

Arbitration of Disputes
in China and Hong Kong:
Challenges and Opportunities

CHICAGO ♦ November 3, 2008 HOUSTON ♦ November 5, 2008 LOS ANGELES ♦ November 6, 2008

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TAB A

David J. A. Boyle

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Experience

- Conducting litigation, arbitration and mediation of construction disputes including claims arising from construction defects, plant and equipment, non-conformance and design responsibilities
- Advising on disputes regarding variations and measured work; claims arising from delay to completion; disputes in relation to insurance claims in the construction context
- Extensive experience in acting for Government departments and statutory corporations, transport and infrastructure entities, education and training institutions, hospitals, housing societies, property developers, utilities, insurers, consultants and banks
- Acting for utilities and infrastructure clients in rating and valuation appeals
- Completed The Law Society of Hong Kong Mediation Training Course and undergoing accreditation assessment

David is a partner of JSM.

Notable Engagements

- **Cathay Pacific** – representing Employer in relation to mediation of construction dispute
- **Highcliff Developments Ltd** – resolution of building contract disputes
- **HK Institute of Education: Tai Po Campus Development** – acting for Hong Kong Institute of Education with regard to construction claims from contractors
- **Hong Kong Housing Authority: Tin Shui Wai Area 31 Phase I** – conduct of claim for recovery of damages from Contractor and Insurers arising from non-compliant foundations
- **Hong Kong Housing Authority** - conduct of various arbitration proceedings with contractors
- **Hong Kong Housing Society: Ma On Shan Site** – acting for Hong Kong Housing Society in defence of claim brought on behalf of Contractor
- **Hong Kong Housing Society: Kai Tak, Tseung Kwan O** – acting for Hong Kong Housing Society in arbitration proceedings brought by contractor, and in recovery of monies under performance bonds
- **Hong Kong Government Works Bureau** – acting for Hong Kong Government in defence of arbitration proceedings on various projects
- **Urban Renewal Authority** – acting for the Urban Renewal Authority (and formerly for the Land Development Corporation) in various contentious and non-contentious construction matters

Education

The Nottingham Trent University (formerly Trent Polytechnic), CPE • University of Oxford, MA

Languages

- English

Admitted

- Hong Kong, 1991
- England & Wales, 1985

Memberships

- The Chartered Institute of Arbitrators, Member

Philippa CharlesPartner
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"Has always brought common sense and leadership to her cases"

UK Legal 500, 2007

Experience

A member of the International Commercial Disputes group, Philippa Charles focuses on international arbitration. Her international litigation practice particularly emphasizes client representation in disputes arising out of cross-border contracts. She regularly advises clients on all aspects of arbitration practice and procedure.

Philippa has arbitration experience in cases under ICC, LCIA, UNCITRAL, ICSID, and LMAA Rules, as well as in ad hoc arbitrations. Philippa also brings and defends warranty claims in relation to a variety of corporate transactions, including claims involving oil and gas industry support services, the food packaging industry and a web-based trading platform. Her experience with distribution agreement disputes includes both bringing and defending claims arising out of manufacturer/distributor relationships, usually involving parties in different countries. She also has experience with both domestic and international joint venture agreement disputes and is fluent in French. She is a Solicitor Advocate with rights of audience in all Higher Courts in England and Wales, and she qualified as a CEDR Accredited Mediator in July 2007.

Notable Engagements

- Advising the Argentine Republic in ICSID arbitration involving alleged breaches of bilateral investment treaties.
- *(1) Michael Anthony Powell (2) William Graham (3) Hg Investment Managers Limited v. General Electric Company*, 2005, concerning the proper construction of escrow provisions in a share sale agreement.
- *MRW Technologies Ltd v. (1) Cecil Holdings Ltd (2) Charter PLC*, 2001, an authority on certain aspects of the Civil Procedure Rules.
- *United Pan-Europe Communications N.V. v. Deutsche Bank AG*, 2000, a leading case concerning the inter-relationship between constructive trusts, fiduciary duties and the use of confidential information.
- ICC arbitration in Paris concerning land reclamation works in a Middle Eastern state.
- ICC arbitration in London concerning a credit card franchise agreement.
- LCIA arbitrations in London in relation to political risk insurance policy coverage, and in relation to a sub-contractor's liability for allegedly inadequate design.
- UNCITRAL arbitration in London regarding payments due to sub-contractor arising out of refinery construction project.
- ICC arbitration in relation to the conduct of parties to a Joint Venture Agreement with regard to property developments in the Middle East and America.
- Advising a participant in a Joint Venture in the Middle East related to the oil and gas industry on issues relating to termination rights and claims arising out of the performance of the Joint Venture Agreement worth in excess of \$100 million.
- UNCITRAL arbitration in Belgium relating to disputed termination of a distribution agreement.

- Ad Hoc arbitration in London concerning a disputed supply contract and involving contested jurisdiction, as well as issues in relation to enforcement in a non-EU jurisdiction.

Education

Oxford Institute of Legal Practice, Diploma in Legal Practice (Distinction), 1996 • University of Oxford, BA (Jurisprudence), 1995

Admitted

- Solicitor Advocate with Higher Rights of Audience (Civil and Criminal), 2005
- England and Wales, 1999

Publications

- "Anti-suit Injunctions in Defence of Arbitration: Protecting the Right to Arbitrate in Common and Civil Law Jurisdictions," *Bloomberg European Law Journal*, February 2008
- "Arbitration Clauses: Inclusive Rather than Exclusive," *Global Arbitration Review*, December 2007
- "[Power Play](#)," Reproduced with the kind permission of *Solicitors' Journal*, September 30, 2005
- *Vindobona Journal of International Commercial Law and Arbitration*, Sub-editor, 2002 to date

Seminars

- "Pre-Emptive Strike or Attack on Comity: English Anti-Suit Injunctions and the Rest of the World," 11th Annual Review of Arbitration Act 1996, London, January 2008
- "Alter Egos in the USA and England": a study of the application of the alter ego doctrine in cases involving claims against States, for a conference on "New Developments in State Immunity," London, October 2007
- "Recent developments in International Litigation and Arbitration," Central Law Training Commercial Litigation Conference, September 2005, March 2006, September 2006, March 2007
- "Jurisdiction: Where on Earth do We Start?" Central Law Training International Law Conference, March 2005
- "The Role of Mediation," Hawksmere Seminar on Litigation and the In-House Lawyer, December 2004
- "The Standard of Proof in International Arbitrations," and "The Alternatives to Litigation," the Centre for International Legal Studies conferences on international arbitration and ADR, Salzburg, Austria, June 2002 and June 2004

Professional Activities

- Member, ICC Commission on Arbitration Task Force on the New York Convention of 1958, 2007
- Member, London Court of International Arbitration
- Member, Chartered Institute of Arbitrators, 2000
- Associate, Chartered Institute of Arbitrators, 1999

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"an extremely intelligent, diligent and diplomatic lawyer who just knows how to win"

Chambers USA 2007

Experience

William Knull has been engaged for more than 30 years in resolving complex business disputes through arbitration and litigation. Many of the disputes have involved transnational transactions in the oil and gas industry, encompassing such issues as arbitral jurisdiction, interpretation and operation of joint venture agreements, reserve engineering and valuation, transportation, marketing, supply agreements, enterprise risk, complex choice of law, multiplicity of parties and proceedings, enterprise and oil field operational matters, and similar concerns.

Bill has been involved as lead counsel and counsel in all varieties of complex corporate, commercial, and financial litigation in state and federal courts and in international and domestic arbitration. He has extensive experience in transnational and domestic disputes involving oil and gas related matters, mergers and acquisitions, contracts, corporate and securities fraud, accounting malpractice, lending practices, automotive products and franchising matters, litigation and investigation of problems of corporate management and governance, fiduciary obligations, and employee fraud.

Bill also has extensive experience as counsel and lead counsel in arbitrations under the auspices of the AAA, ICSID, ICC, ICDR and NASD, and ad hoc proceedings pursuant to UNCITRAL Rules, primarily involving international disputes in the oil and gas industry. He has been lead counsel in multi-billion dollar disputes involving contractual, operational, accounting, governance, jurisdictional, and related issues arising from Middle Eastern, Central Asian, and Chinese oil and gas projects.

Bill has been called "an extremely intelligent, diligent and diplomatic lawyer who just knows how to win" (*Chambers USA 2007*), as well as "profoundly experienced in commercial arbitration" (*Who's Who Legal Texas 2007*), a "talented, reliable and effective" litigator with a "great profile in the market" (*Chambers USA 2005*), and part of a "terrific team" that enjoys a "high reputation for advocacy among its clients" (*Chambers USA 2006*). Bill has been consistently listed in the publication *Texas Super Lawyers* since 2005. He has a working knowledge of Spanish and French.

