# Choice of Law and Choice of Arbitration Institutions

Perspective for international companies doing business in China



**Terence Wong**Partner
Shanghai and Hong Kong



Nassim Hooshmandnia Registered Foreign Lawyer Hong Kong



#### **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

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#### 1. Governing law of the contract?

Chinese Law

Home country law

Law of neutral places



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#### 1. Governing law of the contract?

Chinese Law

Home country law

Law of neutral places

#### 2. Choice of arbitration institutions?

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



# **Choice of Law**



Different types of governing law

Governing law of the contract

- Substantive law
- Body of law governing the <u>contract</u> itself



Different types of governing law

Governing law of the contract substantive law

Law of the seat of arbitration



Different types of governing law

Law of the seat of arbitration

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



Different types of governing law

Governing law of the contract

substantive law

Law of the seat of arbitration

procedural law

to the authority of the party to enter into the contract



Different types of governing law

to the authority of the party to enter into the contract

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



Different types of governing law

Governing law of the contract

substantive law

Law of the seat of arbitration

procedural law

to the authority of the party to enter into the contract

Law of the place of enforcement of the arbitral award



Different types of governing law

Governing law of the contract

substantive law

Law of the seat of arbitration

procedural law

to the authority of the party to enter into the contract

Law of the place of enforcement of the arbitral award

Law of the arbitration clause



Different types of governing law

Law of the arbitration clause

- Governing law of the <u>Arbitration Clause</u>
- Governing the validity of the Arbitration Agreement
- Principle of Separability



Different types of governing law

Governing law of the contract

substantive law

Law of the seat of arbitration

procedural law

to the authority of the party to enter into the contract

Law of the place of enforcement of the arbitral award

clause governing law of the arbitration

clause

Law of the

arbitration

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# 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
НК	Klöckner	Shanghai	German law	Substantive law





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



Factors to be considered



Foreign elements in the eyes of PRC



Familiarity of the law



**Trade customs** 



**Bargaining power of the parties** 



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



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



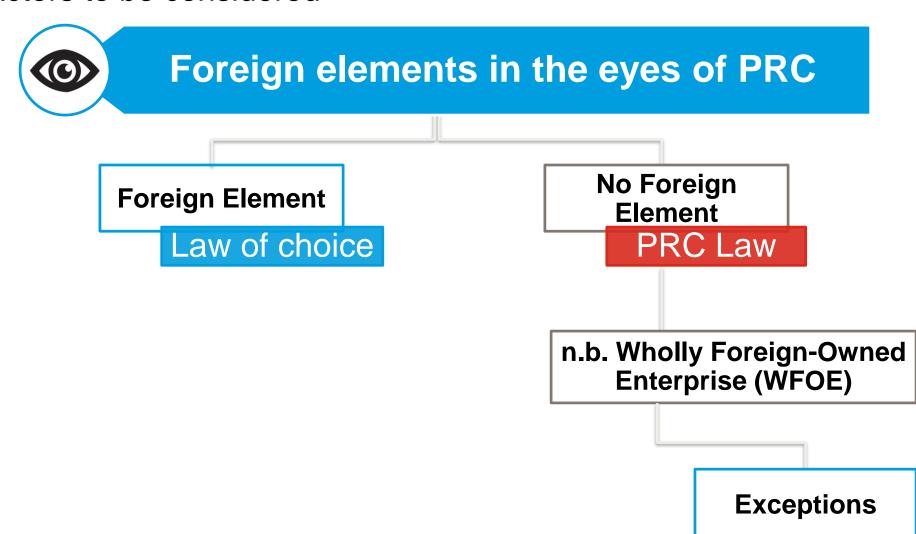
Article 522 – In any of the following circumstances, the people's court may determine it as a foreign-related civil case:

- 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.





