



出帝院





## Szkoła Prawa Chińskiego 中国法 CHINESE LAW SCHOOL

by Magdalena Pszczółka









 Szkoła Prawa

 Chińskiego

 中国法

 Wydział Prawa i Administracji

 Uniwersytetu Gdańskiego

## Agenda 议程

#### Legal culture

- Chinese language
- Chinese legal phrases
- Chinese investments in Poland
- Law with Chinese characteristics
- Confucianists
- Legalists

## Great codifications

- Key milestones
- Empire times
- Post-Mao

#### Sources of law. Courts. Law in action

- Implementation of Western laws
- Sources of law in China
- Common law vs. civil law tradition
- Court structure.
   Professions.
   Arbitration. Internet
   Court

人。 Book 12.22 of the Confucius Analects



## **HOW-to-guide**

#### 1. A WARM WELCOME

Hard copy of the documents. Say hello to others Do your home learning (MEMRISE)

#### 2. FINAL ASSESMENT

Test of choice (50%) A series of short takehome topics papers or essays (50%). Class participation will also be taken into account.

As part of your class participation, please submit one newspaper or magazine article, selected from any major national or regional periodical, relevant to any issue or issues we discuss in this course with your comment thereon. You may email the article to me at spch@prawo.ug.edu.pl or submit the hard copy in class any time before end of module no 6.

Chinese Law School 中国法 | November 18, 2017 I would also be very interested in a movie, TED recommendation or podcast with some relevance to the course.









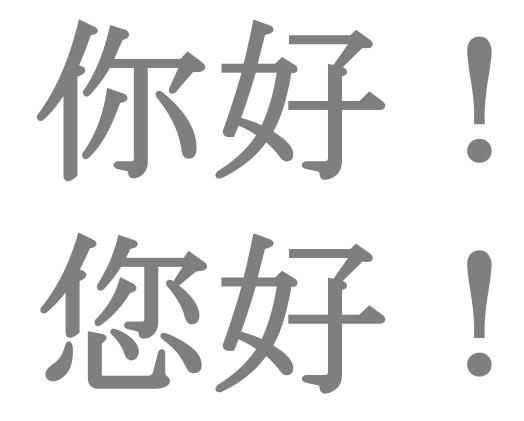
Wydział Prawa i Administracji Uniwersytetu Gdańskiego







Chinese language









Szkoła Prawa Chińskiego 中国法 Wydział Prawa i Administracji Uniwersytetu Gdańskiego

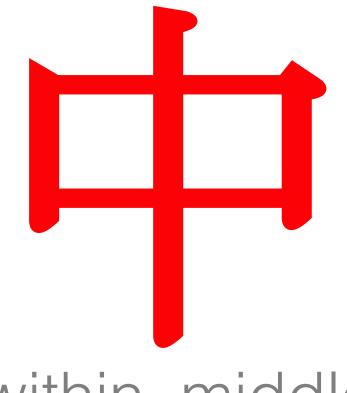
#### Legal culture

Chinese language

50,000 10,0001,000 2()()



- Chinese language
- Chinese legal phrases



## zhōng

## within, middle



- Chinese language
- Chinese legal phrases

guó country, nation, state



## fǎ



- Chinese language
- Chinese legal phrases













Wydział Prawa i Administracji Uniwersytetu Gdańskiego

## Chinese dream 中国梦

## zhōngguó mèng

## Legal culture

 Chinese legal culture: Chinese dream











## Chinese dream



## China in action

- Chinese legal culture
- Jack Ma (Alibaba)