Notable Engagements

- Served as lead counsel for the Government of Turkmenistan and various Turkmen governmental entities in defense of multi-billion dollar claims brought by Bridas SAPIC in three ICC arbitrations, arising out of oil and gas joint ventures in Turkmenistan. The issues included arbitral jurisdiction; contractual interpretation; joint venture accounting and governance; prudent conduct of drilling, development and production operations; and valuation of oil and gas reserves in the face of geologic, political and market risk.
- Served as trial co-counsel for Cargill as claimant in ICSID Additional Facility proceeding against Mexico alleging violations of NAFTA arising out of tax and import measures favoring domestic suppliers of sugar over similarly situated foreign suppliers of high fructose corn syrup.
- Served as co-lead counsel in an ICDR arbitration on behalf of a Canadian importer to enforce a contract for the purchase of railroad car wheels from a Ukrainian steel mill.

- Served as a member of the team advising the Procurador del Tesoro de la Nación with respect to the development of strategies and defenses to claims asserted against Argentina by investors before ICSID.
- Served as lead counsel for the largest North American manufacturer of fertilizer in AAA arbitration/litigation arising out of contract for the supply of natural gas feedstock.
- Served as the lead counsel for a Kazakh consulting firm against an independent oil company in ad hoc arbitration under UNCITRAL rules to enforce a contract to pay a consulting fee in connection with the acquisition of an oil and gas field in Kazakhstan.
- Served as the principal supporting counsel for a major international oil company in AAA arbitration brought by a US independent producer against all of the major integrated and independent oil companies operating concessions in Libya in the early 1970s alleging breach of agreement among producers to address interruptions in supply.

Education

University of Virginia School of Law, JD, 1977; Order of the Coif; Virginia Law Review, Member, 1975-1977; Notes Editor, 1976-1977 • Yale University, BA, magna cum laude, 1970; Departmental Honors in Political Science

Admitted

- US District Court for the Eastern District of Texas, 1989
- US District Court for the Northern District of Texas, 1988
- US District Court for the Western District of Texas, 1988
- US Court of Appeals for the Fifth Circuit, 1988
- US District Court for the Southern District of Texas, 1987
- Texas, 1987
- US Court of Appeals for the Second Circuit, 1984
- US District Court for the Northern District of New York, 1983
- US District Court for the Eastern District of New York, 1978
- US District Court for the Southern District of New York, 1978
- New York, 1978

Publications

- "Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments," *JERL* 2007, Vol 25, No 3, August 2007, with Scott T. Jones, Timothy J. Tyler and Richard D. Deutsch
- ["Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?"](#) 11 *Am. Rev. Int'l. Arb.* 531 (2002), with N. Rubins

Seminars

- "Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments," Institute for Energy Law, Houston, October 10, 2007
- "The Prosecution and Defense of an Oil & Gas Arbitration: The Facts," in Specialized Arbitration & Advocacy Skills in International Oil & Gas Disputes Seminar, Centre for Energy, Petroleum & Mineral Law & Policy, University of Dundee, St. Andrews, Scotland, August 27-31, 2007
- "The Midnight Clause: Ten Traps to Avoid in Drafting Arbitration Agreements," Internet Seminar, June 19, 2007, with Philippa Casey
- "Presentation of Evidence in International Arbitration," Leading Arbitrators' Symposium on the Conduct of International Arbitration, Juris Conferences, Chicago, September 2006, Panelist

- "Uncertainty in the Courts: Split in US Appellate Courts on Expanded Judicial Review by Agreement of Parties," in *Barriers to Free Movement of Civil Justice*, Center for International Legal Studies, Salzburg, Austria, November 2001, www.cils.net/November2001/November2001.htm
- "Arbitrating Oil and Gas Disputes Involving CIS Parties," Moscow, October 2000, with Terri Truitt Griffiths, Levon Grigorian, Timothy J. Tyler and Noah D. Rubins
- "CIS-Related Oil & Gas Dispute Resolution in the West: Major Considerations and Practical Lessons in Oil & Gas," in *Oil & Gas in the CIS Legal and Tax Solutions Euroforum*, Houston, May 2001

Professional Activities

- Institute of Transnational Arbitration, Member, Advisory Board
- Institute for Energy Law, Member, Advisory Board
- AAA Panel of Arbitrators
- Chartered Institute of Arbitrators, Fellow
- London Court of International Arbitration
- Center for International Legal Studies, Fellow
- International Bar Association
- American Bar Association
- State Bar of Texas
- Houston Bar Association

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**Experience**

Jeff Sarles divides his dispute resolution practice between appellate and international arbitration work, and also handles a variety of other litigation matters. He joined Mayer Brown in 1994 and is the co-practice leader of both the firm's Supreme Court and Appellate group and International Arbitration group.

In appellate matters, Jeff has briefed and argued numerous appeals in the federal and state courts, involving such issues as free speech, patent infringement, employment discrimination, ERISA, securities fraud, environmental, telecommunications, consumer class actions, arbitration and antitrust. He is included in the 2009 edition of *Best Lawyers in America* in the field of Appellate Law.

Jeff has represented companies in commercial arbitrations before such leading bodies as the AAA, ICC, CPR, and LCIA, as well as under the UNCITRAL Rules. His numerous domestic and international arbitrations have involved such issues as construction disputes, post-closing purchase price adjustments, the adequacy of custom-ordered software technology, auto production shortfalls, and indemnification for a product recall. He has practiced before courts of first instance and appellate courts in cases involving arbitrability, arbitral jurisdiction, and judicial review of arbitration awards. Jeff has also represented governments and investors in investor-state arbitrations and annulment proceedings before the International Centre for the Settlement of Investment Disputes and in appellate litigation involving the scope of arbitral jurisdiction over foreign governments.

As part of an active litigation practice, Jeff has briefed and argued dispositive motions in federal and state trial courts throughout the country, resulting in numerous cases being dismissed on the pleadings or on summary judgment. He has substantial experience in briefing discovery and evidentiary issues.

Notable Engagements

- Recently won two Seventh Circuit appeals argued on the same day, one for AT&T involving arbitration issues and the other for Chevy Chase Bank involving consumer class action issues under the Truth in Lending Act.
- Currently handling a NAFTA investment arbitration for a US food products supplier against the government of Mexico, ICC arbitrations for a US auto manufacturer and a European airline, and appeals for health insurance and telecommunications companies.
- Successfully briefed and argued against class certification in an antitrust price-fixing case on behalf of seven defendants.
- Recently won a Federal Circuit appeal in a patent infringement case on behalf of a large gambling equipment manufacturer and an ICC arbitration on behalf of a Spanish medical products company.

Education

Northwestern University School of Law, JD, cum laude, 1994; Editor-in-Chief, Northwestern University Law Review • University of Chicago, MA with honors • Wesleyan University, BA; Phi Beta Kappa

Admitted

- Illinois, 1994
- US Supreme Court
- US Court of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits

Publications

- ["Tips on Petitioning for and Opposing Certiorari in the U.S. Supreme Court,"](#) *Litigation*, Winter 2008
- "Tips on Petitioning for Certiorari in the U.S. Supreme Court," *Circuit Rider*, May 2007
- "Bilateral Investment Treaties," *BNA's Corporate Counsel Weekly*, Feb. 28, 2007
- "Drafting Arbitration Clauses That Work For You," ReedLogic Video Leadership Seminar (2006)
- "Winning Legal Strategies for Alternative Dispute Resolution," *ADR Best Practices* (2006)
- "The Confidentiality Conundrum in International Arbitration," *ADR and the Law* (2002)
- "US Courts Divided Over Enforceability of Arbitral Subpoenas to Non-Parties," *Mealey's Int'l Arbitration Report*, Jan. 2001
- ["International Business Disputes are Increasingly Resolved by Arbitration,"](#) *BNA's Corporate Counsel Weekly*, May 10, 2000
- "Using Generic Arbitration Clauses Can Be Bad Medicine," *BNA's Corporate Counsel Weekly*, Apr. 28, 1999

Seminars

- "Arbitrating under NAFTA," Chicago International Dispute Resolution Association, January 2007
- "International Commercial and Investment Treaty Arbitration," LexisNexis Mealey's Corporate Conference Series, Atlanta, June 2006
- "Negotiating and Drafting Purchase Price Adjustments," Corporate University, Mayer, Brown, Rowe & Maw, May 2006
- "Framework of International Arbitration," PriceWaterhouseCoopers Alumni Conference, Chicago, March 2006
- "The Revised AAA and IBA Ethics Rules for Arbitrators," California Bar Association/ International Centre for Dispute Resolution/CANACO, Newport Beach, Calif., March 2006

Professional Activities

- Northwestern University, Adjunct Professor of Law with focus on arbitration, 1995 to date
- American Bar Association
- Seventh Circuit Bar Association
- Chicago International Dispute Resolution Association

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Experience

James Tancula is a litigator and corporate advisor whose practice focuses especially on construction-related matters. He represents architects and engineers in alleged professional malpractice actions, and also acts on behalf of owners and architects/engineers in cases involving contract extras and delay claims. Construction litigation matters that James handles have involved electrical generating facilities, cogeneration facilities, high-rise buildings, apartment buildings, water tunnels, pipelines, prisons, highways, and sports stadiums. He also represents and advises owners, designers and contractors on negotiations and bids for major construction projects.

