Dispute resolution and governing law clauses in China-related commercial contracts

An introductory guide to drafting clauses that work and avoiding technical traps

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Herbert Smith Dispute resolution and governing law clauses in China-related commercial contracts

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What is this guide?
Drafting governing law and dispute resolution clauses to be used in your China-related commercial contracts is not straightforward. This is because the laws of mainland China restrict the types of clauses that can be used in China-related contracts. This guide shows you some ways to tackle these restrictions and draft workable clauses.

Who is it for?
This is a guide for non-Chinese multinational companies who negotiate China-related commercial contracts; and, as a result, need to have a practical understanding of the basics of mainland Chinese law and practice affecting governing law and dispute resolution.

What does the guide contain?
As in earlier editions, our aim is to give a practical introduction to

• what works under Chinese law and what does not work;
• traps to avoid; and
• practical drafting solutions.

As before, the guide has two sections covering:

I. Dispute Resolution Clauses; and
II. Governing Law Clauses.

What are the recent updates?
In the last year, there have been some important developments in the field, including a new Hong Kong Arbitration Ordinance and a much debated decision from the Hong Kong Court of First Instance regarding a PRC State entity’s entitlement to Crown Immunity.

Further introductory notes
Throughout the guide, we use the shorthand “offshore” to mean “outside mainland China” and “onshore” to mean “mainland China.” Hong Kong, Macau and Taiwan are therefore “offshore.” The restrictions discussed in this guide also relate principally to onshore contracts. Different considerations (which are not addressed in this guide) apply if your China-related contract relates to Hong Kong, Macau and Taiwan as opposed to mainland China.

Remember that this guide is just an introduction and not a substitute for legal advice and the exercise of informed judgment in relation to each particular situation. There are many sector-specific and deal-specific issues which justify departure from the general principles set out in this guide. However, we hope that the guide is helpful as a framework and starting point for finding workable solutions, and deciding when to compromise and when to stand firm, and spotting when an issue has arisen on which further advice is required.

The guide is up to date as of 22 August 2011.

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1 This guide addresses only negotiated commercial contracts. It does not address consumer contracts or standard form contracts; specific advice should be sought in relation to these.

2 There has been a longstanding effort led by the Hong Kong International Arbitration Centre to lobby for recognition of Hong Kong as part of “China” so that non-foreign-related arbitrations can have their seat in Hong Kong. So far, however, the general view is that Hong Kong does not count as part of “China” for this purpose.
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## I. DISPUTE RESOLUTION CLAUSES

When drafting dispute resolution clauses, we suggest that you are guided by four principles:

1) Agree arbitration with an offshore seat where possible;
2) Understand when offshore arbitration is not available under Chinese law;
3) Understand the differences between offshore arbitration options; and
4) Keep it simple.

### Principle 1: Agree arbitration with an offshore seat where possible

In this section, we discuss the alternative dispute resolution mechanisms that are available to parties (e.g. onshore litigation, offshore litigation, onshore arbitration and offshore arbitration) and explain why we recommend arbitration with an offshore seat where possible.

#### 1.1. Litigation

Litigation, whether onshore or offshore, is usually not a good dispute resolution mechanism for the foreign party in a mainland China-related contract.

1.1.1. Onshore Litigation

The main problem with onshore litigation is that the quality of the process is patchy. Whilst the Chinese court process is constantly improving, it is still a process that foreign companies may have to engage with. Even with arbitration, one may have to engage with the court system at the enforcement stage, which still sometimes causes problems in China, but there is a big difference between resolving merits in court and simply enforcing in court.

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3 i.e. resolving the merits of a commercial dispute in the court system. Even with arbitration, one may have to engage with the court system at the enforcement stage, which still sometimes causes problems in China, but there is a big difference between resolving merits in court and simply enforcing in court.
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(partially Western) litigants find difficult to understand. The foreignness of the process is compounded by the usual hurdles of litigating in a foreign court e.g. language and limitations on your choice of counsel.

1.1.2. Offshore Litigation

The main problem with offshore litigation is enforcement. In particular:

1) Mainland China does not in practice enforce foreign judgments without a reciprocal enforcement of judgment treaty with the relevant foreign jurisdiction. There are as yet only a relatively small number of these. They cover a few major EU jurisdictions (including France and Italy), but do not yet cover many of the jurisdictions of most interest to foreign investors, such as USA, UK, Germany, Japan and Singapore.

2) Moreover, even where a relevant treaty exists, enforcing a foreign court judgment is still more difficult than enforcing arbitration awards. In particular, the Supreme People’s Court reporting system, which helps with the enforcement of arbitration awards (discussed in section 1.3 below), does not apply to foreign judgments.

1.1.3. Hong Kong Litigation

Hong Kong has a legal system which is different from mainland China and is based on English common law. As a result, it may seem an attractive jurisdiction for foreign parties to litigate China-related disputes.

Again, the main problem is enforcement in the PRC of Hong Kong judgments.

An arrangement for enforcement of commercial judgments between Hong Kong and mainland China was signed in July 2006 and brought into force with effect from 1 August 2008 (the “Judgments Arrangement”).

It is very important to bear in mind that the application of the Judgments Arrangement is very restrictive.

• First, mainland China will only enforce Hong Kong judgments made on or after 1 August 2008 on contractual disputes where the underlying contract expressly provides for the exclusive jurisdiction of the Hong Kong courts.

• Second, its substantive coverage is less than for arbitration awards. The Judgments Arrangement is subject to certain provisions of Chinese law which reserve particular matters to the exclusive competence of the mainland courts. For example, Hong Kong judgments under Sino-foreign Equity Joint Venture or Cooperative Joint Venture contracts will not be enforced in China under the Arrangement, whereas Hong Kong arbitration awards under such contracts are enforceable in mainland China.

• Third, the grounds for objecting to enforcement are wider in the case of a Hong Kong court judgment than in the case of arbitral awards – in particular, an allegation of fraud may be raised under the Judgments Arrangement but not under the corresponding arbitration provisions.

• Fourth, the Supreme People’s Court “reporting system” applicable in arbitration cases (see below, section 1.3, point 2) does not apply.

4 As at June 2011, according to the latest information available, 32 treaties for reciprocal enforcement of judgments have been signed by China. These treaties were signed with (in chronological order) France, Poland, Belgium, Mongolia, Romania, Russia, Belarus, Cuba, Spain, Ukraine, Bulgaria, Egypt, Kazakhstan, Italy, Turkey, Cyprus, Greece, Kyrgyzstan, Hungary, Tajikistan, Uzbekistan, Morocco, Vietnam, Tunisia, Laos, Lithuania, Argentina, UAE, North Korea, Kuwait, Peru and Brazil.
For the above reasons, enforcement of Hong Kong court judgments in mainland China remains difficult, which is why we would not recommend it except in very straightforward contracts (e.g. contracts where the dispute is likely to relate to non-payment).