# Alibaba Group 阿里尼原馬团



 Chinese legal culture: New Silk Road

## Getting on the **New Silk Road** 新丝绸之路 Xīn sīchóu zhī lù

One Blet One road initiative







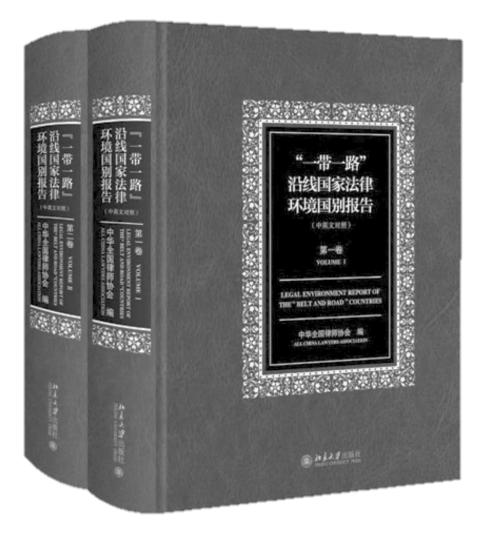




Chinese legal culture

**Legal Environment Report** of the **"Belt and Road"** Countries (Bilingual in English and Chinese)

## All China Lawyers Association











June 20, 2016 MoU by and between Poland(波兰) China

#### Legal culture



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photo by Andrzej Hrechorowicz / KPRP)









- Chinese language
- Chinese legal phrases

## According to article 1...

根据第一条 … … gēnjù dì yī tiáo …

	Act/Law
	中法
Article 1	
第一条	dì yĩ tiáo
_	









- Chinese language
- Chinese legal phrases

## the People's Republic of China



Zhōnghuá rénmín gònghéguó





## 中华人民共和国合同法

Contract Law of the People's Republic of China

> 中国法制出版社 China Legal System Publishing House



# Legal culture Chinese Investment in 没送 • Chinese investment in View ジェンク ● Poland (波兰) ジェンク ● Poland (波兰) ジェンク ● Poland (波兰) ● Poland (加速) ● Poland (波兰) ● Poland (加速) ● Poland (加速)



ICBC (日本) 中国工商银行





 Chinese legal culture: Law

# **outlook on the law in China** laws of the far East?

'People do not see law as a major vehicle for assuring peace and social order. They have even aversion for law (...).\*

\*Rene David and John E.C Brierley, Major Legal Systems in The World Today, third edition (London: Stevens and Son, 1985, pp. 516-546 [in:] Jan Michiel Otto, Law-Making in the People's Republic of China, p. 216.



## A tourist attraction, situated on the border of the lake of Beijing's famous Summer Palace

"Marble Boat"



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Legal culture



 Law with Chinese characteristics

# Laws (法) in the books\*

\*"having laws is one thing, having them fully and properly implemented is another" (Jianfu Chen, *Chinese Law: Context and Transformation* (2015))









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## Half blind picture

## Legal culture





 Law with Chinese characteristics

## CONFUCIUS The ART OF WAR **GUANXI** 关系 "No"/face-saving research, research, research hierarchy 入乡随俗 Rù xiāng suí sú language



 Law with Chinese characteristics: Confucianists

## **Confucius** self-improvement ongoing correction of errors



## The Master (Kongzi, 孔子) said\*:

- Law with Chinese characteristics:
  - Confucianists

## "Not to mend one's ways when one has erred is to **err** indeed."

\*Book 15.30 of the Confucius Analects (论语)



 Law withChinese characteristics: Confucianists Fan Chi asked about benevolence (仁, Ren). The Master said, "**Love your fellow men (** 爱人)."

Book 12.22 of the Confucius Analects (论语)







Chińskiego 中国法 Wydział Prawa i Administracji Uniwersytetu Gdańskiego

Szkoła Prawa

#### Legal culture

 Law with Chinese characteristics: Confucianists

## The US Supreme Court Cited Confucius in its Marriage Equality Ruling

Opinion of the Court

Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a samesex marriage licensed and performed in a State which does grant that right.

