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
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
What should be the governing law of the contract?

Different types of governing law

- Substantive law
- Body of law governing the contract itself
What should be the governing law of the contract?

Different types of governing law

- Governing law of the contract
  - Substantive law

- Law of the seat of arbitration
What should be the governing law of the contract?

Different types of governing law

- Procedural law
  - e.g. whether can get injunction
What should be the governing law of the contract?

Different types of governing law

- Governing law of the contract
  - Substantive law
- Law of the seat of arbitration
  - Procedural law
- Law relating to the authority of the party to enter into the contract
What should be the governing law of the contract?

Different types of governing law

- 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

- Governing law of the contract
  - Substantive law
- Law relating to the authority of the party to enter into the contract
- Law of the place of enforcement of the arbitral award
- Law of the seat of arbitration
  - Procedural law
What should be the governing law of the contract?

Different types of governing law

- Governing law of the contract
  - substantive law
- Law of the seat of arbitration
  - procedural law
- Law relating 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
What should be the governing law of the contract?

Different types of governing law

- 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

- Governing law of the contract
  - Substantive law
- Law of the seat of arbitration
  - Procedural law
- Law relating 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
  - Governing law of the arbitration clause
# Law of the Arbitration Agreement (where there is no express agreement by the parties)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Case</th>
<th>Procedural law</th>
<th>Substantive law</th>
<th>Court’s view on which law governed the arbitration agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>Zhangjiagang</td>
<td>Switzerland</td>
<td>Chinese law</td>
<td>Procedural law</td>
</tr>
<tr>
<td>China</td>
<td>Zhonghai Development</td>
<td>Hong Kong</td>
<td>English law</td>
<td>Procedural law</td>
</tr>
<tr>
<td>India</td>
<td>NTPC</td>
<td>London</td>
<td>Indian law</td>
<td>Substantive law</td>
</tr>
<tr>
<td>India</td>
<td>Sumitomo</td>
<td>London</td>
<td>Indian law</td>
<td>Substantive law</td>
</tr>
<tr>
<td>UK</td>
<td>Sulamérica</td>
<td>London</td>
<td>Brazilian law</td>
<td>Procedural law</td>
</tr>
<tr>
<td>UK</td>
<td>XL Insurance</td>
<td>London</td>
<td>New York law</td>
<td>Procedural law</td>
</tr>
<tr>
<td>UK</td>
<td>Arsanovia</td>
<td>London</td>
<td>Indian law</td>
<td>Substantive law</td>
</tr>
<tr>
<td>Singapore</td>
<td>BCY v BCZ</td>
<td>Singapore</td>
<td>New York law</td>
<td>Substantive law</td>
</tr>
<tr>
<td>Singapore</td>
<td>Firstlink</td>
<td>Sweden</td>
<td>&quot;Laws of Arbitration Institute of SCC&quot;</td>
<td>Procedural law</td>
</tr>
<tr>
<td>HK</td>
<td>Klöckner</td>
<td>Shanghai</td>
<td>German law</td>
<td>Substantive law</td>
</tr>
</tbody>
</table>
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

- Foreign Element
  - Law of choice
    - Exceptions
- No Foreign Element
  - PRC Law
    - n.b. Wholly Foreign-Owned Enterprise (WFOE)
      - Law of choice
        - Exceptions
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

- Foreign Element
  - Law of choice
  - Exceptions
    - PRC Law
- No Foreign Element
  - PRC Law
  - n.b. Wholly Foreign-Owned Enterprise (WFOE)
    - Law of choice
    - Exceptions
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
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
- Enforceability of arbitration awards under the NY Convention
- Avoiding pitfalls
- Arbitration and the UAE
Which arbitration institutions?
Choice of arbitration tribunals (Non-Mainland China)
Chinese companies are increasingly confident and comfortable with choosing international arbitration forums.
Choice of arbitration tribunals (Mainland China)

- Shanghai International Arbitration Center
- Beijing Arbitration Commission
- China International Economic and Trade Arbitration Commission
- Shenzhen Court of International Arbitration
- Shanghai Arbitration Commission
## Chinese courts and arbitration institutions

### Enforcement of foreign awards in Mainland China

<table>
<thead>
<tr>
<th>Time period</th>
<th>Application</th>
<th>Enforced</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002-2006*</td>
<td>74</td>
<td>58</td>
<td>78.38%</td>
</tr>
<tr>
<td>2014-2016**</td>
<td>139</td>
<td>131</td>
<td>94.2%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>213</strong></td>
<td><strong>189</strong></td>
<td><strong>88.7%</strong></td>
</tr>
</tbody>
</table>

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


Chinese courts and arbitration institutions

Enforcement of foreign awards in Mainland China
Chinese courts and arbitration institutions
Enforcement of awards in Hong Kong

## Enforcement of awards in Hong Kong

<table>
<thead>
<tr>
<th>Name of Appointing Authority</th>
<th>No of applications granted</th>
<th>No of applications to set aside order granting leave</th>
<th>No of orders set aside</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beijing Arbitration Commission</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Brazil 1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Changzhou Arbitration Commission</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>China Guangzhou Arbitration Commission</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>CIETAC (Beijing) 2</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>CIETAC (Shanghai) 3</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>France [ICC] 4</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Japan Commercial Arbitration Commission</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Jiading Arbitration Commission</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Chinese courts and arbitration institutions

Enforcement of awards in Hong Kong

<table>
<thead>
<tr>
<th>Name of Appointing Authority</th>
<th>No of applications to enforce arbitral awards</th>
<th>No of applications set aside order granting leave</th>
<th>No of orders set aside</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hong Kong</td>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hong Kong (HKIAC)</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>London</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>SCIA</td>
<td>5</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Shenzhen Arbitration Commission</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Singapore</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Xiamen Arbitration Commission</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>34</strong></td>
<td><strong>2</strong></td>
<td><strong>0</strong></td>
</tr>
</tbody>
</table>

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?
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