1.2. Arbitration

Arbitration (whether onshore or offshore) is a better dispute resolution mechanism than litigation for China-related contracts.

1.2.1. Onshore arbitration

Onshore arbitration is at present a better choice than litigation, but suffers from a number of shortcomings when compared with the standards generally expected in international arbitration.

One of the major problems concerns the way in which the onshore arbitration commissions appoint arbitrators, often resulting in a relatively local tribunal, the majority of which lacks the quality and international sophistication found in offshore centres such as Hong Kong and Singapore. This can be a significant concern for non-Chinese parties.

An improvement in this regard is the arbitration rules of the Beijing Arbitration Commission, which allow parties to nominate arbitrators from outside the BAC panel (article 55.1 of the BAC rules) even if this is not provided for expressly in the arbitration clause. In contrast, the CIETAC rules only permit this where the parties have expressly provided for it in their clause (article 21.2 of the CIETAC rules). Also under the BAC rules, parties are expressly allowed to agree increased remuneration for non-local arbitrators (article 55.4 of the BAC rules), while CIETAC allows for (without providing for it in its rules) an increased fee for non-local arbitrators, but with significant limits in practice on the fees which CIETAC will approve.

We understand that the forthcoming revision of the CIETAC rules could give parties greater scope to appoint arbitrators who are not on CIETAC’s official panel, although the arbitrators chosen would still have to qualify as arbitrators under article 13 of the Chinese Arbitration Act (requiring eight years of experience as an arbitration lawyer, judge, or senior academic).

Notwithstanding the above, we would suggest that non-Chinese parties agreeing to CIETAC or BAC arbitration should still include the modifications allowing appointments off-panel described at pages 37-39 of this booklet.

There can also be problems with the way in which the mainland courts exercise their supervisory jurisdiction over onshore arbitrations. This can be a real problem since Chinese arbitration commissions lack important powers such as powers to grant interim remedies (e.g. asset freezing), to preserve evidence and to rule upon their own jurisdiction (i.e. the “Kompetenz-Kompetenz” principle is not always respected in China).

Sometimes non-Chinese parties find themselves forced to accept onshore arbitration, notwithstanding awareness

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5 In both cases, the arbitrators must be approved by the Commission (a provision entirely in line with international norms).

6 We understand that CIETAC is currently considering further reforms to the level of arbitrator remuneration.

7 In the meantime, the revised CIETAC panel effective from 1 May 2011 (available at www.cietac.org) included an additional 37 non-Chinese arbitrators. Over 25% of the 1,000-strong panel are therefore now non-Chinese.

of the problems, either because Chinese law does not recognize offshore arbitration (see principle 2 below) or because commercial bargaining power lies on the Chinese party’s side.

In negotiations, you will often find that Chinese parties can be very persistent when it comes to insisting on onshore arbitration or onshore litigation. This does not always mean that this is a non-negotiable point. It is definitely worth trying a second time if you fail on the first.

At the end of the day, if you do not have sufficient bargaining power to insist on offshore arbitration, then we would suggest that you aim to secure the five fundamental points set out below before compromising:

1) insist on CIETAC (or the Beijing Arbitration Commission) rather than a more “local” arbitration commission. You will need to specify one of the local arbitration commissions, otherwise the arbitration clause will be considered invalid. Ad hoc arbitrations are not recognised in mainland China (see section 2.2 for further details);

2) if CIETAC, specify whether you want the arbitration to be located in Beijing or in Shanghai, Shenzhen, Tianjin or Chongqing, where CIETAC has sub-commissions. We would recommend specifying Beijing or Shanghai, unless there are good reasons for choosing the other sub-commissions, since CIETAC Beijing and the Shanghai sub-commission have more experienced case administrators;

3) insist on a clause providing for the arbitration to be conducted in English or (if pressed) English and Chinese – otherwise it will be in Chinese only and your choice of arbitrator and counsel will be severely restricted;

4) insist on a clause providing for the presiding arbitrator (in a tribunal of three) to be of a nationality different from the parties – otherwise a Chinese majority is likely to be appointed to the tribunal: CIETAC’s practice differs in this respect from institutions like the ICC which usually seek to appoint a “neutral nationality” person as sole or presiding arbitrator; and

5) you should also seek to agree that “off panel” appointments may be made.

This is not an ideal solution but is worth at least considering as a compromise if you are convinced that the point will otherwise be a deal-breaker. A CIETAC tribunal, modified in the above way, and particularly where the chairman is of neutral nationality, will to some extent adopt procedures that are more in line with international arbitrations e.g. in Hong Kong and Singapore.

See Appendix A for a sample CIETAC clause modified in this way.

1.3. Offshore arbitration

Where available, offshore arbitration is the best dispute resolution mechanism for a non-Chinese party contracting with a Chinese party.

Whilst problems are certainly still encountered in practice, the well respected New York Convention regime applies to the recognition and enforcement of offshore commercial awards in mainland China if the country of the seat of the arbitration

9 Under the CIETAC rules there will be three arbitrators unless the parties expressly agree otherwise. We recommend non-Chinese parties to stay with the three arbitrators rule as it gives the opportunity to appoint one member of the tribunal.

10 The limitation “commercial” excludes, for example, the enforcement of sports arbitration awards or arbitration awards between private persons and the Chinese State. Specific advice should be sought in borderline cases.
is party to the New York Convention (almost all now are – notable exceptions include Burma/Myanmar and North Korea). Strictly speaking, the New York Convention does not apply to the enforcement in the mainland of Hong Kong awards. However, a regime equivalent to the New York Convention has applied since 2000 pursuant to an arrangement entered into between the mainland and Hong Kong governments in 1999, following the emergence of a lacuna upon the transfer of sovereignty from the United Kingdom to the PRC in 1997. There is a separate regime for enforcement of arbitration awards between mainland China and Taiwan.

Enforcement of arbitral awards is generally speaking more straightforward than enforcement of foreign or domestic judgments. Of particular significance in this regard are the following points:

1) The grounds on which enforcement may be denied are limited to certain serious procedural defects and a principle of “public policy” which (after some problems in the 1980s and 1990s) is nowadays usually interpreted narrowly in mainland China.