James also handles construction-related issues in other aspects of his practice. For example, he advises clients engaged in domestic and international arbitrations dealing with oil and gas and construction matters. He also defends clients engaged in product liability cases and acts in defense of architects and engineers in construction accident cases.

In addition to his construction industry focus, James has a varied commercial and commercial litigation practice focusing on contractual issues. He represents clients in concerns and disputes involving stock or asset transfer contracts, partnership agreements, limited partnership control issues, professional services contracts, franchise contracts, employment contracts, utility fuel contracts, and pipeline agreements.

James defends clients involved in civil RICO, bank fraud and other fraud cases. He also represents defendants in federal criminal cases.

Finally, James represents municipal bodies in matters involving construction projects, hiring and promotion practices and budgetary decisions. In related work, he represents and advises corporations on Minority Business Enterprise requirements.

James began his practice with Mayer Brown in the firm's Chicago Office in 1987. He subsequently relocated to Mayer Brown's offices in Houston (1991 to date) and Los Angeles (2006 to date). Prior to joining the firm, James held a senior position with another prominent law firm in Chicago.

Education

University of Chicago Law School, JD, 1982 • Marquette University, AB, magna cum laude, 1979

Admitted

- US District Court for the Western District of Texas, 2002
- US District Court for the Eastern District of Texas, 2000
- US District for the Northern District of Texas, 1999
- US Court of Appeals for the Fifth Circuit, 1995
- US District of the Southern District of Texas, 1993

- Texas, 1992
- US District Court for the Northern District of Illinois, 1982
- Illinois, 1982

Professional Activities

- American Bar Association
- Chicago Bar Association
- Houston Bar Association
- Illinois State Bar Association
- Texas Bar Association

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Experience

- Extensive experience in the liquidation and debt restructuring and led the GITIC liquidation case
- Substantial experience in various aspects of contentious matters at the level of the People's Supreme Court, People's Higher Court of various provinces and municipalities and People's Intermediate Courts of various municipalities in the PRC and the High Court of Hong Kong including banking, commercial and contractual disputes
- China Appointed Attesting Officer (appointed by the Ministry of Justice of PRC)
- China International Economic and Trade Arbitration Commission ("CIETAC"), Arbitrator

Notable Engagements

- Acting for foreign companies and PRC enterprises in arbitration and litigation cases involving commercial, contractual and banking disputes conducted in the Mainland and in Hong Kong.
- Acting for banks in debt restructuring cases.
- Acting as one of the principal professional advisers for the liquidation committees of Guangdong International Trust & Investment Corporation ("GITIC") and its related companies in the liquidation process of GITIC involving 569 proofs with an aggregate amount of RMB 38.777 billion.
- Acting for foreign companies in labour dispute matters in the Mainland and in Hong Kong.

Education

The University of Hong Kong, LLB

Languages

- Chinese and English
- Spoken Putonghua, Cantonese, Shanghainese and English

Admitted

- Singapore, 1991
- Australia (NSW), 1990
- Australia (Victoria), 1982
- England & Wales, 1982
- Hong Kong, 1976

Publications

- One of the Co-authors of Arbitration in China: A Practical Guide

Awards and Honours

- Recommended Dispute Resolution Lawyer in China - PLC Which Lawyer? Yearbook (2007 & 2008)
- Recommended Dispute Resolution Lawyer in China - PLC Cross-border Dispute Resolution Handbook (2006/07 & 2008/09)
- Leading AsiaLaw Labour & Employment Lawyer - Asia Law & Practice Survey (2008)

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**Experience**

Timothy Tyler's litigation practice emphasizes both international commercial and investor-state arbitration, and US litigation with a non-US element. His work involving contracts with state parties has a strong focus on the oil and gas industry. He also has broad experience with more typical commercial disputes such as commission agreements, joint venture agreements, commercial leases, loan agreements, sales of business, and sales of goods. Tim's litigation experience in this area encompasses United States federal and Texas state courts, including appeals and mandamus proceedings, with special emphasis on litigation relating to enforcing and vacating international arbitration agreements and awards.

Alternative dispute resolution plays a substantial role in Tim's international practice. He regularly advises and drafts international arbitration clauses in contracts, as well as structuring transactions to gain investment treaty protection. He has been involved in ad hoc arbitrations under the UNCITRAL Rules, as well as institutional arbitrations under the ICC, ICDR, AAA, Singapore International Arbitration Centre, Cairo Regional International Arbitration Centre and International Centre for the Settlement of Investment Disputes. In these and other proceedings, Tim's international work encompasses particular experience with clients in Canada, Mexico, the Commonwealth of Independent States, the Middle East and Europe. Reflecting the global nature of his practice, he is fluent in German and French and has a basic knowledge of Spanish.

After serving for two years as briefing attorney to Justice Nathan L. Hecht, Supreme Court of Texas, Tim joined Mayer Brown in 1995 and has been counsel in the Houston office since 2003.

Notable Engagements

- *Wabtee Corporation v. Faiveley Transport Malmo AB*, 525 F.3d 135 (Second Cir. 2008). Advised on and drafted successful Second Circuit and district court briefing in case on interim relief pending arbitration.
- *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11. Advised on and drafted briefing in investor-state arbitration under a United Kingdom-Egypt bilateral investment treaty in the International Centre for the Settlement of Investment Disputes, in a matter related to a contract for mining equipment.
- UK company v. North African company, Cairo Regional International Arbitration Centre. Handled this international commercial arbitration based on a contract for equipment.
- Liechtenstein company v. Canadian company, UNCITRAL Rules. Represented a Liechtenstein consulting firm in an ad hoc arbitration in Stockholm against a Canadian oil company for fees arising out of services rendered in connection with the acquisition and operation of an oil field in Kazakhstan.
- UK company v. Russian company, International Chamber of Commerce. Represented a UK-based equipment manufacturer in a commercial dispute governed by English law against a Russian company.
- Colombian company v. Italian companies, Spanish Court of Arbitration. Advised a Colombian seller in a pesticide distribution agreement dispute with Italian parties under Italian law.

- South American company v. Central Asian state-owned company, International Chamber of Commerce. Represented state and state-owned exploration and production entities in two arbitrations under English law, sited in Houston and Stockholm, arising out of two joint ventures between host-government entities and a foreign oil company for the exploitation of oil and gas properties.
- Central Asian-South American joint venture company v. Central Asian state-owned refining company, International Chamber of Commerce. Handled this arbitration under English law arising out of a nonpayment of settlement agreement for failure to lift delivered crude oil.
- US company v. Indonesian company, Singapore International Arbitration Centre. Was part of the team representing a US company in an international arbitration in Singapore under Singaporean law against a pulp-and-paper company for breach of contract for the sale of paper-making machines.
- South American state. Assisted in strategy and some briefing for a South American state party for claims in ICSID under bilateral investment treaties.
- Sovereign wealth fund. Advised sovereign wealth fund on sovereign immunity issues.

