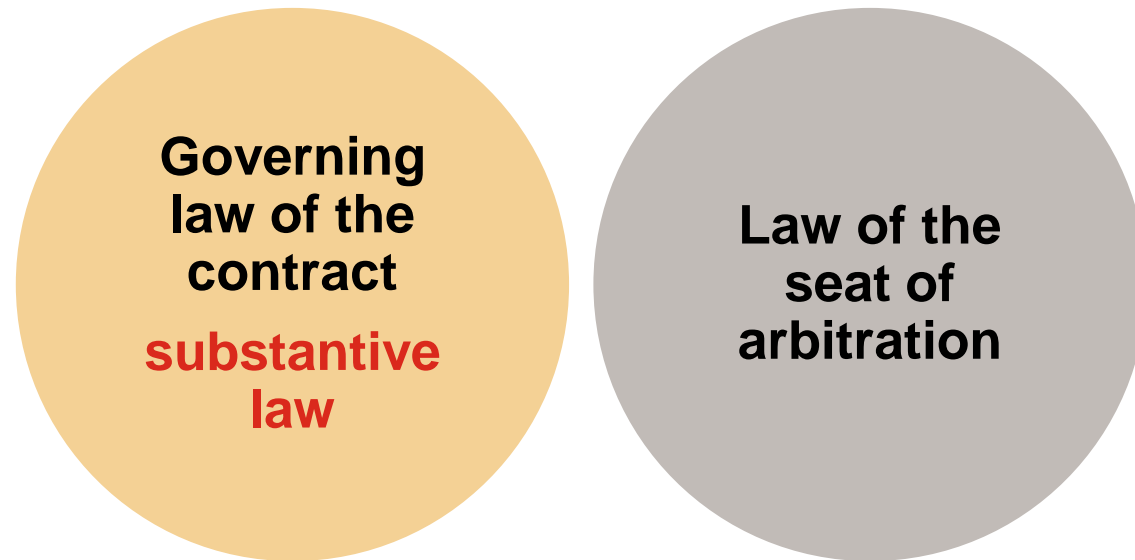


**Governing
law of the
contract**

- Substantive law
- Body of law governing the contract itself

What should be the governing law of the contract?

Different types of governing law



What should be the governing law of the contract?

Different types of governing law

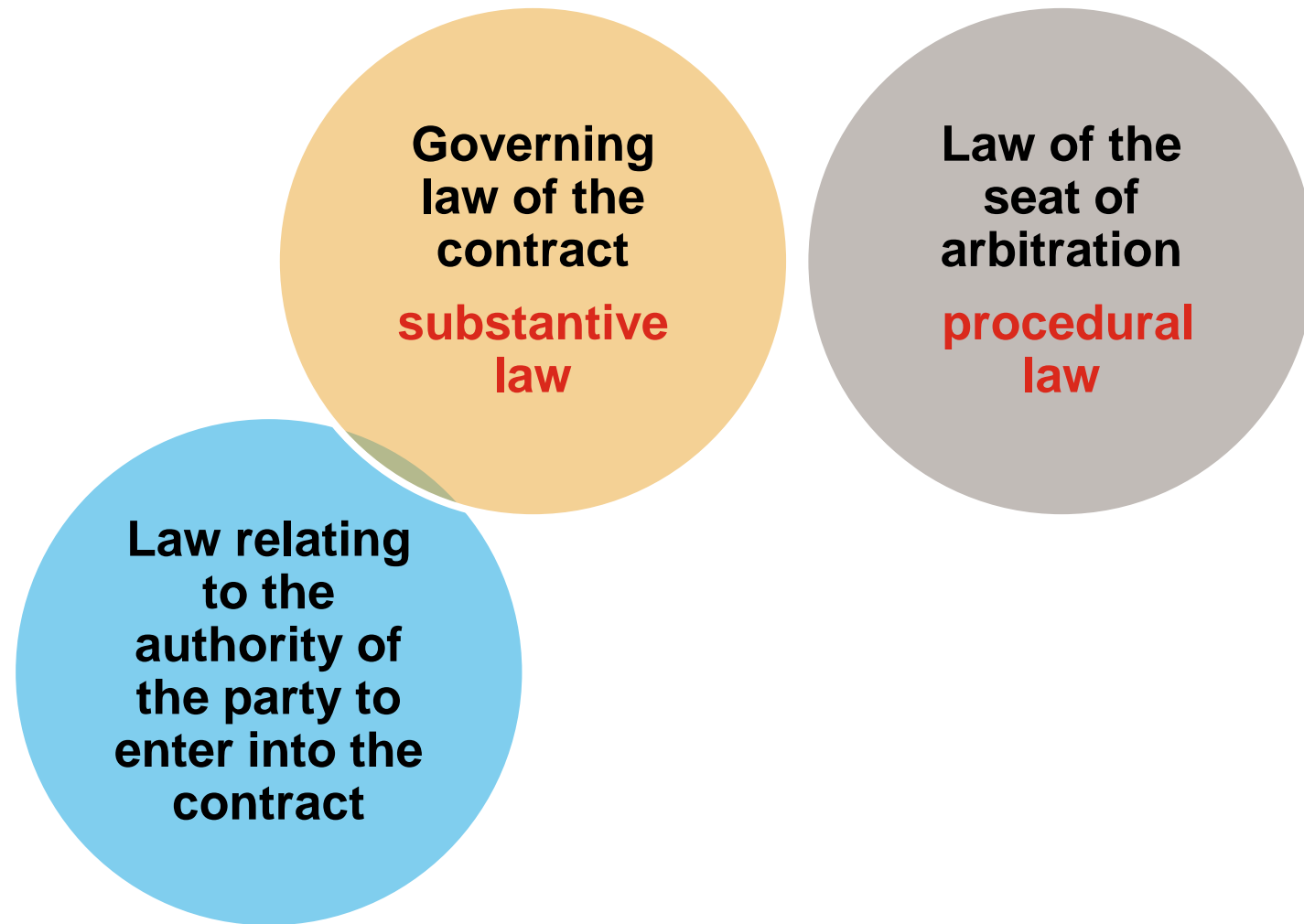


**Law of the
seat of
arbitration**

- Procedural law
 - e.g. whether can get injunction

What should be the governing law of the contract?