#### Π

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

#### Α

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures,





 Law with Chinese characteristics: legalists

# 

## society needs a system of harsh laws



 Law with Chinese characteristics

# **Traditional** Chinese law



 Law with Chinese characteristics

# **Traditional** Chinese law





 Law with Chinese characteristics

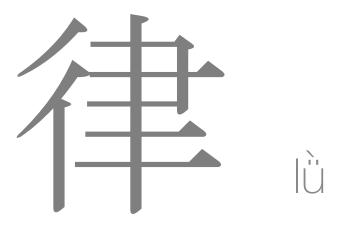
# **Traditional** Chinese law

TI xíng



 Law with Chinese characteristics

# **Traditional** Chinese law





## **GREAT CODIFICATIONS**

CodificationsTang Dynasty

Great

- Song Dynasty
- Yuan Dynasty
- Ming Dynasty
- Life of Confucius

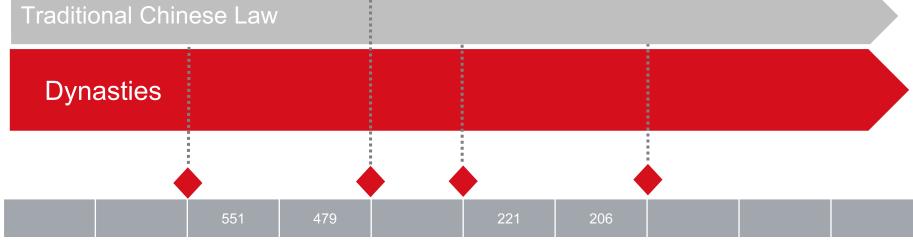


## Qing Dynasty

BC

Han Dynasty



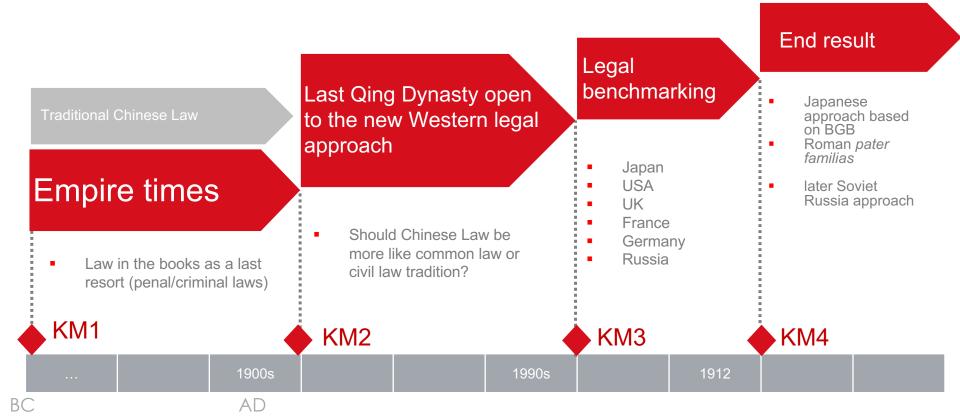




## Great codifications

## CHINESE LEGAL SYSTEM WESTERN APPROACH

Key milestones





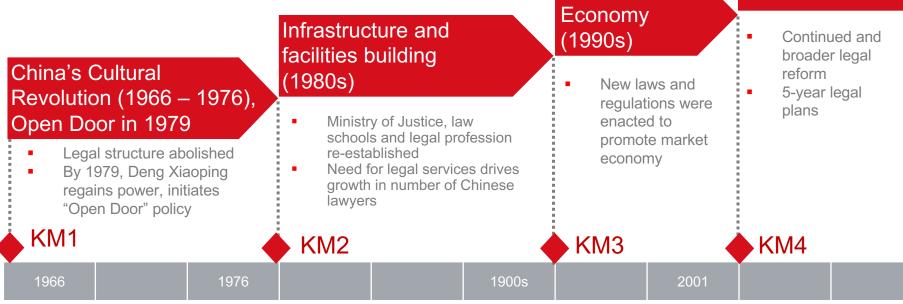
## Great codifications

Key milestones

AD

## CHINESE LEGAL SYSTEM UNDERWAY

restructured following the end of the Cultural Revolution



Market

Post-WTO

(2001+)