Factors to be considered



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Factors to be considered

**Exceptions** 

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

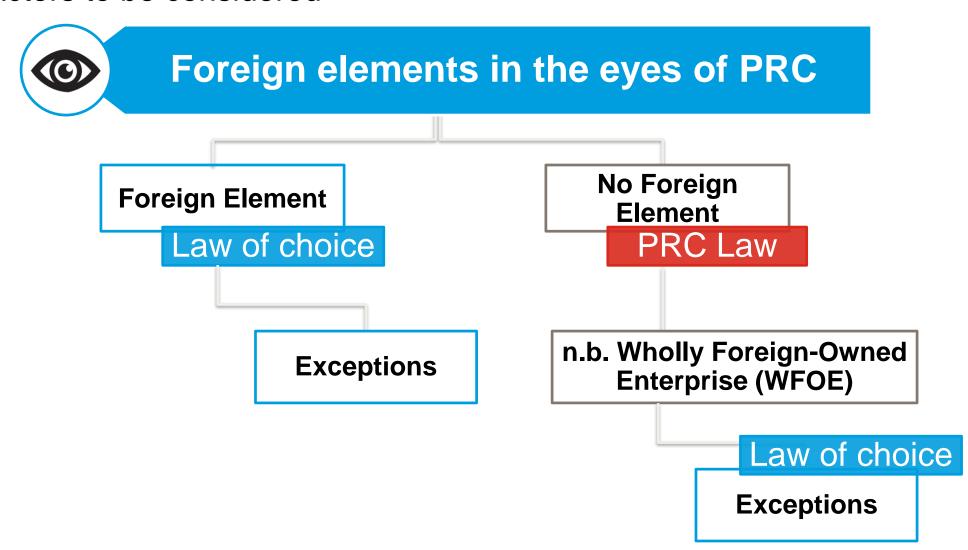
Promulgated on 30 December 2016 by the Supreme People's Court:



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



Factors to be considered



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Factors to be considered

#### **Exceptions**

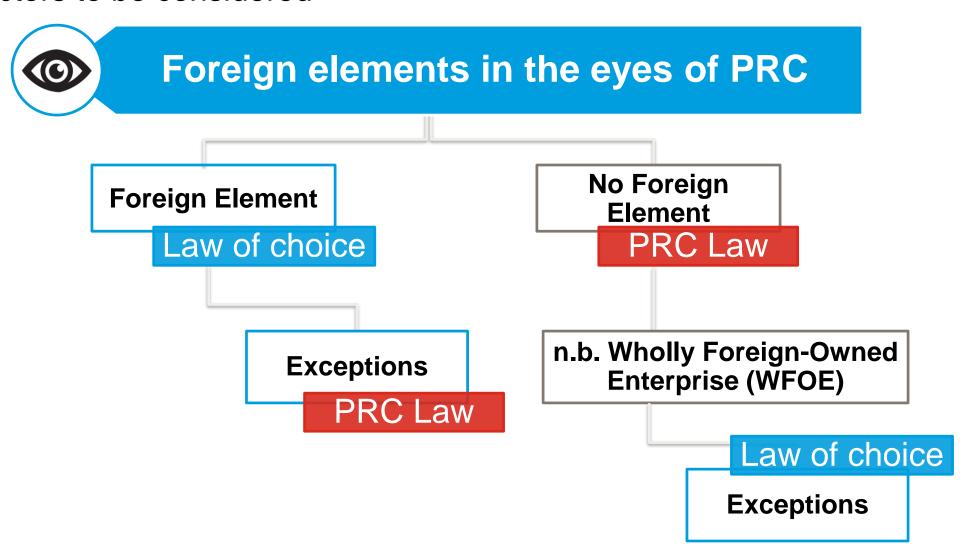


- Chinese-foreign equity joint venture or Chinese-foreign co-operative joint venture contract
- Contracts for Chinese-foreign co-operative exploration and exploitation of natural resources
- Where PRC law has mandatory provisions on Chineseforeign civil relations
- If application of the law would damage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





Factors to be considered







If the substantive law of the arbitration clause is NOT governed by Chinese law, shall the "foreign element" test apply?

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If the substantive law of the arbitration clause is NOT governed by Chinese law, shall the "foreign element" test apply?

**Consideration:** 

**Enforcing the award in China** 

Explicitly state the substantive law of the arbitration clause!

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What if I do not want Chinese law as the governing law of the contract?





What if I do not want Chinese law as the governing law of the contract?

Generally, you need a "foreign element"

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What if I got it wrong?

**Arbitration Clause is invalid.** 

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Factors to be considered



Foreign elements in the eyes of PRC



Familiarity of the law



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.





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**



#### **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? Benefits of arbitration



Reduced costs

Control over process



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Choice of arbitrator

Ease of enforcement

# Should we go to arbitration or the courts? Enforcement of foreign judgments

Foreign judgment may be recognized and enforced by PRC court:

(1) if there is an international treaty between China and the state where the judgment is issued or

No such treaty between the US and China

(2) under the principle of reciprocity



June 2017 – PRC recognized judgment issued by the Los Angeles Superior Court

## Should we go to arbitration or the courts? Chinese courts



# If not US courts, what about Chinese courts?

- More threatening
- Possible remedies
- Faster?