Different types of governing law



What should be the governing law of the contract?

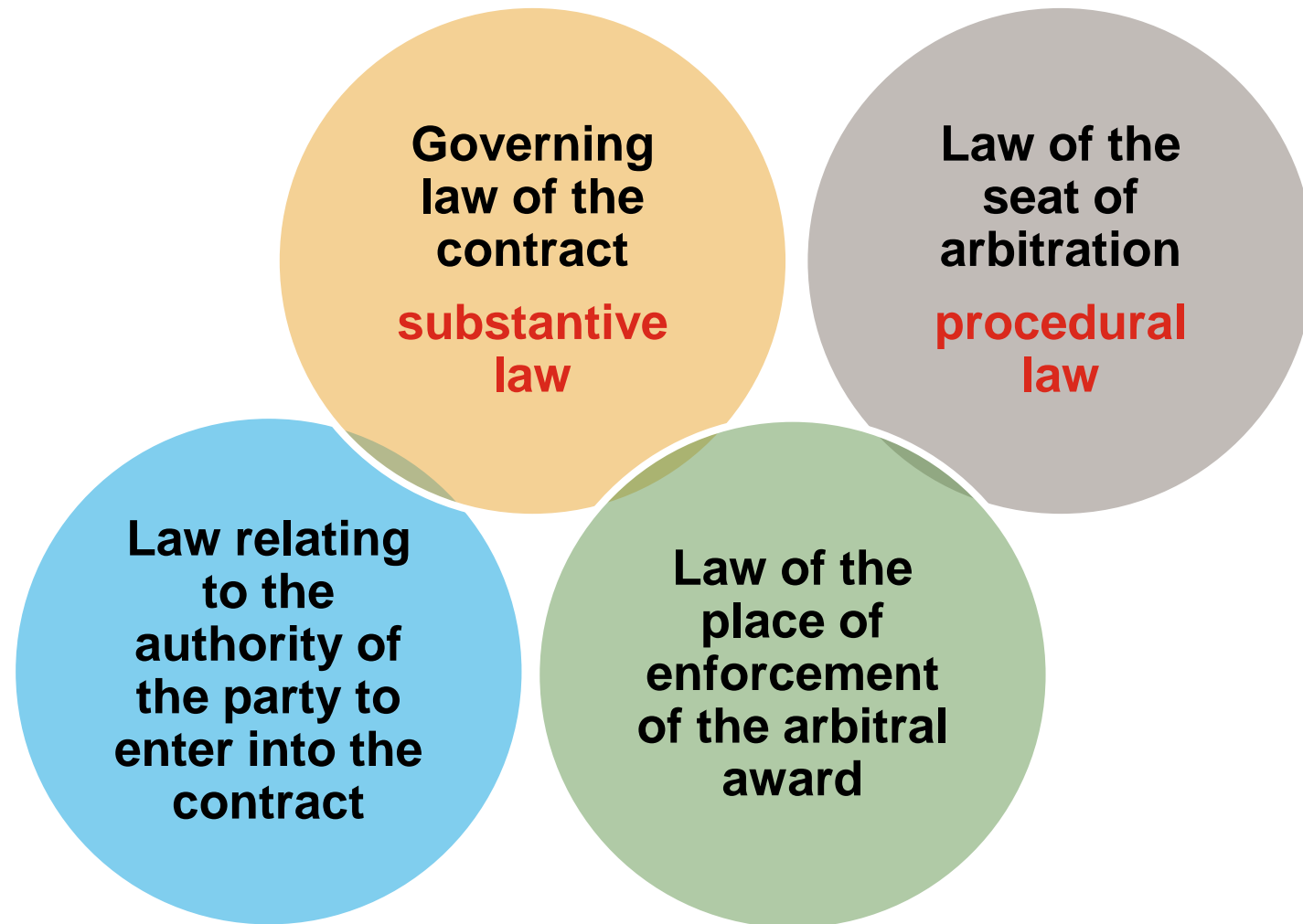
Different types of governing law

**Law relating
to the
authority of
the party to
enter into the
contract**

- Governing the party to the contract