Education

University of Texas School of Law, JD, cum laude, 1994 • Yale University, BA, English, cum laude, 1986

Admitted

- Texas, 1994
- US District Courts for the Northern, Southern, Eastern and Western Districts of Texas
- US Court of Appeals for the Fifth Circuit

Publications

- "Finality over Choice: *Hall Street Associates, L.L.C. v. Mattel, Inc.*" (co-author with Archis Parasharami), __ *J. Int'l Arb.* __ (forthcoming 2008)
- "Beyond Consent: Applying Alter Ego and Arbitration Doctrines to Bind Sovereign Parents" (co-author with Rebecca Stewart and Lee Kovarsky), *Multiple Party Actions in International Arbitration: Consent, Procedure, and Enforcement*, Oxford Univ. Press (forthcoming)
- "Options for the Nervous Investor in Venezuela: Structuring for BIT Protection and Preserving the ICSID Option, 5(2)" (co-author with Richard Deutsch), *Transnat'l Disp. Management*, April 2008
- "Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments" (co-author with William H. Knull III, Scott T. Jones and Richard Deutsch), 25 *J. Energy & Nat. Res. L* 268, August 2007
- "[Arbitrating International Oil and Gas Disputes: Practical Consideration,](#)" *International Oil and Gas Ventures: A Business Perspective*, 2000

Seminars

- "Beyond Consent: Applying Alter Ego and Arbitration Doctrines to Bind Sovereign Parents" (with Lee Kovarsky and Rebecca Stewart), Permanent Court of Arbitration, Houston International Arbitration Club, Inc., The University of Texas School of Law, The Hague, The Netherlands, May 2007
- "Structuring Energy Projects for Investment Treaty Protection: Pitfalls and Guidelines" (with Richard Deutsch), Rocky Mountain Mineral Law Foundation and International Bar Association, Buenos Aires, May 2007
- "Protecting Assets by Nationality Planning," African Venture Capital Association Annual Meeting, Dakar, Senegal, October 2006

- "Protecting Assets Abroad by Nationality Planning, BIT by BIT," State Bar of Texas, International Law Section, June 2005
- "From Planning and Pleading to Proving and Enforcement," State Bar of Texas, International Law Section, February 2005
- "How to Succeed in Arbitration," The University of Texas Law School, Page Keeton Civil Litigation Conference, 2004
- "Investor-State Arbitration," Houston International Arbitration Club, 2004
- "New Era in Oil, Gas and Power Creation – International Investor-State & Commercial Arbitration," University of Texas, Center for Energy Economics, 2000-2006
- "Dispute Resolution Involving Russian and CIS Parties – Arbitrating International Oil and Gas Disputes Involving CIS Parties," Euro Forum, 2000

Professional Activities

- Adjunct Professor, University of Texas School of Law, Fall 2005 to date (International Commercial Arbitration, International Investor-State Arbitration)
- Vice-President, Houston International Arbitration Club, 2005 to date
- Fellow, Chartered Institute of Arbitrators (London), 2006 to date
- Council Member, Chartered Institute of Arbitrators (North American branch), 2005 to date
- Council Member, State Bar of Texas International Law Section, 2006 to date
- Member, American Bar Association, International Law Section, 2004 to date

TAB B

Arbitration of Disputes in China and Hong Kong: Challenges and Opportunities

Arbitration in Hong Kong

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Partner

November 2008

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Agenda

- Introduction
- Hong Kong's political society and the rule of law
- Hong Kong International Arbitration Centre (HKAIC)
- Proximity as gateway to China
- Adoption of UNCITRAL Model Law
- Hong Kong Arbitration Ordinance

Introduction

Growing number of arbitration cases handled by the HKIAC

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
AAA	204	207	187	180	226	320	387	453	510	649	672	646	614	580	N/A
CIETAC	267	486	829	902	778	723	645	609	543	731*	684*	709*	850*	979*	981*
HKIAC	185	139	150	184	197	218	240	257	298	307	320	287	280	281	394⁺
ICC	337	352	384	427	433	452	466	529	541	566*	593*	580*	561*	521*	593*
JCAA	5	3	4	7	8	13	14	12	10	17	9	14	21	11	11
KCAB	30	28	33	18	36	51	59	40	40	65	47	38	46	53	47
KLRCA	4	3	8	7	3	5	7	10	11	1	2	4	3	6	1
LCIA	21*	29*	39*	49*	37*	52*	70*	56*	81*	71*	88*	104*	87*	118*	130
SIAC	7	15	22	37	25	43	67	67	83	99	114	100	129	103	119
STOCKHOLM	44	78	74	70	75	82	92	104	73	74	55	82	50	56	141
VANCOUVER	44*	52*	54*	40*	57*	41*	49*	60*	88*	88*	71*	76*	84*	77*	4
VIENNA	100	100	100	100	100	100	100	100	100	100	33	45	50	55	N/A

* The statistics include domestic as well as international arbitrations.

+ For 2007 HKIAC report receiving 448 cases.

Introduction

- Reasons for Hong Kong's success
 - Stable and prosperous society; maintenance of the rule of law
 - Gateway to China and convenient location
 - Sound appointing institution - HKIAC
 - Adoption of UNCITRAL Model Law
 - Accession to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Agenda

- Hong Kong's political society and the rule of law
- Hong Kong International Arbitration Centre
- Proximity as gateway to China
- Adoption of UNCITRAL Model Law
- Hong Kong Arbitration Ordinance

Hong Kong's political society and the rule of law

- History of Hong Kong



Hong Kong's political society and the rule of law

- Treaty of Nanking - 29 August 1842
 - Permanent cession of Hong Kong Island
- Permanent cession of Kowloon Peninsula in 1860
- 99-year lease of New Territories in 1898

Hong Kong's political society and the rule of law

- Transfer of sovereignty in 1997
 - New Territories lease expired on 30 June 1997
 - Concerns of people in Hong Kong
 - Solution: Joint Declaration in 1984



Hong Kong's political society and the rule of law

- Features of the present constitutional and political system in Hong Kong
 - High degree of autonomy and independent executive, legislative and judicial power vs. foreign and defence affairs
 - Election of Chief Executive and Legislative Council
 - Well trained and educated civil service
 - Freedom of assembly and of speech
- Economic freedom

Hong Kong's political society and the rule of law

- Rule of law
 - Independence of judiciary
 - Preservation of common law system
 - Recognition of human rights obligations
 - High standard of legal education and training
 - Split profession
 - Specialist lists in Court of First Instance
 - Influence of other jurisdictions

Agenda

- Hong Kong's political society and the rule of law

- Hong Kong International Arbitration Centre

- Proximity as gateway to China
- Adoption of UNCITRAL Model Law
- Hong Kong Arbitration Ordinance

Hong Kong International Arbitration Centre

- Established in 1985



- Non-profit making



- Exercises statutory functions as the default appointing authority in both domestic and international arbitrations
- Role of other arbitration institutions

Agenda

- Hong Kong's political society and the rule of law
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- Adoption of UNCITRAL Model Law
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Proximity as gateway to China

- Reasons for Hong Kong's popularity as an international arbitration centre
 - Gateway for professional and financial services, trade and investment
 - Growing overseas investment
 - Hong Kong's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Agenda

- Hong Kong's political society and the rule of law
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Adoption of UNCITRAL Model Law

- Adopted in 1990
- Model Law vs. Hong Kong Arbitration Ordinance
 - International vs. Domestic arbitrations
- Draft bill to abolish distinction between international and domestic arbitrations
- History of Model Law

Principal features of the Model Law

- Definition of "international" arbitration (Article 1)
 - Places of business in different States
 - Place of arbitration specified is outside the places of business
 - Place where substantial part of contractual obligations are performed is outside the places of business
 - Agreement by parties that the subject matter of arbitration agreement relates to more than 1 country

Principle features of the Model Law

- Assistance and supervision (Articles 5 and 6)
 - Article 5 : limit intervention of the national courts
 - Administrative matters vs. judicial discretion

HKIAC	Court of First Instance
<ul style="list-style-type: none">• appointment of arbitrators in the event of default	<ul style="list-style-type: none">• challenge to appointment of arbitrator• failure or impossibility to act• ruling on jurisdiction of tribunal• application to set aside arbitral award

Principal features of the Model Law

- Stay of proceedings (Article 8)
 - Automatic stay *unless* satisfied that the arbitration agreement is null, void, inoperative or incapable of being performed
 - Implements Hong Kong's obligation under Article 2 of the New York Convention
- Appointment of arbitrators (Articles 10 and 11)
 - Article 10 as amended by section 34C(5) of the Arbitration Ordinance: HKIAC has power to decide the number of arbitrators

Principal features of the Model Law

- Interim measures (Article 17)
 - Arbitral tribunal may order interim measures of protection
 - Section 2GB of Arbitration Ordinance: power to order preservation of property and interim injunctions
 - Section 21L of High Court Ordinance: extensive power of the courts to grant injunctions
 - Proposed changes to the Arbitration Ordinance

Principal features of the Model Law

- Equality and fairness (Article 18)
 - Each party to be treated with equality and be given a full opportunity to present its case
 - Section 2GA(1) Arbitration Ordinance: speed + impartiality + avoiding unnecessary expense
 - Section 2GA(2) : arbitral tribunal not bound by the rules of evidence