2) There is a special procedure (known as the “reporting system”) whereby the lower courts in mainland China are authorised to order enforcement of an offshore award (or a mainland Chinese “foreign-related” arbitral award11) without further ado. However, if they are minded to refuse enforcement of such an award, the local courts must refer the case up to ultimately the Supreme People’s Court in Beijing for confirmation12. This procedure, which aims to reduce the risk of local protectionism, does not apply to Chinese or foreign court judgments or to Chinese non-foreign-related arbitration awards. The procedure is often found to be useful in securing enforcement, though it is certainly not perfect: problems include (i) lower courts refusing to recognise an obligation to report (with parties having no remedy against this, since the reporting system is internal to the court system), (ii) a lack of transparency as to the decision-making process, with parties having no rights to be heard at the higher court level (a phenomenon which tends to operate against the foreign party in practice, since a powerful local party determined to avoid enforcement may well seek to rely on private channels of communication with the higher court) and (iii) a lack of deadlines for decision (some cases have notoriously been stuck in the lower courts for years without a decision being made one way or another).

3) Although there used to be confusion on this point, it is now clear that the Chinese courts will enforce offshore ad hoc (i.e. non-institutional) foreign-related awards as well as offshore institutional foreign-related awards13.

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11 See under Principle 2 below for the meaning of “foreign-related.”

12 See the Supreme People’s Court’s Notification concerning the Handling of Issues Regarding Foreign-related Arbitration and Foreign Arbitration Matters by the People’s Courts, August 29, 1995. Of course, one still may have to involve the local court system for actual collection of the money, but reducing the problem to one of collection only is considerably better than having the local court decide the merits of the case or the question of enforceability of a foreign award. If the case is first heard at Intermediate Court Level (as is usually the case), the matter is first reported up to the relevant Higher Court, which has a choice between requiring enforcement or, if not, reporting the matter up to the Supreme People’s Court for a final decision.

13 For awards made in New York Convention territories outside China, this is an obligation of the PRC under public international law, since the Convention makes no distinction between institutional and ad hoc arbitration. The point was confirmed specifically in relation to ad hoc Hong Kong arbitration awards by a reply of the Supreme People’s Court to an inquiry from the Hong Kong Secretary for Justice on 25 October 2007. A recent notification issued by the Supreme People’s Court to Higher People’s Court in January 2010 further confirms that ad hoc Hong Kong arbitration awards, ICC and other foreign institutional awards are enforceable in mainland China.
Principle 2: Legal restrictions on choosing offshore arbitration

Mainland Chinese law is more restrictive than many jurisdictions on the effectiveness of arbitration clauses. There are two main traps to avoid:

2.1. In the eyes of a Chinese court, only “foreign-related” disputes may be validly arbitrated offshore, i.e. with a seat (place of arbitration) outside mainland China.

Whether a dispute is “foreign-related” is therefore a key question. The Supreme People’s Court has published two Judicial Interpretations which indicate that disputes with one or more of the following three elements are “foreign-related”:

1) At least one of the parties is “foreign”. In applying this principle, it is generally considered that:

For companies: it is place of incorporation which matters. So, all companies incorporated under the laws of mainland China – including foreign invested entities, JVs incorporated in China and wholly foreign owned enterprises – are never to be treated as “foreign”, whereas companies incorporated outside mainland China (including Hong Kong, Macau and Taiwanese companies) are always to be treated as “foreign”.

For individuals: PRC citizens can never be “foreign”. Conversely, non-PRC citizens are always “foreign”. In other words, the criterion is nationality (not domicile or residence).

2) The subject matter of the contract is or will be wholly or partly outside mainland China.

For example, if the contract concerns land or goods outside mainland China, or goods which will cross the border of mainland China pursuant to the contract, then it is likely to be treated as “foreign-related”. If the Chinese court considers that the cross-border element is artificial or minor, however, then there is a significant risk that the court will treat the matter as purely domestic. The general understanding is that, if the subject matter is, in substance, in mainland China, then the presence of some indirect or subsidiary foreign factor will not qualify as foreign-related under this heading. For example, a contract to build a factory in China is not “foreign-related” under this heading even if the factory is intended to produce goods for export trade.

3) There are other legally relevant facts “as to occurrence, modification or termination of civil rights and obligations” which occurred outside mainland China.

The meaning of this factor in practice remains uncertain. One point to note in particular is that the mere fact that a contract was signed outside mainland China, may well not in itself be enough, in the eyes of a Chinese court, for it to be treated as foreign-related.

14 The summary of Chinese law given is based on the generally accepted position. Note, however, that the relevant legal authorities are not entirely clear on these points, so that there may be some scope for argument.

15 i.e. guidance on the law, legally binding on the courts in specific cases. See the Opinions of the SPC on Several Issues concerning the Implementation of the General Principles of the Civil Law of the PRC promulgated on 26 January 1998 (Article 178) and 14 July 1992 (Article 304).
Usually only condition (1) is reasonably predictable in its practical application. Seek specific advice before seeking to rely on condition (2) or (3).

### 2.2 In the eyes of a Chinese court, arbitrations with their seats in mainland China (whether domestic or foreign-related) must be administered by a mainland Chinese arbitration commission. Ad hoc arbitration with a seat in mainland China is not permitted.16

It is often thought that the correct interpretation of mainland Chinese law is that only mainland Chinese arbitration commissions (the "commission" terminology reflects their quasi-governmental origins) can validly conduct arbitration with a mainland Chinese seat. A choice of a non-mainland Chinese institution (for example the HKIAC or ICC) with a mainland Chinese seat therefore risks being regarded as invalid by a Chinese court.17

An arbitration clause providing for arbitration in China without specifying an institution will ordinarily be invalid. A Judicial Interpretation of the Supreme People’s Court18 provides for defective clauses to be “saved” if the clause refers to particular rules and the rules in question require institutional involvement (as do the CIETAC rules). However, it is best practice to put the point beyond doubt by providing expressly for the arbitration to be conducted by the relevant arbitration commission.

### Principle 3: Understand the differences between offshore arbitration options

The options include (i) the choice of a place or seat of arbitration and (ii) the choice of an institution whose rules will govern the arbitration.

As to (i), many non-Chinese companies understandably still prefer arbitration with a seat in Europe or other New York Convention territories outside Asia. This is a perfectly good choice where the Chinese party will agree to it, but there is a marked trend today for such companies to resist agreeing to a seat outside Asia (except possibly Stockholm).