 - e.g. authorization of the signatory

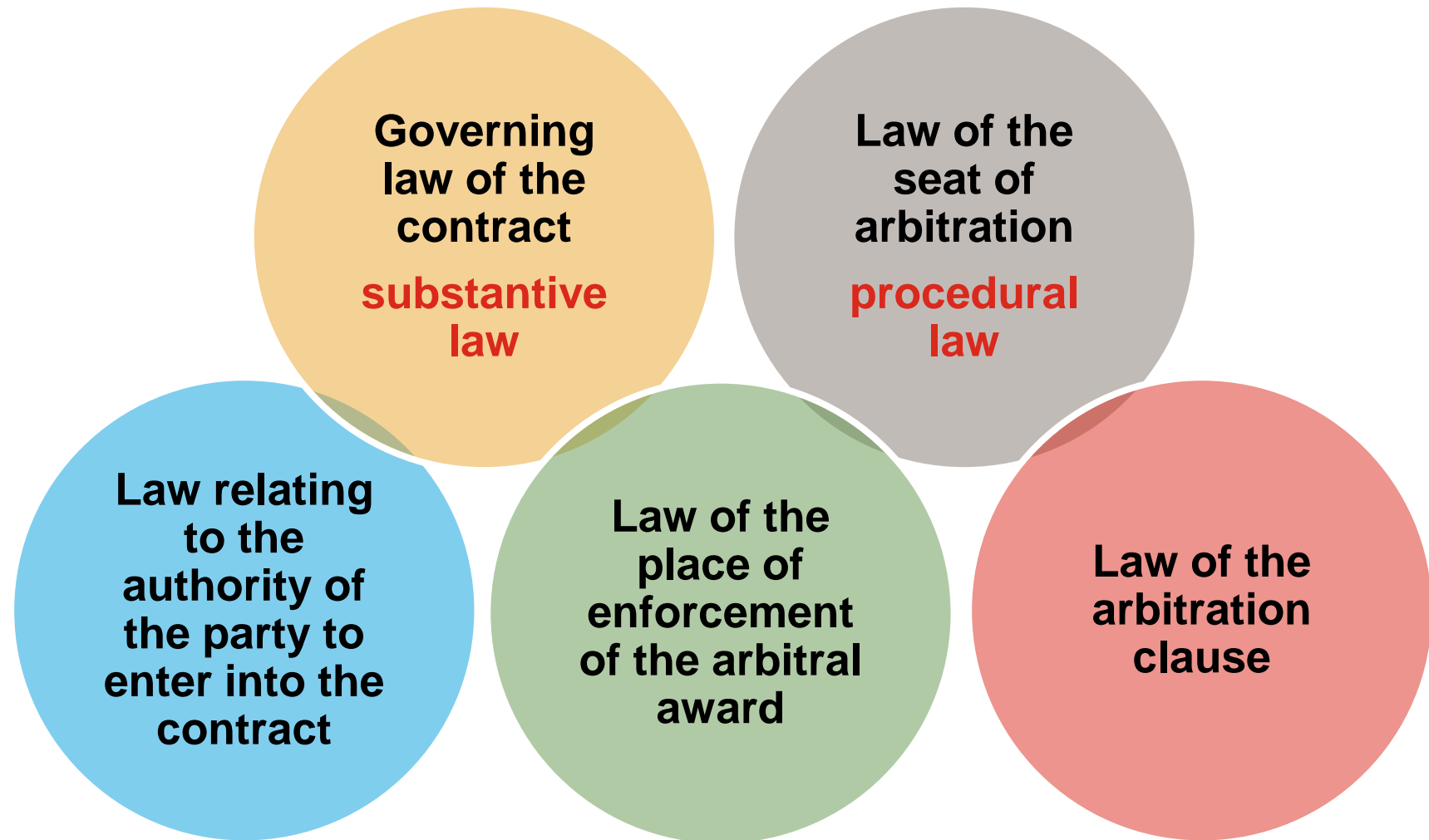
What should be the governing law of the contract?

Different types of governing law




What should be the governing law of the contract?

Different types of governing law



What should be the governing law of the contract?