## Great codifications

post - Mao

Key milestones

Rapid or even massive enactment of laws and regulations

Upon Open Door Policy (开放, Kāifàng) officially launched in 1978, virtually no law in China

	National laws	Administrative regulations	Departmental rules	Local rules
1949 – 1978	127	319	586	118
1979 – 2005	762	3,985	55,714	110,122

Source: Jianfu Chen, Chinese Law: Context and Transformation (2015)



# Source of Law in China

### Sources of law. courts

Primary sources of law: National law 法律 Fǎlǜ Secondary sources of law: national administrative regulations 行政法规 Xíngzhèng fǎguī Tertiary sources of law: local regulations 地方性法规 Dìfāng xìng fǎguī

- Sources of law in China
- 1. The Constitution
- 2. Basic laws (exclusive domain of the NPC) (article 62 of the Constitution)
- 3. Other laws (SCNPC)
- 4. Legal interpretations and Supreme's Peoples Court opinions (*an li*)
- 5. Administrative regulations
- 6. Local regulations
- 7. Autonomous regulations
- 8. Rules.









# White Papers

## Sources of law. courts





 Common law vs. civil law tradition **Guiding cases.** Chinese courts are paying more and more attention to the use of precedent in considering how to decide a case.



# Guiding Case No. 33

Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid

GC No.:	33
GC Date of Release:	2014/12/18
GC Batch No.:	8
Area(s) of Law:	Contract Law
Keyword(s):	Affirmation of the Invalidity of Contracts, Civil, Collusion in Bad Faith, Return of Property

#### TABLE OF CONTENTS

- 1 | Original Judgment(s) leading up to this Guiding Case
- 2 | Subsequent Cases Referencing the Guiding Case
- 3 | Full Text of the Guiding Case

3.1 | Keyword(s)

- 3.2 | Main Points of the Adjudication
- 3.3 | Related Legal Rule(s)
- 3.4 | Basic Facts of the Case
- 3.5 | Results of the Adjudication
- 3.6 | Reasons for the Adjudication
- 3.7 | Endnotes



### Sources of law.

• Where to find laws?

Law on Law-making (the revised 2015) requires\* that laws, administrative regulations, departmental rules and local rules, and their revisions, be published on government legal information websites: npc.gov.cn

chinalaw.gov.cn

# Official law are those published in the gazettes\*\* of the rule/law making authorities.

\*Article 58 et seq of the Law on Law-making.

\*\* Gazette of the Standing Committee of the National People's Congress of the PRC; Gazette of the State Council of the PRC; Gazette of the Supreme People's Court of the PRC; Gazette of the Supreme People's Procuratorate of the PRC; and Gazettes of the various ministries and commissions under the State Council, as well as legislative and administrative authorities at the provincial levels (www.gov.cn)



Sources of law.

Constant struggle to find law that is in effect.

Where to find laws?

## Law-lib.com/law & & en.pkulaw.cn\*

# With a brief notation on the status of the laws validity.

\*PKU Law has evolved over the last 20 years into the largest and most professional legal research system in China.

















Wydział Prawa i Administracji Uniwersytetu Gdańskiego From yamen to the internet court

### **Contract Law**

Dispute settlement



yámén the court as it was known

Sąd beben duzy









Wydział Prawa i Administracji Uniwersytetu Gdańskiego







 Court structure – sources of law Constitution of the People's Republic of China 中华人民共和国宪法 Zhōnghuá rénmín gònghéguó xiànfǎ

> Chapter III The Structure of the State 第三章 国家机构 Dì sān zhāng guójiā jīgòu

Section 7 The People's Courts and the People's Procuratorates 第七节

Dì qī jié

人民法院和人民检察院 Rénmín fǎyuàn hé rénmín jiǎncháyuàn



Article 124



 Court structure – sources of law The People's Republic of China establishes the Supreme People's Court and the people's courts at various local levels, military courts and other special people's courts. (...)