As to (ii), consideration should be limited to those institutions whose international experience and reputation are clearly established, including in the context of China-related trade and contracts. These include (in alphabetical order):

- the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- the Hong Kong International Arbitration Centre (HKIAC)
- the International Chamber of Commerce (ICC), with a Secretariat function based in Paris and Hong Kong
- the London Court of International Arbitration (LCIA)
- the Singapore International Arbitration Centre (SIAC)

The ICC (and increasingly the LCIA) administers cases in many countries and in all regions of the world. The other institutions tend to organise arbitrations mostly in their respective cities. The SCC...
has, historically, administered east-west trade disputes involving the former Soviet bloc and China and, as a result, still administers a number of China-related arbitrations.

The ultimate choices will of course depend on the parties’ respective preferences and bargaining power. We consider two broad alternatives below:

3.1 If the parties agree to offshore arbitration with an Asian seat, the best choice is usually one of (in alphabetical order):

- HKIAC arbitration in Hong Kong
- ICC arbitration in Hong Kong or Singapore
- SIAC arbitration in Singapore

Other alternatives include ad hoc arbitration in Hong Kong or Singapore. Most other arbitration alternatives are either impractical or undesirable or both in the China-related context.

The recommendation of Hong Kong and Singapore as seats (places of arbitration) is based on the fact that both have arbitration laws and courts which are broadly supportive of arbitration (in practice, not just in theory). In the case of Hong Kong, a new Arbitration Ordinance was passed in November 2010 and came into force on 1 June 2011, while Singapore’s amended Arbitration Act came into force on 1 January 2010, further strengthening the “arbitration friendly” reputation of both jurisdictions. These are the only two jurisdictions in Asia which currently approach a standard comparable to the leading European seats.

HKIAC arbitration in Hong Kong and SIAC arbitration in Singapore are also options when acting for non-Chinese parties in mainland China-related matters. The choice between the two will often be driven by non-legal considerations. For example, mainland Chinese counterparties may be more comfortable politically and emotionally with the concept of arbitrating under HKIAC Rules in Hong Kong, rather than SIAC Rules in Singapore. However, there are also some more concrete differences between them, eg:

- SIAC plays a greater role in the administration of arbitrations, with its approach having been inspired by the ICC approach to issues such as terms of reference (known as a “memorandum of issues” under the SIAC rules) and review of awards, though there is no SIAC equivalent to the ICC Court of Arbitration. In contrast, the HKIAC adopts a “light touch” approach, with minimal involvement of anyone other than the Tribunal in making decisions. The new HKIAC Administered Arbitration Rules which came into force on 1 September 2008 are essentially a modified version of the UNCITRAL Arbitration Rules, influenced significantly by the Swiss Arbitration Rules (which are also ultimately based on the UNCITRAL Rules). Reflecting its “light touch” approach, HKIAC charges lower
administration fees than SIAC (and, indeed, CIETAC and the ICC).

- The fee structure for arbitrators is different. HKIAC arbitrations still default to a time-based charging model unless the parties agree to scale-based fees, whereas SIAC (again following the ICC model) has opted for scale-based fees.

Choosing ICC arbitration with a seat in Hong Kong or Singapore can represent a good compromise between the preferences of Asian and non-Asian parties. In the past, the administration of such a case would be carried out by the ICC headquarters in Paris. Since the Asia branch of the ICC secretariat opened in Hong Kong in November 2008, day-to-day administration of Asian cases is now largely carried out in Hong Kong with a view to providing a more convenient service. However, whilst this is undoubtedly a useful innovation, particularly from a negotiating point of view, it ought to be relatively unimportant, objectively, in influencing the choice of institution. In practice, absent an agreement between the parties, the ICC will appoint arbitrators resident in many countries, chosen according to the nature of the case and the applicable law. The only strict requirement is that the Chairman or sole arbitrator, as the case may be, shall not have the nationality of any of the parties to the dispute.

An acceptable alternative would be to opt for ad hoc arbitration pursuant to the UNCITRAL Rules with a Hong Kong or Singapore seat and with the HKIAC or SIAC as the appointing authority. The lack of an institution can sometimes make it more difficult to drive forward an arbitration effectively. However, as noted earlier in this guide, the Supreme People’s Court expressly confirmed in October 2007 and again in January 2010 that Hong Kong ad hoc arbitration awards are enforceable in mainland China on the same basis as foreign and Hong Kong institutional awards and there is no reason to think that Singapore ad hoc arbitration awards will be any different. Generally speaking, ad hoc arbitration clauses which do not refer to the UNCITRAL Rules are not recommended because the procedural framework is so uncertain.

When your counterparty is a State or State entity (such as a government department) and disputes are to be resolved, or enforcement is sought, in Hong Kong, you should be aware that the counterparty might try to claim sovereign immunity or crown immunity from adjudication and/or enforcement. When your counterparty is a State or State entity other than the PRC or a PRC State entity, because there will be no question of the courts of one State assuming jurisdiction over another State.

22. The underlying principle of sovereign immunity is that the courts of one sovereign State may not exercise jurisdiction over another sovereign States or the assets of that State without its consent. The Court of Final Appeal of Hong Kong confirmed in a provisional judgment in the case of Democratic Republic of the Congo v. FG Hemisphere Associates LLC FACV Nos 5, 6 & 7 of 2010 in June 2011 that the absolute doctrine of sovereign immunity applied in Hong Kong (see http://www.herbertsmith.com/NR/rdonlyres/5517F982-11A1-496A-90DD-27E0EE1D3223/22168/0627hongkongcou rtfinalappealclarifieslawofsovere.htm). Whilst the judgment is technically provisional pending the interpretation by the Standing Committee of the National People’s Congress of certain provisions of the Basic Law which the Court of Final Appeal referred to the Standing Committee under Article 19 of the Basic Law, it is highly unlikely that the result will change once the interpretations have been given. Accordingly, sovereign immunity may apply where your counterparty is a State or State entity other than the PRC or an organ of the PRC, and disputes are to be resolved, or enforcement is sought, in Hong Kong (which for the purposes of sovereign immunity is part of the PRC). Sovereign immunity will not, therefore, apply where your counterparty is the PRC or a PRC State entity, because there will be no question of the courts of one State assuming jurisdiction over another State.