Different types of governing law

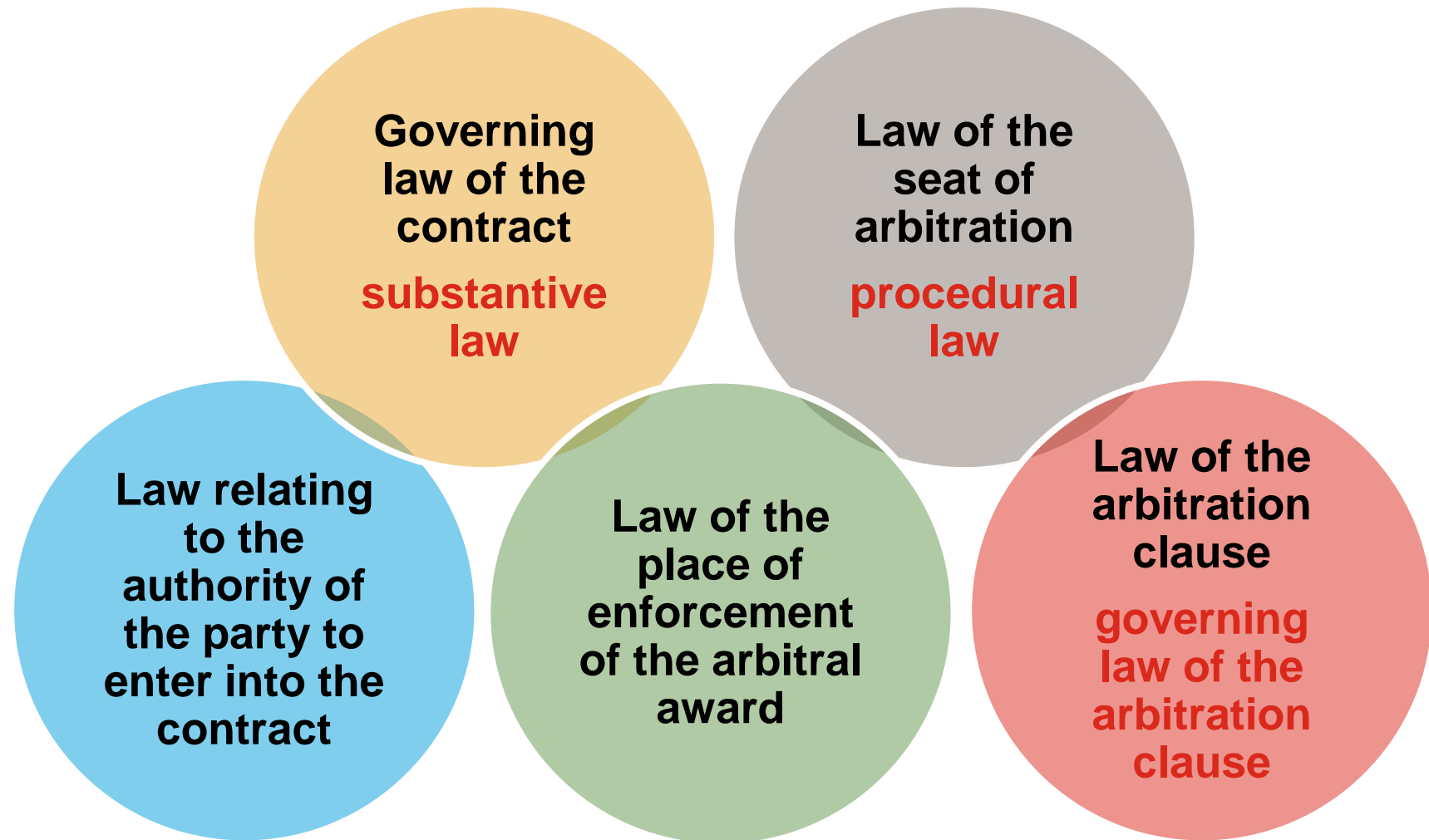


**Law of the
arbitration
clause**

- Governing law of the **Arbitration Clause**
- Governing the validity of the Arbitration Agreement
- Principle of Separability

What should be the governing law of the contract?

Different types of governing law



Law of the Arbitration Agreement (where there is no express agreement by the parties)

Jurisdiction	Case	Procedural law	Substantive law	Court's view on which law governed the arbitration agreement
China	Zhangjiagang	Switzerland	Chinese law	Procedural law
China	Zhonghai Development	Hong Kong	English law	Procedural law
India	NTPC	London	Indian law	Substantive law
India	Sumitomo	London	Indian law	Substantive law
UK	Sulamérica	London	Brazilian law	Procedural law
UK	XL Insurance	London	New York law	Procedural law
UK	Arsanovia	London	Indian law	Substantive law
Singapore	BCY v BCZ	Singapore	New York law	Substantive law
Singapore	Firstlink	Sweden	"Laws of Arbitration Institute of SCC"	Procedural law
HK	Klöckner	Shanghai	German law	Substantive law

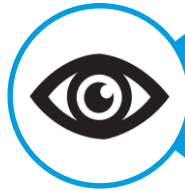


Best
Practice

**Always stipulate the
governing law of
the Arbitration Agreement
in the contract**

What should be the governing law of the contract?

Factors to be considered



Foreign elements in the eyes of PRC



Familiarity of the law



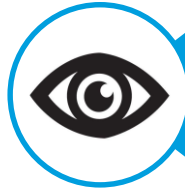
Trade customs



Bargaining power of the parties

What should be the governing law of the contract?

Factors to be considered



Foreign elements in the eyes of PRC

Article 12 of the General Rules of Civil Law



All civil activities within the territory of the People's Republic of China shall be governed by the laws of the People's Republic of China, unless otherwise provided for in the law.



Anhui Hengshuo Textile Co Ltd and Zhangjiagang Free Trade Zone Sumian International Trade Co Ltd

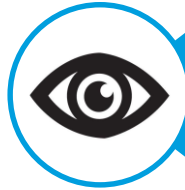


Parties to a contract may not choose foreign law as governing law if the contract is not foreign related



What should be the governing law of the contract?

Factors to be considered



Foreign elements in the eyes of PRC

Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China



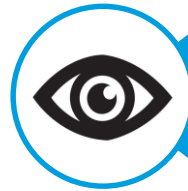
Article 522 – In any of the following circumstances, the people's court may determine it as a foreign-related civil case:

1. One or both parties are foreigners, stateless persons, foreign enterprises or organizations.
2. The permanent residence of one or both parties is outside the territory of the People's Republic of China.
3. The subject matter is outside the territory of the People's Republic of China.
4. The legal facts concerning the creation, alteration or elimination of civil relations occur outside the territory of the People's Republic of China.
5. Other circumstances that can be identified as foreign-related civil cases.



What should be the governing law of the contract?

Factors to be considered



Foreign elements in the eyes of PRC

Foreign Element

Law of choice

No Foreign
Element

PRC Law

n.b. Wholly Foreign-Owned
Enterprise (WFOE)

Exceptions

What should be the governing law of the contract?