## Which arbitration institutions?

Choice of arbitration tribunals (Non-Mainland China)















**SWISS ARBITRATION** 









Takeaway

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



## Which arbitration institutions?

Choice of arbitration tribunals (Mainland China)

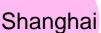


Beijing

China International

Economic and Trade **Arbitration** 

Commission



Shenzhen

Shenzhen Court of International Arbitration



Shanghai International **Arbitration Center** 



**Beijing Arbitration** Commission





Shanghai Arbitration Commission



### Which arbitration institutions?



# Why would I choose a Chinese arbitral institution?

- easier to enforce
- cheaper and faster
- type of and amount in dispute

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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%



<sup>\*</sup>International Law Review of Wuhan University (Volume 9)

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

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

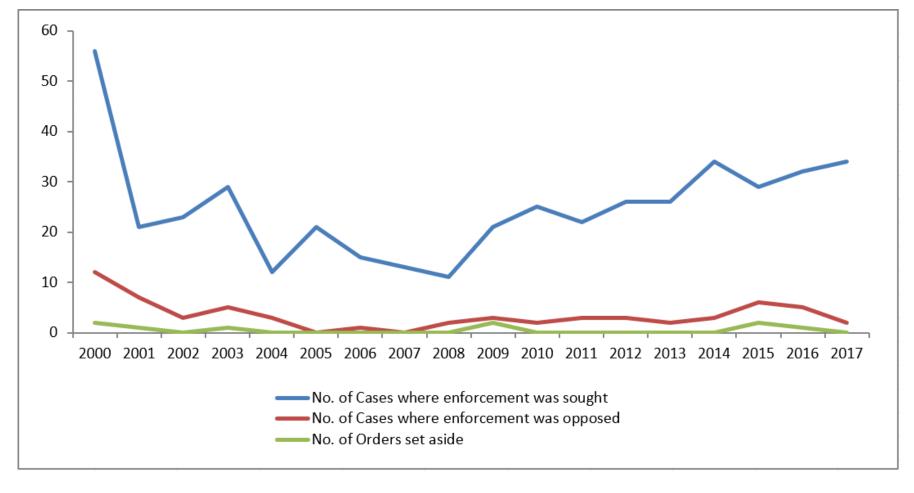
<sup>\*\*</sup>China International Economic and Trade Arbitration Commission - http://www.cietac.org/Uploads/201710/59df3824b2849.pdf

Enforcement of foreign awards in Mainland China





## Enforcement of awards in Hong Kong





## Enforcement of awards in Hong Kong

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



## Enforcement of awards in Hong Kong

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





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

Thoroughly consider key factors including "foreign element" and enforcement, etc.

Be familiar with Chinese law and Chinese arbitral institutions



## **Questions?**





#### Practice International Arbitration

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

#### **Bar Admissions** Hong Kong **England & Wales**

#### **Terence Wong**

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

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.





Practice International Arbitration Litigation

#### Education William & Mary, JD, 2010 University of Virginia, BS, 2006

#### **Bar Admissions** District of Columbia, USA Virginia, USA

#### Nassim Hooshmandnia

Registered Foreign Lawyer Hong Kong +852 2292 2141 nhooshmandnia@winston.com

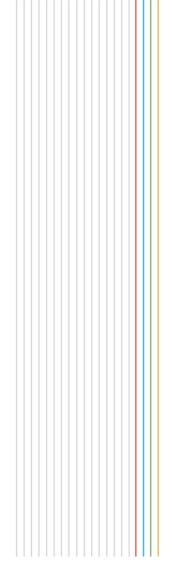
As a key member of our litigation team in Asia, Nassim Hooshmandnia is a senior associate in the firm's Hona Kong office who focuses on international arbitration and complex commercial litigation. Obtaining a recent victory for a leading fashion brand, Nassim has expanded her practice into three continents, having worked in the firm's offices in Washington, DC; Geneva, Switzerland; and now Hong Kong.

In addition to her experience in handling commercial disputes, Nassim also represents sovereigns and foreign investors in investment treaty arbitration, including the Republic of Ecuador in a multibillion-dollar arbitration initiated by Chevron and Texaco under the UNCITRAL rules in The Hague. Nassim also represents M. Dagher, a former Motorola executive in the first ever investor-state arbitration against Sudan under ICSID Rules and Eskosol in an investment arbitration against Italy under the ECT.

Nassim has acted as counsel in a wide variety of commercial arbitrations representing private clients under most international arbitration rules including the International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID), and United Nations Commission on International Trade Law (UNCITRAL) rules.

Prior to joining Winston, Nassim was at the World Bank where she was a member of the Department of Institutional Integrity, investigating allegations of fraud and corruption against corporations, government agencies, and individuals involved in Bank-funded projects.





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