23. In contrast to sovereign immunity, the underlying principle of crown immunity is that the “crown” and its assets may not be subjected to the jurisdiction of its own courts without its consent. In the first instance case of Intraline Resources SDN BHD v. The Owners of the Ship or Vessel "Hua Tian Long" HCAJ 59/2008, the Hong Kong Court of First Instance held in April 2010 that the concept of crown immunity, which was a product of the English common law, continued to subsist in Hong Kong following the resumption of sovereignty by the PRC in 1997 (see Herbert Smith e-bulletin, “Crown Immunity subsists as part of the common law in Hong Kong following resumption of sovereignty by the PRC in 1997”, http://www/herbertsmith.com/NR/rdonlyres/A0D323EF-BE61-449C-9BB2-F37FAC4642B7/15307/0517CrownimmunityGHTMDJGLJSDMV.htm). An appeal to the Hong Kong Court of Appeal was set down for November 2010 but was adjourned. It is unclear whether an appeal of the case will now be heard. Accordingly, crown immunity may apply where your counterparty is the PRC or a PRC State entity, and disputes are to be resolved, or enforcement is sought, in Hong Kong.
enforcement\textsuperscript{24}. A State or State entity will not be entitled to claim sovereign or crown immunity from the jurisdiction of an arbitral Tribunal seated in Hong Kong (or elsewhere)\textsuperscript{25}, and we consider it unlikely that such an entity could successfully claim immunity from the supervisory jurisdiction of the courts of Hong Kong over the arbitration\textsuperscript{26}. In the relatively rare instances in which the issues of sovereign and/or crown immunity arise, therefore, they should not affect the choice of Hong Kong as a seat of arbitration. In contrast, a State or State entity may be able successfully to claim immunity from the adjudicative jurisdiction of the courts of Hong Kong, and it is strongly advisable to avoid including a Hong Kong court jurisdiction clause in a contract with such a party. In addition, you should be aware that such an entity may be entitled to claim sovereign or crown immunity from enforcement proceedings and execution or attachment against assets in Hong Kong (this will apply regardless of where the relevant arbitral Award or court judgment was rendered, and again, therefore, should not affect the choice of Hong Kong as a seat of arbitration). Further information on sovereign and crown immunity in Hong Kong can be found on Herbert Smith’s website\textsuperscript{27}.

\textbf{3.2 If the parties agree to arbitration with a seat outside Asia}

Arbitration in a leading arbitration seat outside Asia, in particular London, Paris, Stockholm\textsuperscript{28}, Geneva and Zurich, pursuant to the rules of an internationally reputed organisation is another viable possibility which Chinese parties may accept. In that case, arbitration may be organised in any of these seats by the ICC (and, increasingly, the LCIA and the SCC). All of these seats have arbitration-friendly laws, with Switzerland and France standing out as being even more laissez-faire jurisdictions than the other popular arbitration venues. In the case of London, there had been concerns about the legality of provisions contained in certain institutional rules which restrict the nationality of arbitrators (for example, by providing that the sole arbitrator or the chairman of the arbitral tribunal should not share the same nationality as any of the parties). Those concerns have now been dispelled following a recent judgment of the UK Supreme Court, and such nationality criteria can therefore be included in arbitration clauses which provide for London as the seat of arbitration without posing any risk to the validity of the arbitration clause under English law\textsuperscript{29}.

\textit{Ad hoc} arbitration in Europe is possible but we would usually not recommend it as a first choice for the reasons discussed above in relation to \textit{ad hoc} arbitration in Hong Kong and Singapore.

In our experience, arbitration in a US seat is usually not acceptable to Chinese parties.

\textsuperscript{24} Immunity (whether sovereign or crown) will arise both when a court seeks to exercise jurisdiction over the State concerned and, separately, when enforcement is sought against its assets.

\textsuperscript{25} This is because an arbitral Tribunal is a private, contractual entity which does not form part of the apparatus of any particular State.

\textsuperscript{26} An arbitration clause constitutes an implied waiver of immunity for the supervisory jurisdiction of the courts of the seat of an arbitration under customary international law. That position was expressly endorsed (albeit in strictly obiter remarks) by the Court of Appeal in \textit{FG Hemisphere Associates LLC v. Democratic Republic of the Congo} CACV 373/2008 & CACV 43/2009 (per Stock VP at paragraph 177).


\textsuperscript{28} Historically a popular choice in Sino-foreign contracts.

Principle 4: Keep it simple

In China, as elsewhere, it is advisable not to over-complicate arbitration clauses. Over-complications frequently cause practical trouble in at least three areas in China-related contracts:

4.1. Bilingual arbitration clauses

Arbitration clauses providing for any arbitration to be conducted in two languages (typically, English and Mandarin Chinese) are common in mainland Chinese related contracts.

For a non-Chinese party, such “bilingual” arbitration clauses are usually preferable to “Chinese only” arbitration clauses. This is not just an issue of convenience for such parties: it also impacts on the availability of counsel and arbitrators, given that very few of the top rated international arbitration counsel and arbitrators speak, read and write Chinese.

However, the ideal choice for such parties is “English only” if that can be agreed (common in international business outside China; admittedly often difficult to agree in China-related contracts).

Bilingual arbitrations tend to be more expensive and slower moving than single language arbitrations. For example, a bilingual arbitration clause could be argued to require the translation of all documentary evidence into Chinese and English, which could be very expensive and time consuming in a complex case. Moreover, there is considerable scope for arguments as to translation during oral hearings conducted bilingually (not to mention the additional translation and transcription costs involved in bilingual arbitration hearings). Be aware of these issues before agreeing to a bilingual arbitration clause.

Notwithstanding the above problems with bilingual arbitrations, our experience is that they are still preferable to Chinese language arbitrations.

4.2. Escalation clauses

Clauses providing for the parties to take certain steps before initiating arbitrations (such as meetings at a certain level), often called “escalation clauses”, are to be approached with caution in mainland China-related contracts because they can cause significant delay whilst not achieving the occurrence of the desired negotiations anyway.

If you consider that such a clause is desirable, or if a counterparty insists, then be aware that such a clause may prevent initiation of arbitration until the time periods set out in the clause have expired – and with that in mind make the relevant period short and clear.

Escalation clauses are generally not advisable in mainland China-related contracts where they provide for anything other than a simple meeting between a certain level of executives.

We do not generally recommend mediation clauses or other tiered settlement procedures in mainland China – if such a process is to work (rather than just be a source of expense and delay) our experience in mainland China is that it needs genuine buy-in from all parties at the time the dispute arises. Putting such a process in the contract is therefore often a mistake.

Expert determinations are not recognised by mainland Chinese law so must be avoided if the result may need to be enforced against a counterparty in mainland China.

4.3. Clauses specifying the qualifications of the tribunal

It is generally not recommended to impose, in an arbitration clause, specific qualification other than language that the arbitrators must fulfil (in particular, experience in a particular sector). This is because such restrictions operate to reduce the pool of available arbitrators, often causing serious harm to your interests. For example, requiring all the arbitrators
to speak English and Chinese and to have experience in a particular industry sector would likely operate in practice to radically reduce the number of available, top quality arbitrators (so that you may end up with an arbitrator of distinctly lesser quality).