Factors to be considered

Exceptions

Article 9 of the Opinion on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones

Promulgated on 30 December 2016 by the Supreme People's Court:

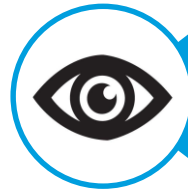


Arbitration agreement concluded between WFOEs incorporated in a pilot free trade zone submitting a commercial dispute to foreign arbitration should not be held as invalid solely based on lack of foreign element of the dispute

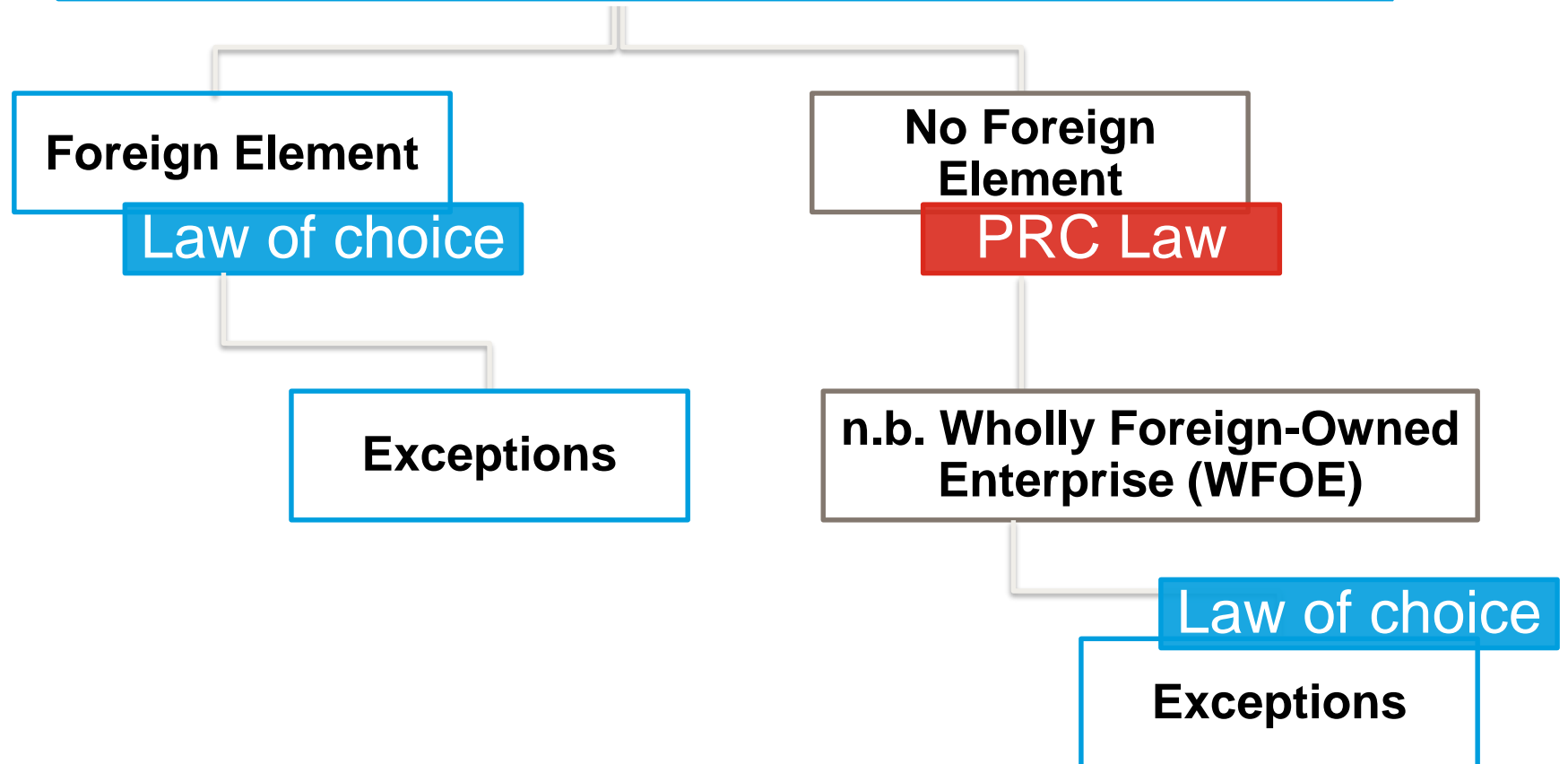


What should be the governing law of the contract?

Factors to be considered



Foreign elements in the eyes of PRC



What should be the governing law of the contract?

Factors to be considered

Exceptions



- *Chinese-foreign equity joint venture or Chinese-foreign co-operative joint venture contract*
- *Contracts for Chinese-foreign co-operative exploration and exploitation of natural resources*
- *Where PRC law has mandatory provisions on Chinese-foreign civil relations*
- *If application of the law would damage the PRC social and public interests.*