Principal features of the Model Law

- Determination of rules of procedure (Article 19)
 - Parties free to agree rules of procedure; otherwise, the tribunal will decide
 - Standard procedural rules: UNCITRAL Arbitration Rules or ICC Rules
 - HKIAC: bias towards the adversarial system

Principal features of the Model Law

- Place of arbitration (Article 20)
 - Parties free to agree place of arbitration; otherwise, the tribunal will decide
 - Chinese International Economic and Trade Arbitration Commission (CIETAC) arbitrations: take place outside China?
- Language (Article 22)
 - Parties free to agree language to be used; otherwise, the tribunal will decide
 - CIETAC arbitrations: Chinese language should be used

Principal features of the Model Law

- Statement of Claim or Defense (Article 23)
 - Submission of pleadings as agreed or determined by arbitrator
 - May be submitted with relevant documents
 - May be amended during the course of the proceedings
 - CIETAC Rules: definite timeframe when parties should submit pleadings

Principal features of the Model Law

- Hearings and written procedures (Article 24)
 - Discretion to conduct oral hearings or on paper
 - CIETAC Rules: more paper-based; rarely have cross-examination of witnesses
- Expert appointed by arbitral tribunal (Article 26)
 - Appointment of experts to report on specific issues
 - Experts to testify in hearings

Principal features of the Model Law

- Discovery
 - Model Law silent on discovery
 - Common law type discovery is usual, but often limited to documents upon which parties rely
 - Specific discovery
 - Comparison with CIETAC Rules
 - Electronic discovery
 - Electronic data vs. paper documents
 - Problems associated with e-discovery

Principal features of the Model Law

- Rules of law applicable to substance of dispute (Article 28)
 - Disputes to be decided in accordance with rules of law chosen by parties as are applicable to the substance of the dispute

Principal features of the Model Law

- Recourse against arbitral awards (Article 34)
 - Does not recognize the right of appeal
 - Except in limited circumstances set out in Article 34
 - Incapacity of a party
 - Party not being given proper notice of arbitration
 - Award deals with matters outside jurisdiction of arbitrator
 - Composition of arbitral tribunal not in accordance with parties' agreement
 - Subject matter of dispute not capable of settlement by arbitration

Principal features of the Model Law

- Enforcement of awards
 - Part IV of Arbitration Ordinance: enforcement of Convention awards with limited reasons for refusal
 - Part IIIA of Arbitration Ordinance: enforcement of Mainland awards with limited grounds of refusal pursuant to *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*

Principle features of the Model Law

- Costs, security and interest
 - Section 2GB(1)(a) of Arbitration Ordinance: power to make order requiring claimant to give security for costs of the arbitration
 - Section 2GJ: power to order a party to pay costs and to settle the amount of such costs
 - Section 2GH: power to award simple or compound interest

Agenda

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Hong Kong Arbitration Ordinance

- Different regimes for international and domestic arbitrations
- Important features in the domestic regime
 - Consolidation of arbitration proceedings (section 6B(1))

Hong Kong Arbitration Ordinance

- Important features in the domestic regime (cont'd)
 - Determination of preliminary point of law (section 23A)
 - Confirming, varying or setting aside an award which arises out of an appeal on a question of law (section 23(2))
 - Ordering the arbitrator to state reasons for his award (section 23(5))
 - Setting aside an arbitration agreement or giving leave to revoke the arbitrator's authority (section 26(2))

Hong Kong Arbitration Ordinance

- Attempts to reform the Arbitration Ordinance
 - Unitary regime
 - Main changes
 - Appointment of arbitrators
 - No power of court to consolidate related arbitration
 - No power of court to determine preliminary issues
 - Limited rights of appeal against an arbitral award
 - Challenging award on ground of serious irregularity

Hong Kong Arbitration Ordinance

- Attempts to reform the Arbitration Ordinance (cont'd)

- Advantages

- No need to decide whether an arbitration is domestic or international
- Model Law being an internationally recognised model
- More user friendly

Hong Kong Arbitration Ordinance

- Mediation and Arbitration clause drafting
 - Considerations
 - Which type of mediation and/or arbitration clause is most appropriate
 - Whether there should be one or more steps in the dispute resolution process
 - Whether the same dispute resolution process be used for all potential disputes under the contract

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- The contents are intended to provide a general guide to the subject matter only and should not be treated as a substitute for specific advice concerning individual situations
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TAB C

Arbitration of Disputes in China and Hong Kong: Challenges and Opportunities

Arbitration in China

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Introduction to China (PRC) legal system

- Constitutional overview: civil litigation in China

Court system

- Supreme People's Court
- Higher People's Courts
- Intermediate People's Courts
- Basic People's Courts
- Special Court
 - Two instance hearing

Introduction to China (PRC) legal system

- Constitutional overview: civil litigation in China Court system
 - Time limit
 - Domestic disputes: usually within 6 months
- Foreign disputes: no time limit
 - Limited fee-shifting awards

Introduction to China (PRC) legal system

- Main features of legal system
 - Civil law system (no stare decisis)
 - Limited discovery
 - Mediation/conciliation, a necessary procedure before delivery of judgment
 - Live witnesses at trial (rarely)
 - No jury
 - Chinese language only, with interpretation services available
 - Developing judiciary
 - Interference factors

Introduction to China (PRC) legal system

- Foreign trade law
 - China has enacted special laws and regulations to standardize the organization and behaviour of enterprises with foreign investment
 - The result is a distinction between domestic parties, foreign parties and foreign investment enterprises
 - Sources of governing PRC foreign-investment enterprises
 - Laws on foreign-capital enterprises, Chinese-foreign contractual joint ventures and Chinese-foreign equity joint ventures
 - Regulations for the implementation of the above laws

Choice of Law

- Contracts must be governed by PRC law unless
 - One of the parties is of foreign nationality
 - Subject matter of the dispute is located outside Mainland China
 - The legal fact that establishes, changes or terminates the legal relationship takes place outside Mainland China

(Art.126 of the Contract law and 1992 Opinion of Supreme People's Court)

Mandatory Choice of Law

- Contracts must be governed by PRC law
 - Chinese-foreign equity joint ventures
 - Chinese-foreign contractual joint ventures
 - Chinese-foreign cooperation in exploring and exploiting natural resources

(Art.126 of the Contract Law)

Statutory framework for arbitration

- Sources of PRC arbitration law
 - Arbitration law 1994
 - Contract law 1999
 - Civil procedure law 2008
 - Judicial interpretations and court procedural rules
 - Notice of the Supreme People's Court Concerning Implementation of the Arbitration Law to Enforce an Arbitral Award according to Law (4 October 1995 - Fafa [1995] No. 21)
 - Notice of the Supreme People's Court Concerning Several Issues of Implementation of the "PRC Arbitration Law"

(26 March 1997- Fafa [1997] No. 4)

Statutory framework for arbitration (cont'd)

- Sources of the PRC Arbitration Law

- Notice of the People's Supreme Court Concerning a Number of Questions over the Handling of Foreign-related Arbitrations and Foreign Arbitrations, (28 August 1995 - Fafa [1995] No.18)
- Reply of the Supreme People's Court Concerning the Issue as to whether a Party may Appeal after the People's Court's Decision to Set Aside an Arbitral Award or Reject the Party's Application to Set Aside an Arbitral Award (23 April 1997- Fafu [1997] No.5)
- Notice of the Supreme People's Court on Matters Concerning the Setting Aside of a Foreign-related Arbitral Award by the People's Court (23 April 1998 - Fa [1998] No.40)
- Reply of the Supreme People's Court Concerning Several Issues Concerning Hearing of an Application to Set Aside an Arbitral Award (21 July 1998 - Fashi [1998] No.16)
- Reply of the Supreme People's Court Concerning an Application for a Re-trial after the People's Court's Decision to Set Aside an Arbitral Award (11 February 1999 - Fashi [1999] No.6)
- Interpretation of the Supreme People's Court Concerning Several Issues of the Application of the PRC Arbitration Law (26 December 2005 - Fashi [2006] No.7)

Disputes that cannot be arbitrated

- Two types of disputes that cannot be arbitrated
 - Disputes arising out of certain personal rights under marriage, adoption, guardianship, maintenance and inheritance
 - "Administrative disputes" such as disputes between different government departments or disputes involving a government department

Freedom of "foreign-related" parties to choose seat of arbitration and to refer disputes to foreign arbitral tribunal for arbitration

- What is foreign-related arbitration?
 - No specific definition
 - Some clarification may be found in a 1992 opinion of the Supreme People's Court concerning the definition of "foreign-related" civil litigation

What does it mean to be "foreign-related"?