The organization of the people's courts is prescribed by law.

中华人民共和国设立**最高** 人民法院、地方各级人民 法院和军事法院等专门人 民法院。

Zhōnghuá rénmín gònghéguó shèlì zuìgāo rénmín făyuàn, dìfāng gè jí rénmín făyuàn hé jūnshì făyuàn děng zhuānmén rénmín făyuàn.

(……) 人民法院的组织由法律规 定。

Rénmín făyuàn de zǔzhī yóu fălǜ guīdìng.









Wydział Prawa i Administracji Uniwersytetu Gdańskiego

Sources of law. courts

Court room













Court room

# 











Court room



defender, a counsel, an advocate











Wydział Prawa i Administracji Uniwersytetu Gdańskiego

## Sources of law. courts

Court room







Court room



## 书记员 **shūjì yuán** clerk, scriber



Court room







# Sources of law. Legal professions in China courts

Legal Professions

**people's judge** people's procuratore lawyers notaries





**Supreme People's Court.** Cases assigned by the law, judication over appeals or protest from the higher people's court and special people's courts.

Court structure

# **Special Courts**

instance in cases assigned by law or handed-over from lower courts, major criminal cases which impact the entire province. Court of appeals or protests against judgements and orders of lower courts.

## Higher People's Court. Judication in the

first instance in cases assigned by law or handed-over from lower courts, major criminal cases which impact the entire province. Court of appeals or protests against judgements and orders of lower courts. (one per province) ~31.

## Intermediate People's Court. First

instance in some cases (including those handed-over from Basic People's Court, major cases dealing with foreign parties, criminal cases of life imprisonment or death, ~389

# Basic People's Courts. Local level

courts adjudicate civil and criminal cases of first instance, ~3133.



### Legal culture





### Legal culture

## Chinese Court Proceedings

 Law witch Chinese characteristics

A growing number of trials **livestreamed online**.

Knowledge exchange to happen - prosecutors and lawyers to learn **how to cross-examine witnesses in court.** 









Uniwersytetu Gdańskiego

#### 重大案件 Main cases



聂树斌故意杀人、强奸妇女再审案宣判 最高人民法院



乔丹商标争议行政纠纷案宣判 最高人民法院

更多>



更多 >

海难救助纠纷案 最高人民法院



行政案件



乔丹商标争议行政纠纷系列案件审理 最高人民法院

#### 刑事案件 Criminal cases



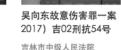
上诉人张雷雷故意杀人案 (2017) 黑刑终242号

黑龙江省高级人民法院



出售出入境证件罪 (201 7) 沪01刑初91号

上海市第一中级人民法院



故意伤害罪 (2017) 浙

刑终291号

浙江省高级人民法院

民事案件 **Civil cases** 



合资、合作开发房地产合 同纠纷 (2017) 最高法

#### 最高人民法院



其他合同纠纷 (2017) 最高法民再290号

股权转让纠纷 (2017) 最高法民终651号 最高人民法院



企业承包经营合同纠纷

最高人民法院

青海省高级人民法院

2017) 最高法民再231号



劳动和社会保障 (2017 ) 沪03行终395号

土地行政登记一案 (201

7) 青行终52号

上海市第三中级人民法院



地矿行政处罚 (2017)

浙09行终49号

舟山市中级人民法院

更多>

行政复议 (2017)桂03行初 188号

桂林市中级人民法院

2017年10月24日下午

最高人民法院

2017年10月24日 上午

2017年10月24日上午

。2017年10月24日下午



#### 其他合同纠纷

最高人民法院

关注法院



案情简介

法院简介

黑龙江盛恒基房地产开发集团有限责任公司与海通证券股份有限公司于2011年8月2日签订《购买办公用房协议》。2013年 10月31日。或帽其开发公司为或帽其教育公司的3.5亿元贷款与开发银行签订含案洗房屋在内的《折拥合同》。目前3.38亿

最高人民法院

关注



Internet court

The world's first court specialising in handling internet-related cases in the city of Hangzhou, Zhejiang Province, the central hub of ecommerce.