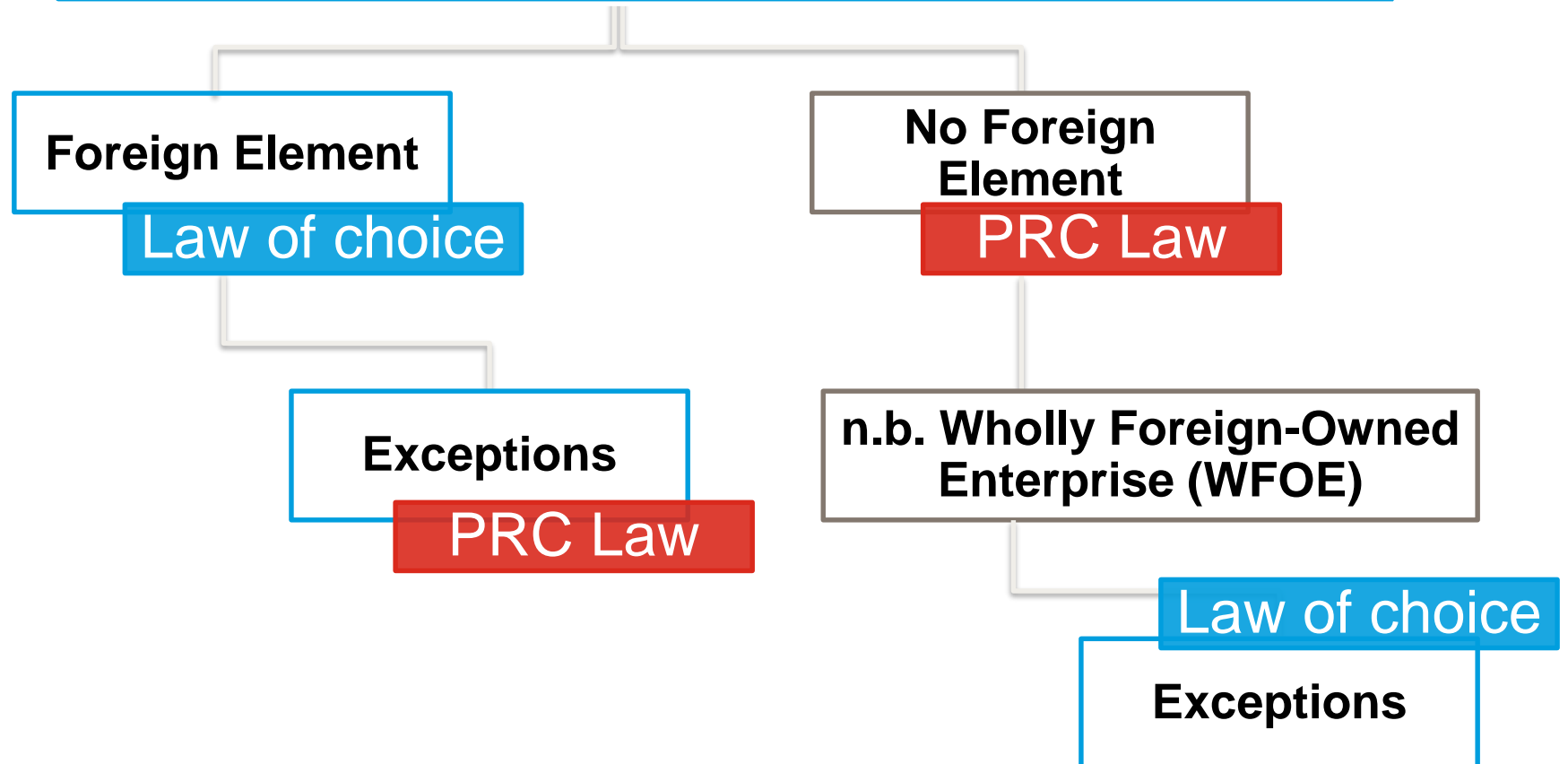


What should be the governing law of the contract?

Factors to be considered

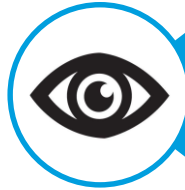


Foreign elements in the eyes of PRC



What should be the governing law of the contract?

Factors to be considered



Foreign elements in the eyes of PRC



Familiarity of the law

What should be the governing law of the contract?

Factors to be considered



Familiarity of the law

E.g. PRC law – liquidated damages



Article 114 of the PRC Contract Law

Where the amount of liquidated damages prescribed for breach of contract is **lower** than the loss caused by the breach, the party concerned may apply to a people's court or an arbitration institution for an **increase**.

Where the amount of liquidated damages prescribed for breach of contract is **excessively higher** than the loss caused by the breach, the party concerned may apply to a people's court or an arbitration institution for an appropriate **reduction**.



What should be the governing law of the contract?

Factors to be considered



Familiarity of the law

E.g. PRC law – liquidated damages



SPC Interpretation II on Certain Issues Concerning the Application of the People's Republic of China Contract Law

... If the damages agreed upon by the parties **exceeds 30%** of the losses, they can generally be regarded as excessively higher than the losses caused by the second paragraph of Article 114 of the Contract Law.



Choice of Arbitration Institutions

A series of approximately 20 thin, horizontal white lines stacked vertically, spanning most of the width of the slide.

WINSTON
& STRAWN

Choice of Arbitration Institutions

Should we go to
arbitration or the courts?

Which arbitration
institutions?

Statistics regarding
Chinese courts and
arbitration institutions

Should we go to arbitration or the courts?

Court Litigation v Arbitration

Confidentiality

Costs

Carving Out

Choose your
arbitrator

New York
Convention
1958

An International perspective: UAE

The approach of
the UAE court to
exclusive
jurisdiction clauses

Arbitration and the
UAE

Enforceability of
arbitration awards
under the NY
Convention

Avoiding pitfalls

Which arbitration institutions?

Choice of arbitration tribunals (Non-Mainland China)



ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE



DIS | Deutsche Institution für
Schiedsgerichtsbarkeit e.V.
German Institution of Arbitration

SWISS ARBITRATION

WINSTON
& STRAWN



Takeaway

Chinese companies are increasingly confident and comfortable with choosing international arbitration forums

Which arbitration institutions?

