Choice of Law and Choice of Arbitration Institutions
Perspective for international companies doing business in China

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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 relating to the authority of the party to enter into the contract
- Law of the seat of arbitration
  - procedural law
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 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
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>
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<td>Procedural law</td>
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<td>Zhonghai Development</td>
<td>Hong Kong</td>
<td>English law</td>
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<td>India</td>
<td>NTPC</td>
<td>London</td>
<td>Indian law</td>
<td>Substantive law</td>
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<td>Sumitomo</td>
<td>London</td>
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<td>Sulamérica</td>
<td>London</td>
<td>Brazilian law</td>
<td>Procedural law</td>
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<td>UK</td>
<td>XL Insurance</td>
<td>London</td>
<td>New York law</td>
<td>Procedural law</td>
</tr>
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<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>“Laws of Arbitration Institute of SCC”</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?

If the substantive law of the arbitration clause is NOT governed by Chinese law, shall the “foreign element” test apply?
What should be the governing law of the contract?

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!
What should be the governing law of the contract?

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

What if I got it wrong?

Arbitration Clause is invalid.
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

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**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

- Confidentiality
- Reduced costs
- Control over process
- 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?

If not US courts, what about Chinese courts?

• More threatening
• Possible remedies
• Faster?
Which arbitration institutions?
Choice of arbitration tribunals (Non-Mainland China)
Chinese companies are increasingly confident and comfortable with choosing international arbitration forums.
Which arbitration institutions?
Choice of arbitration tribunals (Mainland China)

- Shanghai International Arbitration Center (Shanghai, China)
- Beijing Arbitration Commission (Beijing, China)
- Shenzhen Court of International Arbitration (Shenzhen, China)
- China International Economic and Trade Arbitration Commission (Shanghai, China)
Which arbitration institutions?

Why would I choose a Chinese arbitral institution?

- easier to enforce
- cheaper and faster
- type of and amount in dispute
## 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>
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</thead>
<tbody>
<tr>
<td>2002-2006*</td>
<td>74</td>
<td>58</td>
<td>78.38%</td>
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<tr>
<td>2014-2016**</td>
<td>139</td>
<td>131</td>
<td>94.2%</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>213</strong></td>
<td><strong>189</strong></td>
<td><strong>88.7%</strong></td>
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</tbody>
</table>

Source:
*International Law Review of Wuhan University (Volume 9)
Enforcement of foreign awards in Mainland China

Chinese courts and arbitration institutions
Chinese courts and arbitration institutions

Enforcement of awards in Hong Kong

## 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 to set aside order granting leave</th>
<th>No of orders set aside</th>
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</thead>
<tbody>
<tr>
<td>Beijing Arbitration Commission</td>
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<td>Changzhou Arbitration Commission</td>
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<tr>
<td>China Guangzhou Arbitration Commission</td>
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<td>CIETAC (Beijing) ²</td>
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<td>CIETAC (Shanghai) ³</td>
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<td>0</td>
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<tr>
<td>France [ICC] ⁴</td>
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<tr>
<td>Japan Commercial Arbitration Commission</td>
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<tr>
<td>Jiaxing Arbitration Commission</td>
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## Chinese courts and arbitration institutions

### Enforcement of awards in Hong Kong

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<td>Shenzhen Arbitration Commission</td>
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<td>Xiamen Arbitration Commission</td>
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<td><strong>Total:</strong></td>
<td><strong>34</strong></td>
<td><strong>2</strong></td>
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</table>

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?
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.
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As a key member of our litigation team in Asia, Nassim Hooshmandnia is a senior associate in the firm’s Hong 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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