- It is generally thought that an arbitration in China is "foreign-related" when a dispute involves:
 - A Chinese party and a foreign party; or
 - Two foreign parties; or
 - Two Chinese parties, if the legal relationship between them or the subject matter in dispute take place or is located in a foreign country

(Article 128 of Contract Law)
- Some academics take the view that the law prohibits offshore arbitration by two domestic parties and there is a risk that a foreign arbitral award between two domestic parties is unenforceable in China

Arbitration that must take place in China

- Labor arbitration
- Rural land arbitration

No ad hoc arbitrations: institutional arbitrations only

- Arbitration Law refers only to institutional arbitration
 - Article 18 of Arbitration Law requires the parties to specify the name of the arbitration institution. If not, the agreement is void
 - Ad hoc arbitration may not be recognized
- Even if the contract is not governed by PRC law, ad hoc arbitration does not appear to be permitted
 - It was held by the Supreme People's Court in the case of *People's Insurance Company of China, Guangzhou Branch v Guangdong Guanghe Power Co Ltd*((2003) Min Si Zhong Zi 29) that ad hoc arbitrations are not permitted in China

High level consideration of arbitration clause

- Domestic or foreign
- Choice of arbitration rules
- Place of arbitration and place of hearing
- Arrangement concerning mutual enforcement of arbitral awards between the Mainland and Hong Kong
 - An award made in Hong Kong pursuant to the Arbitration Ordinance is enforceable in the Mainland

PRC arbitral institutions

- CIETAC

- Full name: China International Economic and Trade Arbitration Commission
- It is headquartered in Beijing and it has sub-commissions in Shanghai and Shenzhen
- The foreign-related arbitrations are largely administered by CIETAC

PRC arbitral institutions

- Domestic arbitration commissions
 - Since 1995, local government authorities in the PRC have established a number of permanent arbitration bodies that accept domestic and international arbitration cases
- International secretariats
 - Filing and service of documents are dealt with via the secretariat

Arbitration fees vs court fees

- Arbitration fees for a domestic arbitration
 - Based on size of claim; for a claim exceeding RMB1 million, arbitration fees amount to RMB18,550 + 0.5% of any amount exceeding RMB1 million - Negotiable?
- Arbitration fees for a foreign-related arbitration
 - Based on size of claim; for a claim exceeding RMB50 million, arbitration fees amount to RMB610,000 + 0.5% of any amount exceeding RMB50 million - Negotiable?
- Court fees
 - Based on size of claim; for a claim exceeding RMB20 million, court fees amount to RMB41,800 + 0.5% of any amount exceeding RMB20 million

Advantages of arbitrating disputes in the PRC

- Avoidance of PRC courts
 - Reduce the risk of a developing judiciary
 - Reduce the risk of interference
 - Reduce the risk of publicity
 - Confidentiality (if specifically agreed)

Advantages of arbitrating disputes in the PRC (cont'd)

- Parties can choose neutral, expert arbitrators
 - Panel system including the expert from all walks of life
 - Panel of arbitrators for international (foreign-related) disputes;
 - Panel of arbitrators in financial industry;
 - Panel of arbitrators in construction, land & building transactions
 - Choose arbitrators outside of panel upon approval by the Chairman of CIETAC

Advantages of arbitrating disputes in the PRC

- CIETAC a respected body
 - International
 - Arbitrating the cases with international experiences, more than 10,000 international cases has administered by the CIETAC
 - International arbitration rules
 - Independent, impartial and professional
 - Speedy and efficient
 - Professional and supportive secretariats

Advantages of arbitrating disputes in the PRC

- Awards enforceable across borders
 - China acceded to the New York Convention in 1987 subject to commercial and reciprocity reservations
 - Mutual arrangements
 - Hong Kong
 - Macao

Validity of arbitration agreements under PRC law

- What is a valid arbitration agreement?
 - In writing and concluded by a willing party who has capacity
 - An expression of intention to apply for arbitration
 - A designation of an arbitration institution
 - The agreed matters for arbitration must not fall outside the scope of matters to be resolved by arbitration as permitted by law

Validity of arbitration agreements under PRC law

- Who decides validity of arbitration agreement?
 - The arbitration institution
 - The court
 - If one party requests that an arbitration institution make a decision and the other party applies to the court for a ruling, a ruling by the court will prevail over the one by the arbitration institution

Appointment of tribunal under CIETAC rules

- Number of arbitrators
 - The rules generally call for the appointment of three arbitrators
 - A single arbitrator can be appointed if:
 - The parties agree to appoint a single arbitrator
 - The amount in dispute is RMB500,000 or less
 - No specific amount is claimed and CIETAC considers that the case is not complex
- Panel of arbitrators
 - CIETAC maintains a panel of domestic arbitrators and a panel of international arbitrators for selection by the parties

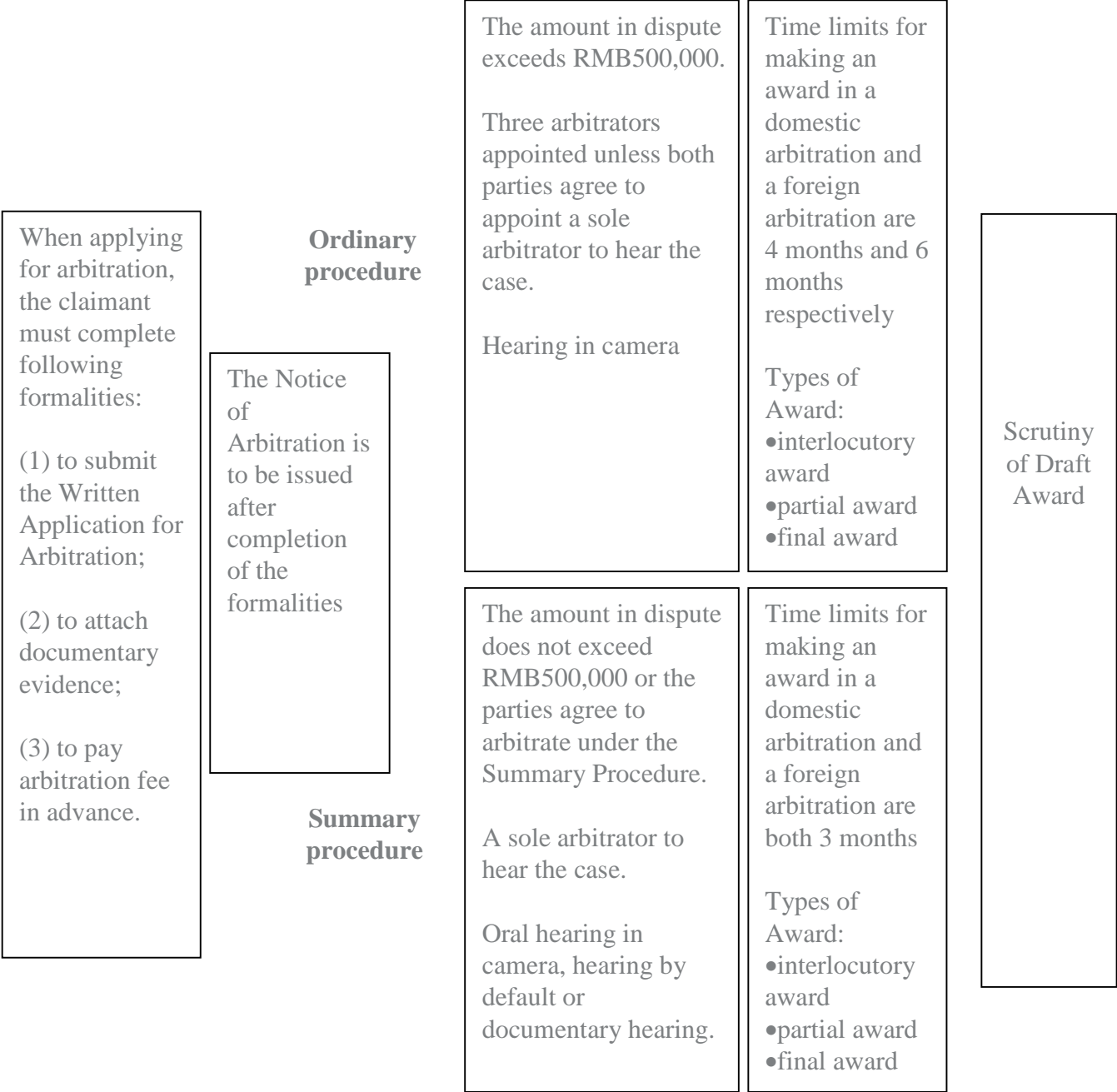
Appointment of tribunal under CIETAC rules