Online dispute Platform











# Alternative Dispute Resolution

Court structure

# Mediation (negotiation/consultation)

# **Arbitration**

Petiton (Xinfang)

# Litigation in the court





Alternative Dispute Resolution

Court structure

# **5-9**mIn

cases per year

# 96.9%

Success rate

**Mediation** (negotiation/consultation) 调解 tiáojiě

Dispute resolution that maintains harmony in society, softens social conflict and enhances unity between parties, easier to implement, based on voluntary agreement of the parties, face-saving approach.





# Alternative Dispute Resolution

### Sources of law. courts

Court structure

**Mediation** (negotiation/consultation) 调解 tiáojiě:

1. Court mediation (final);

Success rate

65%

2. People's mediation (Constitution, article 111);

Success rate in 2009

97%

3. Administrative mediation.



Court structure



**Pavilion** Ming Dynasty Shēnmíng tíng



# Alternative Dispute Resolution

Court structure

Arbitration 仲裁 zhòngcái

**NO** *ad hoc* Arbitration

Possible merger of Med-Arb or Arb-Med

Arbitration Law dated as of 1994 (new effective in 2018) and a series of Interpretations.











# Alternative Dispute Resolution

## Sources of law. courts

Court structure



**2k** caseloads in 2015

# **CIETAC** – model arbitration clause

Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

示范仲裁条款

凡因本合同引起的或与本合同有关的任何争议,均应提交中国国际经 济贸易仲裁委员会,按照申请仲裁时该会现行有效的仲裁规则进行仲 裁。仲裁裁决是终局的,对双方均有约束力。







Alternative Dispute Resolution

Court structure

A touch of sin movie dated 2013

# 10mln

petitions in 2004

Petition Xìnfǎng 信访- letters and visits

Mechanism for expressing grievance and finding remedies. Additional channel (to the more complicated legal system).



## China in action

keynote

# **ENFORCEMENT** language governing law arbitration/court









New milestone May 2017

### Sources of law. courts

GDDiA vs. Covec

Dispute

# CASE STUDY\_





**Sources of law.** CASE study GDDiA vs. Covec **courts** 

Dispute

Polish General Directorate of National Roads and Motorways (GDDKiA) vs. Chinese construction and engineering company China Overseas Engineering Group Co., Ltd (Covec).

Construction of 2 sections of the A2 Motorway between Łódź and Warsaw, Poland.





# Sources of law. Keynotes part 1 courts

Dispute

Contract for construction awarded in **2011**. **Consortium**: Covec part of China Railway Engineering (giant, 2 mln employees), China Railway Tunnel Co., Shanghai Consortium.

European Football Championship in June 2012. Project estimated cost: PLN 1.3 billion (EUR 330 mln). Covec offered **less than half** the amount allocated in the Polish government budget. Other companies complained of **dumping prices**.

After 2 years contract was cancelled (with **20% work done**).



# Sources of law. Keynotes part 2 courts

Dispute

Covec's price not based on educated guess. **Series of mistakes** (no geological survey, soil turned out to be not what was expected, legal issues on employment law – working hours, environmental issues – severe rare species of frogs – obligation to create tunnels for the passage of wildlife).

Chinese construction model 中国打法 zhōngguó dǎ fǎ is unsuitable for European markets:

- The lowest price offer, which after a few months is revised upwards on the possible grounds of a number of conditions (e.g. cost of materials, rate exchange).