A common exception to this general rule is in relation to the nationality of arbitrators. For example, arbitration clauses and institutional rules often include provisions to the effect that a sole arbitrator or the chairman of the arbitral tribunal may not be of the same nationality as any of the parties to the arbitration\(^{30}\). The perception is that such a provision helps to ensure the independence and impartiality of the arbitral tribunal, although in many cases parties may be comfortable dispensing with such a requirement in the arbitration clause or agreeing subsequently to waive it.

4.4 One-way arbitration clauses/unilateral options to arbitrate

In certain jurisdictions, it is possible to have a one-way arbitration clause or a unilateral option to arbitrate. This refers to dispute resolution mechanisms where the default dispute resolution mechanism is litigation but one party has the unilateral option to arbitrate disputes. It could also refer to mechanisms where the default is arbitration and one party has the unilateral option to go to litigation. These clauses are common in finance agreements where the financing party usually has the stronger bargaining power and is able to negotiate such unilateral rights from the borrower.

Whilst these clauses have been upheld in a number of jurisdictions (e.g. England, and Hong Kong), they are unlikely to succeed in China. Instead, the Chinese courts are likely to find that these clauses are unfair (especially if the non-Chinese party has the benefit of the unilateral option). There is a risk that if the Chinese courts consider a clause unfair, it will be struck out and parties will be required to litigate their dispute in the Chinese courts, in the absence of a workable dispute resolution mechanism. However, provided an agreement is not governed by Chinese law, a Hong Kong or foreign award rendered pursuant to the arbitration clause which formed part of a unilateral option clause in the agreement is enforceable in China under the New York Convention.

II. GOVERNING LAW CLAUSES

Chinese contract law is largely based on the UNIDROIT General Principles of International Commercial Contracts (a document largely reflecting the principles of contract law of the Western European Civil Law systems) albeit with some special rules and some significant uncertainties.

Whilst non-Chinese parties still often prefer to choose another legal system for reasons of familiarity and greater certainty, the content of Chinese law is, broadly speaking, within the normal expectations of most non-Chinese parties, and can usually be agreed to as part of a wider compromise.

We suggest that non-Chinese parties consider the following general approach:

1) First, consider whether Chinese law is required (see below).
2) If it is not required then, if you can do so as a matter of commercial bargaining power, choose a non-Chinese law that you are familiar and comfortable with.
3) If you are obliged to choose Chinese law (whether under a legal requirement to do so or as a matter of commercial bargaining power) ensure that you have a qualified person review the

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30 See the ICC Rules (Article 9.5), the LCIA Rules (Article 6.1) and the HKIAC Administered Arbitration Rules (Article 11.2). The SIAC Rules do not contain such a provision, although they state that in making an appointment under the SIAC Rules, the Chairman of SIAC (who ultimately appoints all arbitrators, including those nominated by the parties) shall have regard to any qualifications imposed by the agreement of the parties (Article 10.2).
contract to ensure that it takes account of areas where Chinese contract law differs from the contract law system(s) with which you are familiar.

**The restrictions imposed by Chinese law on choice of governing law**

The restrictions imposed by Chinese law on the parties’ ability to choose a non-Chinese governing law vary according to whether the contract is considered to be “foreign-related” (see the discussion of that concept in the “Dispute Resolution Clauses” section of this guide).

**Non-foreign related contracts must all be governed by Chinese law, irrespective of the type of transaction contemplated.**

Parties to a foreign-related contract are permitted to choose a non-Chinese governing law save that:

1) certain specific categories of contract must be governed by Chinese law (see below);

2) foreign law will not be applied where it conflicts with the “public interests of the People's Republic of China.” This includes “basic principles of Chinese law” and “public interests of society” concepts which are significantly uncertain; and

3) foreign law will also not be applied if the relevant choice of law represents an attempt by the parties to seek to avoid Chinese “mandatory laws, regulations or prohibitions”.

In practice, there is scope for debate as to the meaning of points (2) and (3). We suggest you speak to a person qualified to advise on Chinese law if you are concerned that either of them might apply.

In addition to the above points, there are seven specific categories of contracts which must clearly be governed by Chinese law if they are to be performed in mainland China:

1) Sino-foreign joint venture equity or co-operative contracts;

2) contracts for Sino-foreign co-operative exploration and exploitation of natural resources;

3) contracts transferring equity in Sino-foreign equity or co-operative joint ventures and wholly foreign owned enterprises (“WFOEs”);

4) contracts for the management by a foreign party of Sino-foreign equity or co-operative joint ventures established within mainland China;

5) contracts for purchase of equity in enterprises without foreign investment which are located within mainland China by a foreign party;

6) contracts relating to the subscription by foreign parties to an increase in registered capital of a company without foreign investment which is located within mainland China; and

7) contracts for the purchase by foreign parties of assets from enterprises without foreign investment which are located within mainland China.

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31 General Principles of Civil Law, article 150 and article 7 of the Provisions of the Supreme People's Court on Certain Issues Concerning the Proper Law When Trying Cases regarding Disputes about Civil and Commercial Contracts Involving Foreign Elements passed on 11 June 2007 (the “2007 Provisions”).

32 Minutes issued by the Supreme People's Court on 26 December 2005 (“SPC Minutes”), item 54.

33 SPC Minutes, item 50 and Article 6 of the 2007 Provisions.

34 This provision applies only limited liability companies and companies limited by shares.

35 Article 8 of the Provisions. The Provisions also contain a “catch-all” provision covering any other contracts which other Chinese laws or regulations require to be governed by Chinese law. If you are concerned that any such law or regulation might apply, please talk to a member of Herbert Smith’s mainland dispute resolution team in our Beijing or Shanghai office.
These restrictions are important because:

- An invalid choice of law is likely to create problems where approval for a contract is required from Chinese governmental authorities.
- Where the contract provides for disputes to be resolved in mainland China, the choice of a “foreign” law in contravention of these restrictions will be regarded as invalid. In such circumstances, it will usually be best to show respect for the legal restrictions and avoid the potential uncertainty arising from an invalid choice of a foreign law by opting for a Chinese governing law.
- If the contract provides for arbitration in (say) Hong Kong to resolve any disputes and the counterparty is Chinese or has significant assets in China, then a tribunal may well respect the choice of law applying Hong Kong conflict of laws principles, but there is a risk that a Chinese court could refuse to enforce any award rendered by that tribunal on the ground of violation of Chinese public policy.