- Method of selection
 - Each party nominates its own choice of arbitrator subject to clearance of conflict
 - The parties jointly appoint the presiding arbitrator but failing agreement, the Chairman of CIETAC will appoint such presiding arbitrator
 - Both parties may appoint arbitrators who are not sitting in the panel subject to approval by the Chairman of CIETAC in accordance with the law

CIETAC arbitration

- Procedure and evidence
 - Procedure flow chart (shown in following slide)
 - Evidence
 - Types of evidence
 - Duty of producing evidence
 - Experts commissioned by the arbitration tribunal subject to the comments of the parties
 - Opportunities for the parties to scrutinize (limited discovery)

Procedural flow chart



CIETAC arbitration

- Combining arbitration with conciliation
 - Under the CIETAC rules, the parties may request the tribunal to mediate the dispute
 - If mediation is successful, CIETAC will render an arbitral award in terms of the settlement reached through conciliation

Powers of CIETAC tribunal

- To rule on jurisdiction
- To preserve or freeze assets via a PRC Court
- To preserve evidence via a PRC Court
- To award interest
- To order the losing party to make payment of the arbitration fee in whole or in part
- To order the losing party to make payment of the cost of arbitration up to 10% of the amount of the award

Place of arbitration and place of hearing

- Place of arbitration
 - Beijing, Shanghai or Shenzhen as may be agreed upon by the parties
 - Failing agreement, Beijing
- Place of hearing
 - Any place as may be agreed upon by the parties
 - Additional expense pre-paid, failing which, hearing will take place in Beijing

Intervention by courts

- Grounds for setting aside an arbitral award
 - Applicable law
 - Article 58 of Arbitration Law

Grounds

Grounds	
1	Evidence on which the award is based was forged
2	Evidence sufficient to affect the outcome of the award was withheld by a party to the arbitration
3	No arbitration agreement or arbitration agreement was invalid
4	Matters arbitrated fell outside the scope of the arbitration agreement or the tribunal lacked jurisdiction
5	The formation of the tribunal contravened the arbitration rules or law
6	Malpractices of arbitrators
7	Contrary to social and public interest

✓ the award may be set aside in China

Intervention by courts

- Issues arising out of the setting aside of an award
 - Time limit for taking out an application to set aside an award
 - 6 months from the date of receipt of the award
 - Court with which the application is filed
 - The Intermediate Court of the place where the arbitration institution is located

Intervention by courts

- Centralised system for the setting aside of an award
 - The Intermediate Court requires directions from the high court which in turn requires directions from the Supreme Court before an award can be set aside (Reply of the Supreme People's Court Concerning Several Issues Concerning Hearing of an Application to Set Aside an Arbitral Award dated 21 July 1998 - Fashi [1998] No.16)
- No right of appeal
- Effects of setting aside an award
 - The disputes will have to be re-arbitrated

Enforcement

- Grounds for refusing enforcement of an arbitral award
 - Applicable law
 - Article 213 of the Civil Procedure Law for domestic awards
 - Article 258 of the Civil Procedure Law for foreign-related awards
 - Article V of the New York Convention for foreign awards
 - Comparison between the grounds for refusing enforcement of a domestic award, a foreign-related award and a foreign award

Grounds for refusal of enforcement of an arbitral award

Grounds		Domestic Arbitration Awards	Foreign-related Arbitration Awards	Foreign Arbitration Awards
*1	Evidence for finding facts was insufficient	✓		
*2	Law was incorrectly applied	✓		
3	No arbitration agreement or arbitration agreement was invalid	✓	✓	✓
4	Matters arbitrated fell outside the scope of the arbitration agreement or the tribunal lacked jurisdiction	✓	✓	✓
5	The formation of the tribunal contravened the arbitration rules or law	✓	✓	✓
6	Award has not yet become binding or has been set aside or suspended by the country the award is made			✓
7	Malpractices of arbitrators	✓	probably covered by ground 8	probably covered by ground 8
8	Contrary to social and public interest or public policy	✓	✓	✓
9	Judicial review	procedural and substantive issues	procedural issues	procedural issues

Enforcement

- Issues arising out of refusing enforcement of an award
 - Court with which the application is filed
 - The Intermediate Court of the place where the assets for levying execution are located

Enforcement

- Centralised system for the setting aside of an award
 - The Intermediate Court requires directions from the High Court which in turn requires directions from the Supreme Court before an award can be set aside (Notice of the People's Supreme Court concerning a Number of Questions over the Handling of Foreign-related Arbitrations and Foreign Arbitrations dated 28 August 1995 - Fafa [1995] No.18)
- No right of appeal
- Effects of refusing enforcement of an award
 - The disputes cannot be re-arbitrated

Mediation and conciliation in the PRC

- Mediation encouraged by the Government and judiciary
- Basic principles observed in conducting conciliation
 - Parties' autonomy
 - Establishing facts, distinguishing right from wrong
 - Ensuring fairness and reasonableness
 - Compliance of law
 - Confidentiality

Enforcement

- Application filed with the Court of the locality in which the assets liable for execution are situated
- Time limit for making an application to enforce is two years from the date of performing the award
- Priority for payment
- Secured creditor
 - Creditor with the benefit of an attachment order
 - Creditors unsecured will have to share on a pro-rata basis
- Local protectionism

TAB D

MAYER·BROWN

Arbitration of Disputes in China and Hong Kong: Challenges and Opportunities

Treaty Protection for Investments in China

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Bilateral investment treaties

- BITs protect foreign investors both substantively and procedurally against political risk
- Substantively, they protect against mistreatment by the host State
- Procedurally, they allow investors to file claims against the host State before a neutral panel of arbitrators

Free trade agreements

- Free trade agreements (FTAs) often provide the same protections as BITs
- FTAs also include provisions governing trade between States, such as market entry requirements and tariffs
- Advantage over WTO: Don't require consensus of 150 countries
- Example: NAFTA

China's BITs and FTAs

- China has entered into over 120 BITs, more than any other country (except Germany)
- 2002 China-ASEAN FTA to be fully implemented in 2010
- China is now in 10 FTA negotiations with 29 countries and regions
 - China/New Zealand signed June '08
 - China-Singapore FTA just announced (investment provision incorporates China-ASEAN terms still in negotiation)

China investment treaty timeline

1966	Washington Convention establishes ICSID
1979	Beginning of China's "Open Door" to foreign investment
1982	First China BIT signed with Sweden; arbitration limited to expropriation compensation
1990	China signs ICSID Convention
1993	China accedes to ICSID Convention
1998	Chinese-Barbados BIT first broad agreement to ICSID or ad hoc arbitration
1999	Administrative Review Procedure adopted; later incorporated in BIT's as condition to arbitration
2000	First of the second generation BIT's signed with traditionally capital-importing nations (e.g., Botswana, Bosnia-Herzegovinia; Brunei)
2001	Sino-Netherlands BIT signed, effective 2004; first with capital-exporting nation
2003	Sino-German BIT signed; effective 2005
2008	China-New Zealand Free Trade Agreement

China's evolving attitude

- Until 1979, China was skeptical about international law protections for foreign investment, which it viewed as an impingement on state sovereignty
- In 1979, China announced its “open door” policy, guided by three principles:
 - Sovereignty
 - Equality and mutual benefit, and
 - Reference to international practice

China's evolving attitude (2)

- China's attitude evolved as its foreign investment grew
- Signed NY Convention in 1985
 - Commercial reservation: claims against government not commercial
- China signed ICSID Convention in 1990, became effective in 1993
- Today China is the largest importer and a major exporter of foreign investment
- Dual status requires investment protection at both ends

China's BITs

- 1982: China's first BIT -- with Sweden
- Today, China has BITs with almost all capital-exporting countries and many developing countries
- But not with the United States -- yet
 - Negotiations announced in June

Two Generations of BITs

- First generation
 - Reflected old concerns about state sovereignty
 - First BIT with Sweden contained no investor-State dispute resolution mechanism
 - Subsequent BITs and China's 1993 notification to ICSID allowed arbitration only over amount of compensation for an expropriation
 - Did not provide for treatment of foreign investors at least as well as Chinese nationals

Two Generations of BITs (2)

