

BRYAN CAVE

BRYAN CAVE
INTERNATIONAL TRADE

INTERNATIONAL TRADE AND THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

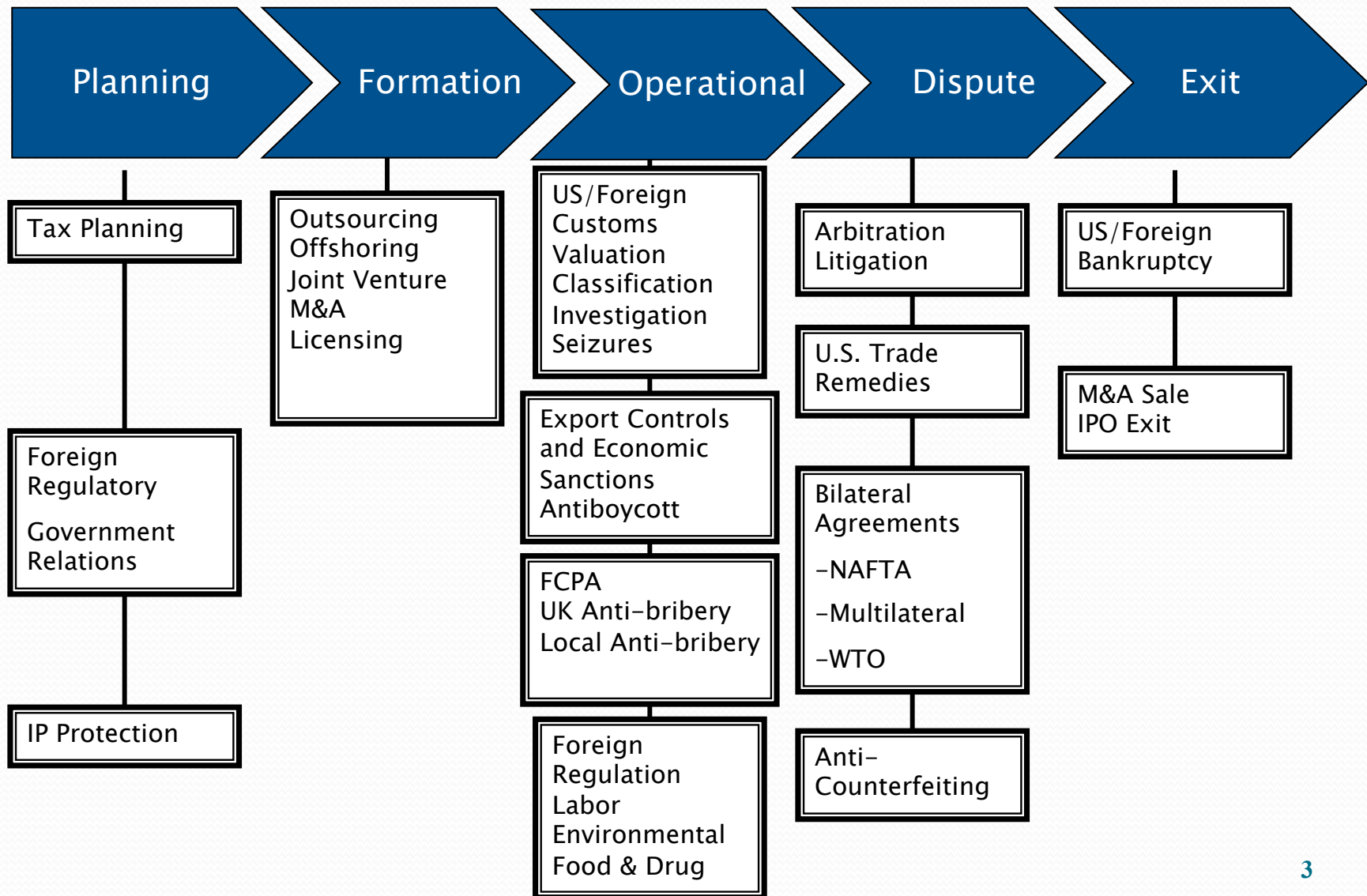
Evan Y. Chuck
International Trade Group Leader
Managing Partner – Shanghai Office
Bryan Cave LLP