APPENDIX A

RECOMMENDED ARBITRATION CLAUSES

Below are suggested English and Chinese language clauses providing for some of the most common choices seen in China-related contracts:

- HKIAC arbitration
- SIAC arbitration
- ICC arbitration in Hong Kong or Singapore
- ad hoc arbitration in Hong Kong or Singapore
- CIETAC arbitration in mainland China

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1. The clauses are all based on the standard clause for the relevant institution or rules but incorporate certain amendments which we suggest for your consideration.
2. They all apply the institution’s rules in force at the date of arbitration. It is also acceptable to opt for the rules in force at the date of the contract.
3. Always review the most up to date version of the relevant arbitration rules (available on the various websites cited below) before drafting or agreeing to an arbitration clause providing for the application of those rules.
4. Always consider whether there is any potential for a dispute to involve more than two parties or more than two contracts. If there is, you should consider seeking expert advice on drafting a suitable multiparty arbitration clause (a technical matter of some subtlety).

36 Although it would be possible for the parties to agree subsequently to apply Chinese law.

37 On the basis of a working assumption that the institutions are more likely to improve their rules over time than they are to make them worse.
5. Three arbitrators are generally recommended for all contracts except for those in which any disputes are likely to be of low value, in which case a sole arbitrator may be considered. This is because a three-member tribunal allows the parties a greater say over constitution of the tribunal and generally improves the quality of the tribunal and its decision (although opting for a sole arbitrator does usually reduce the cost of any arbitration and may help expedite the process).

**HKIAC arbitration in Hong Kong**

Any dispute, controversy or claim arising out of or relating to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in Hong Kong under the HKIAC International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted in accordance with these Rules. The number of arbitrators shall be [one or three]. The arbitration proceedings shall be conducted in [English].

凡因本合同所引起或与之相关的争议、纠纷或索赔，包括合同的效力、无效、违反和终止，均应根据提交仲裁通知时有效的《香港国际仲裁中心机构仲裁规则》，在香港仲裁解决。仲裁员人数为 [一/三]名。仲裁语言为 [英文]。

**Note** that the HKIAC Administered Arbitration Rules are different from the HKIAC Procedures for the Administration of International Arbitration, and the arbitration clause should always make clear which set of rules is being incorporated by reference. There is no need to add any additional wording regarding the appointment of the tribunal (irrespective of whether there will be one or three arbitrators) because this is covered in the HKIAC Rules. In short, these provide (a) where there are three arbitrators, for each party to appoint one arbitrator and for the presiding arbitrator to be agreed by the two party appointed arbitrators; (b) where there is one arbitrator, for the parties to agree the sole arbitrator; and (c) where the party appointed arbitrators or parties cannot agree the presiding or sole arbitrator (as the case may be), for the HKIAC to appoint the sole or presiding arbitrator.

**SIAC arbitration in Singapore**

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) in force at the date of applying for arbitration, which rules are deemed to be incorporated by reference in this clause. The number of arbitrators shall be [three]. [Each party shall appoint one arbitrator, and the two arbitrators appointed by the parties (or by the Chairman pursuant to Rule 7.2 of the SIAC Rules as the case may be) shall within [30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act according to the UNCITRAL Rules. The UNCITRAL Rules, which were revised in 2010, are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html (the original 1976 version is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html). The HKIAC Procedures for the Administration of International Arbitration are available at http://www.hkiac.org/show_content.php?article_id=34.

40 Absent agreement on the number of arbitrators, there is a slight ambiguity between the UNCITRAL Rules and the Hong Kong Arbitration Ordinance as to whether there should be one or three arbitrators. Whilst the better argument is that there should be three arbitrators, it is therefore important (as with any arbitration clause) to specify the number of arbitrators.

41 The newest version of the SIAC Rules is the fourth edition, which took effect from 1 July 2010 (available at http://www.siac.org.sg).
as the presiding arbitrator. If the third arbitrator has not been agreed within this time period, the third arbitrator shall be appointed by the Chairman of the SIAC.] [Note that this provision reflects the SIAC Rules default position regarding the appointment of a three-member tribunal, save that it introduces an opportunity for the party appointed arbitrators to seek to agree the presiding arbitrator. This should be omitted if there is only to be one arbitrator, in which case the SIAC Rules allow the parties to try to agree the sole arbitrator.] The language of the arbitration shall be [English].

Note that if the parties or their appointed arbitrators are unable to agree on the identity of the presiding or sole (as the case may be) arbitrator, SIAC will appoint that arbitrator.

ICC arbitration in Hong Kong or Singapore

All disputes arising out of or in connection with the present contract, or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the “ICC Rules”) in force at the date of applying for arbitration by [three arbitrator(s)] appointed in accordance with the said Rules. [Each party shall appoint one arbitrator, and the two arbitrators appointed by the parties (or by the ICC Court pursuant to Article 8(4) of the ICC Rules as the case may be) shall within [30] days of the appointment of the second arbitrator agree upon a third arbitrator who shall act as Chairman of the Tribunal.] [Note that this provision reflects the ICC Rules default position regarding the appointment of a three-member tribunal, save that it introduces an opportunity for the party appointed arbitrators to seek to agree the presiding arbitrator. This should be omitted if there is only to be one arbitrator, in which case the ICC Rules allow the parties to try to agree the sole arbitrator.] The place of the arbitration shall be [Hong Kong/Singapore]. The language of the arbitration shall be [English].

Note that the ICC will appoint the presiding or sole (as the case may be) arbitrator if the parties or their appointed arbitrators are unable to agree. As noted earlier in this guide there is a significant risk that a clause providing for ICC arbitration in mainland China would be considered invalid by the Chinese courts (even if the ICC’s standard form clause purportedly designed specifically for arbitrations in China is used): such clauses should therefore be avoided.
**Ad hoc arbitration pursuant to the UNCITRAL Rules in Hong Kong or Singapore**

Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in force at the date of applying for arbitration. The appointing authority shall be [the Hong Kong International Arbitration Centre / the Chairman or Deputy Chairman of the Singapore International Arbitration Centre]. The number of arbitrators shall be [three]. The place of arbitration shall be [Hong Kong / Singapore]. The language(s) to be used in the arbitral proceedings shall be [English].

**Note** that there is no need to add any additional wording regarding the appointment of the tribunal (irrespective of the number of arbitrators) because this is covered in the UNCITRAL Rules. In short, they provide (i) where there are three arbitrators, for each party to appoint one arbitrator and for the presiding arbitrator to be agreed by the two party appointed arbitrators; (ii) where there is one arbitrator, for the parties to agree the sole arbitrator; and (iii) where the party appointed arbitrators or parties cannot agree the presiding or sole arbitrator (as the case may be), for the HKIAC or SIAC (as the case may be) to appoint the sole or presiding arbitrator.