Dispute

### Action by GDDiA

Renounced from the contract

Called banks to exercise bank guarantees

Filed a claim against Covec with Polish common court seeking PLN 140 mln LDs and seeking compensation for non-performace of the motorway





Dispute

### Natural reaction of Chinese banks upon Chinese People's Court application lodged by Covec

Performance bank guarantees from Deutsche Bank, Bank of China and Bank and Export-Import Bank of China.

High street banks, but ...





### GDDiA engaged Polish Ministry of Foreign Affairs

Dispte. Arbitration

Building the strategy

	CLAIM	
-	诉状	
		_
_		_



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#### Covec's Sources of law. courts

# management

Dispute. Arbitration

Apply to the Chinese court with a motion to issue preliminary inunction and to freeze activities not to use bank guarantees

And

Waits





### Sino-Polish Agreement on legal aid in civil and criminal cases, dated as of June 5, 1987 (being in effect)

Arbitration

#### 65

UMOWA

między Polską Rzecząpospolitą Ludową a Chińską Republiką Ludową o pomocy prawnej w sprawach i karnvch.

podpisana w Warszawie dnia 5 czerwca 1987 r.

W imieniu Polskiej Rzeczypospolitej Ludowej

RADA PAŃSTWA POLSKIEJ RZECZYPOSPOLITEJ LUDOWEJ

podaje do powszechnej wiadomości:

#### UMOWA

Rozdział 1 POSTANOWIENIA OGÓLNE

Artykuł 1

Ochrona prawna

między Polską Rzecząpospolitą Ludową a Chińską Republiką Ludową o pomocy prawnej w sprawach cywilnych i karnych.

Polska Rzeczpospolita Ludowa

i Chińska Republika Ludowa,

pragnąc zacieśnić więzy przyjaźni w dziedzinie współpracy prawnej, z poszanowaniem suwerenności, niezawisłości, równości praw i wzajemnych interesów, postanowiły zawrzeć niniejszą umowę i w tym celu uzgodniły. co nastepuje:

Obywatele jednej z Umawiających się Stron korzystają na terytorium drugiej Umawiającej się Strony z takiej samej ochrony prawnej, jaka przysługuje obywatelom tej Umawiającej się Strony. Mają oni prawo wytaczać powództwo i składać wnioski do sądów i innych

#### Artykuł 20 Odmowa uznania i zezwolenia na wykonanie Orzeczenia sądowe wymienione w artykule 16 nie

będą uznane i nie zezwoli się na ich wykonanie, jeżeli a) według prawa tej Umawiającej się Strony, na której terytorium orzeczenie ma być uznane lub wykonane sądowi, który wydał orzeczenie, nie przych

a Chińską Republiką Ludową o pomocy prawnej w sprawach cywilnych i karnych w następujący e) na terytorium tej Umawiającej się Strony, na którym orzeczenie ma być uznane lub wykonane, zostało wydane wcześniej prawomocne orzeczenie w tej samej sprawie między tymi samymi stronami lub postępowanie w takiej sprawie jest w toku albo prawomocnie uznano orzeczenie wydane przez sąd trzeciego państwa w takiej sprawie,



Arbitration

Article 25 23 *(revised 2017)* of the Civil procedural law in China Limits the choice to Chinese court. Enforcement of foreign judgement is more than rare.

Hague Conventions.



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Arbitration

Forum shopping *Thinking with the end in mind Economic analysis of the clause* 



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Arbitration clause



## How to mitigate risk?

Does your lawyer use economic analysis of contract?





# Law & Economics

### Sources of law. courts

Arbitration clause



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Arbitration clause

**Negotiating cost** of the risk clause

clearing, mitigating, settling **costs of the risk**  **probability** of the loss/damage, the risk occurrence (%)





### Once again?

Sources of law. courts

> So GDDiA would have to call to the Chinese court and file a claim against Covec once again?

Covec may block the activities earlier

Covec may also file arbitration claim on the basis of Sino-Polish Agreement on legal aid in civil and criminal cases, dated as of June 5, 1987.





case study

Arbitration



# sources of law. CASE study GDDiA vs. Covec

Arbitration

Finally reached settlement via mediation (May 19, 2017 - Chinese approach), yet stepping into the shoes of Covec, I would initiate arbitration case.