- New generation
 - The first signed in 2000 with Botswana and other small nations
 - Netherlands signed in 2001, effective 2004
 - Germany signed in 2003, effective 2005
 - Full array of investor protections typical of other countries' BITs
 - Apply to “any dispute”; BIT consents take precedence over limitation in China's accession to ICSID Treaty
- Third Generation: China/NZ FTA: incorporates lessons of recent ICSID decisions

Scope

- Broad definition of investment --
“every kind of asset”
- Not just factories – securities,
intellectual property rights, interests
in JVs, contract rights, etc.
- Tax disputes generally excluded
 - Up to the two governments whether a
dispute is a tax dispute

Scope (2)

- Chinese BITs do not guarantee the admission of foreign investments
- Thus, the PRC may exclude or limit BIT protection for particular sectors of the economy, such as energy
- The US does the same
 - Attempted purchases of Unocal and 3Com by Chinese companies were blocked by political opposition in US

National Treatment

- Old generation: “to the extent possible”
- New generation: “no less favorable”
- Reasons for change
 - China’s interest in protecting investments abroad
 - Accession to WTO
 - Market economy reliance on competition to allocate resources efficiently
- Grandfather clause: does not affect
 - Measures already in force
 - Extension of measures in force
 - Modifications of measures in force so long as do not increase disparity
- Security exception: Doesn’t apply to measures taken for reasons of “public security and order, public health or morality”

Fair and equitable treatment

- Check on arbitrary or corrupt agencies
- Tool to address center-periphery problem
- Whether treaty standard exceeds customary international law minimum standard subject to current debate
- Stability and predictability, legitimate expectations, procedural due process, nonarbitrary conduct, transparency, proportionality

Expropriation

- Direct and indirect
- Compensation standard: New generation has adopted consensus – prompt, adequate, and effective
- But applicability of “market value” unclear
 - Reference to “fair market value” added to 2008 New Zealand FTA

Umbrella clause

- Often included in new generation treaties
- Useful in infrastructure and other projects where investor contracts with state agency or enterprise
- Dispute may be with government not as regulator but as contracting party
- If contract has commercial arbitration provision, can you still bring treaty claim based on umbrella clause?

Most favored nation

- In new generation treaties
- Substantive application clear
- Procedural application controversial
 - Tribunals split on whether MFN clauses apply to dispute resolution provisions
 - China/NZ explicitly excludes application to dispute resolution procedures
 - Don't assume they do

Miscellaneous provisions

- Capital transfer protections
- Currency protections
- Visas and work permits
- Other

Dispute resolution

- If suit cannot be settled amicably in six months, parties may submit the case to arbitration before
 - ICSID
 - Ad hoc tribunal under UNCITRAL rules
 - Under Sino-German BIT, both parties must agree to choose ad hoc arbitration
 - Dutch treaty provides also for submission to local courts
 - Does not preclude arbitration if lawsuit is withdrawn

Enforcement caveat

- New treaties permit arbitration under auspices of ICSID or ad hoc under UNCITRAL rules
- ICSID awards enforceable under Washington Convention
- But
 - China’s accession to the NY Convention limits enforcement of awards to “commercial disputes,” i.e., not those with the government
 - Chinese law does not permit ad hoc arbitration
 - Uncertain whether award on treaty claim rendered by UNCITRAL ad hoc tribunal would be enforceable in Chinese courts

Preconditions to arbitration

- Parties must attempt to resolve amicably for six months
- Must also submit to administrative review procedure, allowing three months for resolution
 - Statute adopted in 1999, included in BITs beginning in 2000
 - Purpose is to allow internal review to determine whether conduct of administrative agencies was legal and appropriate
 - Not a requirement of exhaustion of local remedies

Pitfalls in China's treaty protection

- China has more BITs than any country other than Germany
- Very important differences between BITs
 - Especially between 1st and 2nd generation treaties
 - Also in nuances between later treaties
 - NZ FTA more protective of state interests than Dutch, German BITs
- MFN clauses even the playing fields, but vary in scope, interpretation
- Essential to structure investments carefully to qualify for the most effective treaty protection

Example: indirect investment

- Modern treaties commonly interpreted to allow claims held through intermediate subsidiaries
- Terms of recent China BITs vary that rule

Example: Dutch BIT retains restriction on “investments” from earlier treaties

- “The term ‘investments’ includes investments of legal persons of a third state which are owned or controlled by investors of one Contracting Party and which have been made in the territory of the other Contracting party [t]he relevant provisions of this Agreement shall apply to such investments only when such third State has no right or abandons the right to claim compensation after the investments have been expropriated by the other Contracting Party.”
 - Effect unclear
 - No comparable term in Sino-German BIT

Sino-German BIT expressly limits indirect claims

- “‘Invested indirectly’ means invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party.”
 - Seems to exclude intermediate corporate subsidiaries as holding companies

Denial of benefits – New Zealand FTA Art. 149

- “[A] Party may deny the benefits of this Chapter to:
 - (a) investors of the other Party where the investment is being made by an enterprise that is owned or controlled by persons of a non-Party and the enterprise has no substantive business operations in the territory of the other Party; or
 - (b) investors of the other Party where the investment is being made by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operations in the territory of the other Party”

Other China/NZ Innovations

- Provides for preliminary objections that claims are “manifestly without merit”
- Requires the tribunal to refer requests for “joint interpretation” of treaty provisions to the Parties to the treaty on request of the State party
- Awards “shall have no binding force except between the disputing parties and in respect of the particular case”

Planning for treaty coverage: conclusion

- Structuring investments to optimize treaty coverage requires careful, expert planning
- Structure investments in light of treaty nuances
- Reconcile investment protection with tax optimization

TAB E

Arbitration of Disputes in China and Hong Kong: Challenges and Opportunities

Real-Life Issues: Hypothetical or Not-so- Hypothetical Scenarios

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The Scenario (1)

US Corporation (Manufacturing)

Contract with Chinese Corporation to supply engines

Contracting party is US Corporation's French subsidiary

Agreement includes a provision for disputes to be resolved by arbitration in London under ICC Rules

Agreement excludes a choice of law provision

Delays occur in the supply of engines to China

Chinese party brings proceedings against the French subsidiary, and the US parent company, in the US parent's local Court, although US Corporation is not a party to the contract

The Issues (Scenario (1))

- Tactical decisions:
 - 1) Continue with claim in local US Court
 - Is it a favourable Court to the client?
 - 2) Seek to strike out the claim in the US Court by challenging jurisdiction of local US Court?
 - Risks of losing?
 - 3) Commence parallel arbitration proceedings seeking a declaration of non-liability in London?
 - 4) Assess the likely governing law to be selected by whichever Tribunal/Court determines the merits
 - How does this influence the tactical response?

The Scenario (2)

US Corporation contracts with Chinese counter-party for manufacturing to take place in China and for supply to be made to the US Corporation's subsidiary in Italy

Agreement is governed by New York law

No agreement as to jurisdiction

Disputes arise:

- i. In relation to the quality of the goods supplied; and
- ii. In relation to payments due from the Italian subsidiary to the Chinese counter-party

The Issues (Scenario (2))

- Where can proceedings be brought?
- If the Italian subsidiary “goes first” – will an Italian Court take jurisdiction over a Chinese counter-party?
- Will an Italian Court judgment be effective in China?
- What difference would an arbitration agreement make?
- If an award was made by an arbitration in the PRC, how can it be enforced in China?
- If the award is made in New York, will it be easier or more difficult to enforce?

Scenario (3)

US Corporation establishes plant in China for supply of Asian companies. Its principal markets are Japan and Malaysia, but it also supplies to local PRC companies

For tax reasons, the US Corporation uses a Netherlands Antilles holding company to hold the shares in its Chinese venture

One of the customers of the Chinese subsidiary, a PRC corporation, does not pay its invoices

The Chinese subsidiary has used standard terms and conditions of supply which provide for arbitration in Singapore in the event of a dispute

The Issues (Scenario (3))

- Can disputes between 2 PRC companies validly be referred to arbitration in Singapore?
- If that term is invalid, what options does the US-owned PRC company have to recover the debt owed to it?
- How can it avoid this risk?

Scenario (4)

US-owned Chinese Corporation with premises in PRC (for storage purposes only)

Contract for supply of parts to companies in Japan and Malaysia – no customers in China

Chinese local government issues notice of redevelopment of the site and proceeds to evict the company without offering an alternative site or paying compensation

The Chinese subsidiary is owned via an Italian holding company

Our client wishes to claim for its losses

The Issues (Scenario (4))

- Is there an available claim under PRC law?
- If not, is there a BIT claim potentially available?
- What hurdles are there for the claim under a BIT?
- What are the likely causes of action?
- How could the investor better protect its position in the future?