**CIETAC arbitration in mainland China**

Any dispute, controversy or claim arising from or in connection with this Contract, or the breach, termination or invalidity thereof, shall be submitted to China International Economic and Trade Arbitration Commission (“CIETAC”) for arbitration in Beijing. The arbitral award shall be final and binding upon the parties. The arbitration shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration, subject to the following procedures: (1) the arbitration shall be conducted exclusively in the English language. All arbitrators appointed must be fluent in the English language. All documents filed, and all oral submissions must be in the English language. Any party wishing to rely on documentary or witness evidence in any other language shall be responsible for providing an accurate English translation or interpretation of the same to the other party and to the arbitrators, at the same time as the original language version is provided, and in the absence of such English translation or interpretation, such evidence shall be disregarded; (2) there shall be three arbitrators; (3) the presiding arbitrator shall in no circumstances be an individual who holds (or has at any time in his or her lifetime held) Chinese nationality; (4) the parties agree to the appointment of arbitrators from outside of CIETAC’s Panel of Arbitrators.

凡因本合同而引起的或与本合同有关的，或由于本合同的违约、终止或无效而引起的或与本合同的违约、终止或无效有关的任何争议、纠纷或索赔，均应提交中国国际经济贸易仲裁委员会（“贸仲会”）北京总会仲裁。仲裁裁决是终局的，对双方均有约束力。本仲裁应按照申请仲裁时该会现行有效的仲裁规则进行仲裁，但该等规则须作以下更改：(一) 仲裁应完全用英语进行。所有受委派的仲裁员必须精通英语。所有提交的文件和所有口头陈述均应用英语。任何一方，如需依据其他语言的文件或证人证言应负责向另一方和仲裁员提供相同的准确的英语翻译或口译，同时即使原用语言的文本已经提供，但没有英语翻译或口译，该证据应予采纳；
(二) 仲裁员人数为三名；(三) 首席仲裁员在任何情况下都不得是（或在他/她一生中任何时候曾经是）中国或[ ]公民。（四）双方同意在贸仲会仲裁员名册之外选定仲裁员。

Note that this clause provides for arbitration by CIETAC headquarters in Beijing. If our client wishes any arbitration to be conducted in Chongqing, Shanghai, Shenzhen or Tianjin instead (for example, for convenience or if it is concerned that the counterparty may have local influence in Beijing), the phrase “China International Economic and Trade Arbitration Commission for arbitration in Beijing” may be replaced by either:

- “China International Economic and Trade Arbitration South West China Sub-Commission for arbitration in Chongqing”,
- “China International Economic and Trade Arbitration Shanghai Sub-Commission for arbitration in Shanghai”,
- “China International Economic and Trade Arbitration South China Sub-Commission for arbitration in Shenzhen”, or
- “China International Economic and Trade Arbitration Tianjin International Economic and Financial Arbitration Centre for arbitration in Tianjin”.

The square brackets in (3) should be replaced with the nationality (or nationalities) of the foreign invested party’s ultimate parent(s). It is clearer to mention the relevant excluded nationalities specifically, since phrases such as “the same nationality as any party” invite debate, when a dispute arises, as to whether place of incorporation or direct ownership or “ultimate” ownership is meant.

Point (1) may be changed under commercial pressure to provide for the arbitration to be conducted in English and Chinese:

(1) the arbitration shall be conducted in English and Chinese (Mandarin / Simplified). All arbitrators appointed must be fluent in English and Mandarin Chinese. All documents filed, and all oral submissions must be in English and Mandarin / Simplified Chinese Characters. Any party wishing to rely on documentary or witness evidence which is not in both languages shall be responsible for providing an accurate translation or interpretation of the same to the other party and to the arbitrators upon request, and in the absence of such translation or interpretation, such evidence shall be disregarded;

The CIETAC Rules provide for each party to appoint one arbitrator and for the parties to seek to agree the presiding arbitrator. Absent such agreement, the presiding arbitrator will be appointed by the Chairman of CIETAC. Note that it is generally accepted that the CIETAC Chairman’s appointing powers in this regard are a mandatory requirement of Chinese law, so that it is not possible to agree to nominate a third party to appoint the presiding arbitrator.
APPENDIX B

GOVERNING LAW CLAUSE

This Agreement shall be governed by, and construed in accordance with, the laws of [       ].

本协议受[      ]法管辖并依其解释。

User’s Guide

1. It is sufficient to simply add the name of the relevant legal system in the space indicated above square brackets.

2. It is a matter of taste whether to use short form or long form names (e.g. “Hong Kong” or “the Hong Kong Special Administrative Region of the People’s Republic of China”).

3. Although for absolute precision the term “mainland of the People’s Republic of China” can be used, the phrases “People’s Republic of China” or “China” are usually understood as having the same meaning.

4. There is no need to add phrases which developed in relation to mainland China-related contracts in the 1980s, such as “so far as publicly available” or “published laws” but such phrases are harmless if a counterparty includes them.

5. Avoid errors such as “the laws of the UK” or “British law” (use “the laws of England” or “the laws of England & Wales” if that is what is intended) or “the laws of the USA” (use “the laws of New York” or whichever other State law is desired).
Jessica Fei  
Partner, dispute resolution, Beijing

Jessica is an international arbitration and dispute resolution specialist with over 15 years experience working with leading firms in New York and Asia. Her practice focuses on large-scale international arbitration, litigation and regulatory investigations in China, Asia, Europe and the US for clients that include Chinese State Owned Enterprises, multinationals and major regional corporates.

Jessica is qualified in the PRC and New York and is a native Mandarin and fluent English speaker. She has worked at the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing as a research fellow and case administrator and is also listed on the international panel of arbitrators for ICDR (International Centre for Dispute Resolution) of AAA, CIETAC, HKIAC, KLRCA and CEAC and several Chinese local arbitration institutions.

Sarah Munro  
Senior consultant, dispute resolution, Shanghai

Sarah is admitted as a solicitor in England and Wales and in Hong Kong. Across both jurisdictions, she has broad experience in litigation and arbitration, including international arbitration, general commercial disputes, shareholder disputes, and contentious regulatory matters. She has a particular focus on cross-border China-related dispute resolution.

Sarah rejoined Herbert Smith in November 2008 in our Hong Kong office, having trained with the firm and spent two further years in the London office. In the interim, she worked for a law firm in Ghana, Africa and a US firm in London.