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# Ten mistakes of doing business in China

## Mistakes 8, 9, and 10 – A legal perspective

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## Mistake No. 8: "Champagne clauses"

- Dispute resolution clauses negotiated as an afterthought minutes before the deal is done.
- Boilerplate clauses copied from an unrelated transaction, or template clauses imported from publicly available sources.
- An ill-suited disputes clause that is added to an otherwise meticulously negotiated contract.



All disputes to be resolved by friendly negotiations. If the friendly negotiations do not result in the resolution of dispute, the dispute shall be submitted for final and binding arbitration in China under the UNCITRAL Rules. The Tribunal shall consist of three members and shall be appointed by UNCITRAL.

### The harmful effects of "Champagne clauses"

- Impossibility to resolve disputes in a speedy and efficient manner
- Increased risk of having to resolve the dispute in domestic courts of one of the disputing parties
- Increased legal fees when dealing with jurisdictional objections and procedural deadlocks
- Procedural delays
- Undermining the enforceability of the award
- Outcomes neither desired nor anticipated by the parties
- "All disputes to be resolved by friendly negotiations.
- If the friendly negotiations do not result in the resolution of dispute, the dispute shall be submitted for final and binding arbitration in China under the UNCITRAL Rules.
- The Tribunal shall consist of three members and shall be appointed by UNCITRAL".



The harmful effects of "champagne clauses": The Hummingbird Music Litigation

## Mistake No. 9: Governing Law of the Arbitration Agreements

- The dangers of neglect
- Arbitrations have been derailed into a lengthy and costly sideshow as to the law applicable to the arbitration agreement
- The plethora of avenues and tests that can be applied to determine the law governing the arbitration agreement in the absence of the parties' choice

### The plethora of laws and tests in the absence of parties' agreement

- The law governing the underlying contract;
- The law of the arbitral seat;
- The law governing the arbitration agreement expressly or implicitly chosen by the parties;
- The law of the judicial enforcement forum;
- The law of the state with the “closest connection” or “most significant relationship”;
- The law according to the “validation” principle;
- International law; and
- The law governing the appointment of the arbitrator.

### The harm done through failure to agree governing law

- A disputed construction project in a Southeast Asian state
- The project stalled pending the resolution of the dispute
- Work force visas cancelled, workers forcefully removed from the construction site
- Clashes between the workers and the enforcement officers
- Injury and death
- Major delays and disruption
- **All while the lawyers were debating which laws apply to the arbitration agreement**



- ✓ Two years
- ✓ Four Rounds of Written Submissions
- ✓ Two hearings
- ✓ Five Witnesses
- ✓ Millions in Legal Fees

## Mistake No. 10 Arbitrability of disputes



"Arbitrable disputes – disputes that are capable of settlement by arbitration"

- Rooted in national laws
- National laws contain lists of arbitrable disputes
- These lists vary from jurisdiction to jurisdiction

### Arbitrability of Disputes in China

Non-arbitrable	Arbitrable
Marital, adoption, guardianship, support and succession disputes;	"Contractual and other disputes concerning property rights and other disputes concerning property rights and obligations between citizens, legal persons and other organizations of equal status may be subject to arbitration" (Article 2 of the PRC Arbitration Law)
Administrative disputes that are required by law to be handled by administrative authorities (Articles 3 of the PRC Arbitration Law);	Disputes arising from economic and trade transactions of a contractual and non-contractual nature (Article 2 CIETAC Rules)
Labor disputes and disputes within the agricultural collective economic organizations over contracted management in agriculture (Article 2 CIETAC Rules)	

### Arbitrability of IP Disputes in Hong Kong

- HKIAC launched a new panel of arbitrators for IP disputes, which consists of experienced arbitrators, senior counsel, former judges or heads of IP professional organisations from 12 different jurisdictions
- The Government published a consultation paper to amend the Arbitration Ordinance to include provisions dealing with IP issues
- Under the amendments, the IP disputes (registered and unregistered rights whether or not subsisting in Hong Kong) **are arbitrable**, along with disputes over the subsistence, scope, validity, ownership and infringement of IP rights.



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