Choice of arbitration tribunals (Mainland China)



Chinese courts and arbitration institutions

Enforcement of foreign awards in Mainland China

Time period	Application	Enforced	Rate
2002-2006*	74	58	78.38%
2014-2016**	139	131	94.2%
Total	213	189	88.7%

Source:

**International Law Review of Wuhan University (Volume 9)*

***China International Economic and Trade Arbitration Commission - <http://www.cietac.org/index.php?m=Article&a=show&id=2723>*

***China International Economic and Trade Arbitration / China Academy of Arbitration Law - <http://www.cietac.org/Uploads/201612/58678e45783ae.pdf>*

***China International Economic and Trade Arbitration Commission - <http://www.cietac.org/Uploads/201710/59df3824b2849.pdf>*

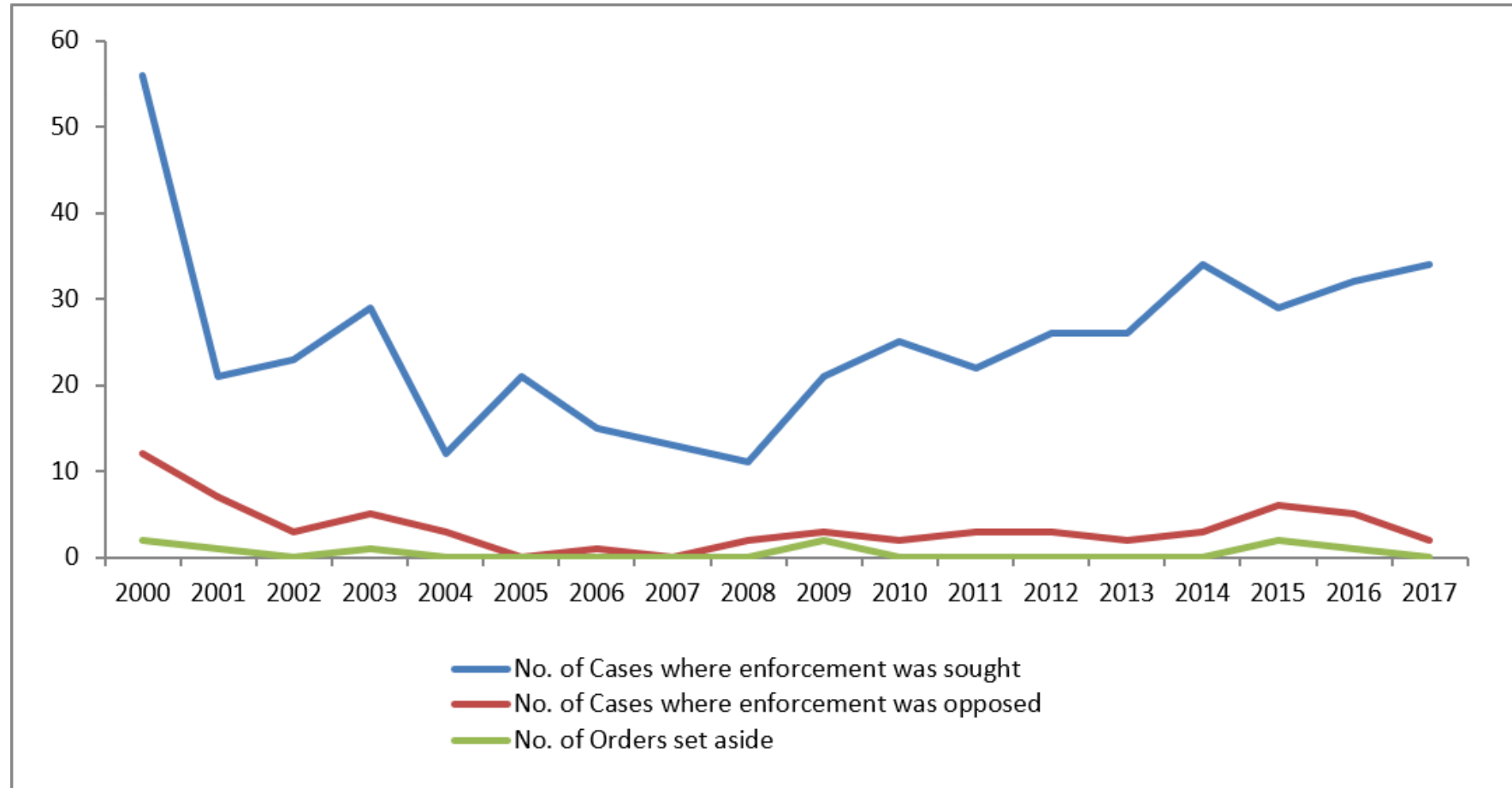
Chinese courts and arbitration institutions

Enforcement of foreign awards in Mainland China



Chinese courts and arbitration institutions

Enforcement of awards in Hong Kong



Source: HKIAC - <http://www.hkiac.org/about-us/statistics/enforcement-awards>

Chinese courts and arbitration institutions

Enforcement of awards in Hong Kong

	No of applications to enforce arbitral awards		No of applications to set aside order granting leave	No of orders set aside
	Name of Appointing Authority	No of applications granted		
1	Beijing Arbitration Commission	2	0	0
2	Brazil ¹	1	0	0
3	Changzhou Arbitration Commission	1	0	0
4	China Guangzhou Arbitration Commission	2	1	0
5	CIETAC (Beijing) ²	1	0	0
6	CIETAC (Shanghai) ³	2	0	0
7	France (ICC) ⁴	1	0	0
8	Japan Commercial Arbitration Commission	1	0	0
9	Jiaxing Arbitration Commission	1	0	0