Between GDDiA and Covec governing law – Polish Law, no arbitration clause. For Chinese arbitration ad hoc is not permitted.







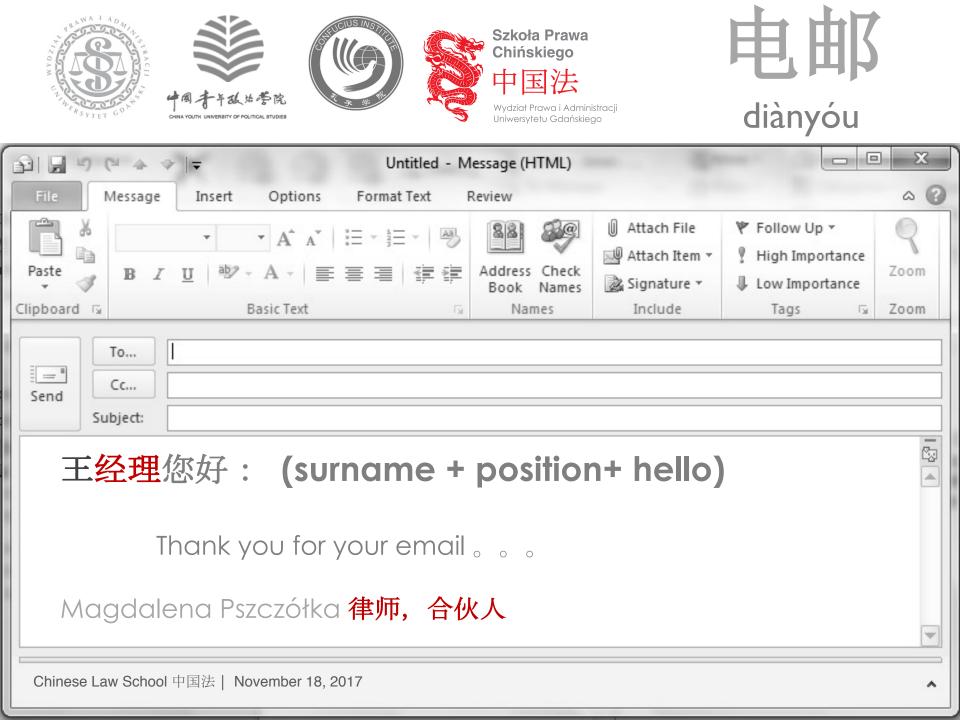




Wuhan Intermediate People's Court recognises a US court judgment – Breakthrough in cross-border litigation?

Liu Li v Tao Li and Tong Wu







#### **Power of Attorney**

Law in action

Before a power of attorney (委托书, wěituō shū) can be valid in China, it must be:

(1) signed in front of a notary public (公证律师),
(2) authenticated by the Department of Foreign Affairs and Trade (DFAT), and then
(3) authenticated by the Obinana Embagation of the second seco

Chinese Embassy or consulate – it is a three-stage process.







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Court expert witness in Chinese law and international agreements (common law).

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# Szkoła Prawa Chińskiego 中国法

CHINESE LAW SCHOOL



by Magdalena Pszczółka











Wydział Prawa i Administracji Uniwersytetu Gdańskiego

# Appendix











Ice breaking, how do you rate Mark's Chinese language?

#### China in action

Mark Zuckerberg's Chinese 清华大学经济管理学院顾问委员会 2014年会议 2014 Advisory Board Meeting Tsinghua University School of Economics and Management

### 顾问委员走进清华经管课堂 Tsinghua Students Dialogue with Board Members

青4 \_\_\_\_\_」b课堂 Tsinghua x-lab Session

2014.10.22

清华大学经济管理学院 University School of Economics and Management