Source: HKIAC - <http://www.hkiac.org/about-us/statistics/enforcement-awards>

Chinese courts and arbitration institutions

Enforcement of awards in Hong Kong

	No of applications to enforce arbitral awards		No of applications to set aside order granting leave	No of orders set aside
	Name of Appointing Authority	No of applications granted		
10	Hong Kong ⁵	6	0	0
11	Hong Kong (HKIAC) ⁶	3	1	0
12	London ⁷	3	0	0
13	SCIA ⁸	5	0	0
14	Shenzhen Arbitration Commission	2	0	0
15	Singapore ⁹	2	0	0
16	Xiamen Arbitration Commission	1	0	0
	Total:	34	2	0

Source: HKIAC - <http://www.hkiac.org/about-us/statistics/enforcement-awards>

Chinese courts and arbitration institutions

Highlight development

- **Memorandum of Guidance between DIFC Courts and Hong Kong High Court**
 - Signed on August 12, 2018
 - A judgement of either court can be enforced as long as:-
 - it is final and conclusive;
 - in the nature of a money award; and
 - the respective court has had jurisdiction to determine the subject matter of the dispute
- **Memorandum of Understanding between DIFC Courts and the Shanghai High People's Court**
- **Memorandum between DIFC Courts and the University of Oxford China Centre**

Questions?

A series of approximately 20 thin, horizontal white lines spanning the width of the slide, located in the lower third of the image.

WINSTON
& STRAWN



Terence Wong

Partner
Hong Kong & Shanghai
+852 2292 2014 +86 21 2208 2643
twong@winston.com

Practice

International Arbitration
Litigation

Education

Bachelor of Laws (LL.B.)
University of Queensland

Bar Admissions

Hong Kong
England & Wales

Terence Wong is a partner at Winston & Strawn who focuses his practice on commercial arbitration. He helps clients resolve disputes via international arbitration as well as other dispute resolution mechanisms (such as mediation, expert determination, and court proceedings). In addition, Terence drafts construction contracts for major projects.

Terence is familiar with the arbitration rules of many arbitral institutions, including the China International Economic and Trade Arbitration Commission (CIETAC), the Shanghai International Court of Arbitration (SHIAC), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) Model Rules, and the Terms of the London Maritime Arbitrators Associations (LMAA).

Terence is a Fellow with the Chartered Institute of Arbitrators, and is listed in the Panel of Arbitrators with CIETAC, SHIAC, HKIAC, and SAC.

Terence has solid experience in dealing with multi-jurisdictional disputes, including China, Hong Kong, Singapore, England, France, Indonesia, the Middle East, Nigeria, Tanzania, and Venezuela. His experience spans a wide range of sectors such as infrastructure (such as rail, roads, and bridges), power and utilities, energy, real estate, international trade, shipping, joint venture, intellectual property etc.



Ben Bruton

Partner
Dubai
+971 4 424 2357
bbruton@winston.com

Practice

International Arbitration
Litigation
Investigation

Education

University of Nottingham,
LPC, 1998
University of Leeds, LLB, 1996

Bar Admissions

England & Wales

Described in Legal 500 as "intelligent, approachable and a true leader...[who] achieves the best for his client," Ben Bruton is head of Winston's Middle East dispute resolution and investigations practice. Ben has almost 20 years of international dispute resolution and financial crime experience, having handled high-stakes disputes for several FTSE 100 and S&P 500 companies across many jurisdictions including in the London courts, the UAE courts and a range of arbitral seats.

Having been based in the UAE since 2012 and experienced in working in Bahrain, Ben acts on behalf of major corporate entities, in both the public and private sector, in high stakes disputes before both arbitral tribunals and the courts. Before joining Winston, he was managing partner and head of dispute resolution at the UAE office of a leading UK international law firm.

Prior to the UAE, Ben was based in London at a leading City firm, where he acted on behalf of a range of global corporations in complex, high-value litigation and investigations matters. While Ben was in London, he was ranked as one of only two lawyers by Financial News as a top 100 rising star of the City in recognition of his work on disputes arising out of the global financial crisis.

NOT LEGAL ADVICE

This presentation has been prepared by Winston & Strawn for informational purposes only and are not legal advice. Receipt of this information does not create an attorney-client relationship. Do not act upon this information without seeking professional counsel.

By viewing this presentation, you acknowledge and agree that any communication or material you transmit to Winston & Strawn, in any manner and for any reason, will not be treated as confidential or proprietary. Furthermore, you acknowledge and agree that any ideas, concepts, techniques, procedures, methods, systems, designs, plans, charts, or other materials you transmit to Winston & Strawn may be used by Winston & Strawn, anywhere, anytime, and for any reason whatsoever.

You acknowledge and agree that no partnership or client/attorney relationship is formed and neither of you nor Winston & Strawn has the power or the authority to obligate or bind the other.

Statement in Compliance with the Texas Rules of Professional Conduct: Lawyers resident in all offices, unless otherwise indicated in an individual attorney biography, are not certified by the Texas Board of Legal Specialization.

CASE RESULTS DEPEND ON A VARIETY OF FACTORS UNIQUE TO EACH CASE. ANY CASE RESULTS NOTED ON THESE SLIDES DO NOT GUARANTEE OR PREDICT A SIMILAR RESULT IN ANY FUTURE CASE.

For the full disclaimer, please visit our website at <https://www.winston.com/en/legal.html>