Asia Pacific Business Outlook Conference
Los Angeles, California
April 8, 2013

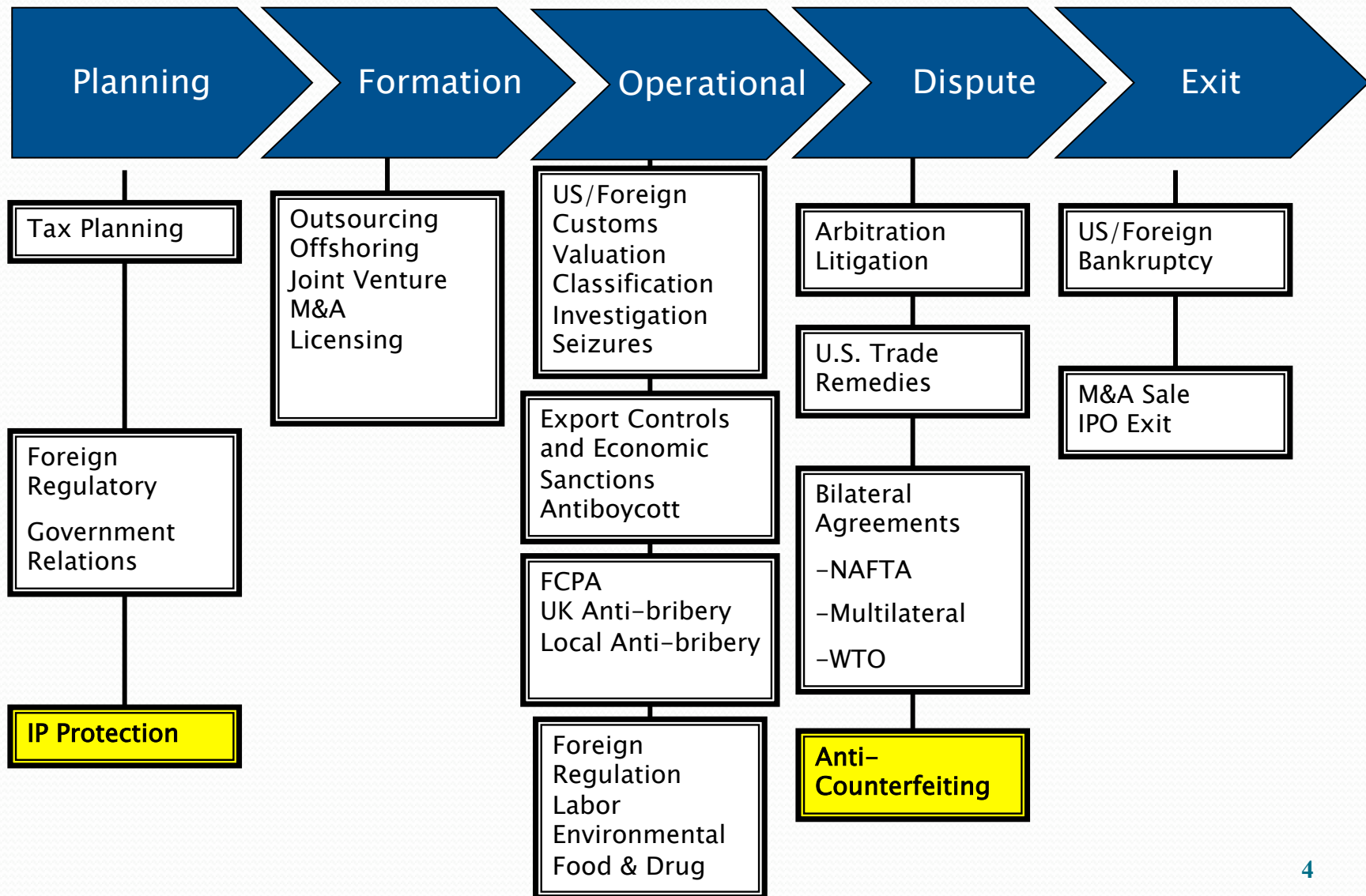
Roadmap to Doing International Transactions in China

- International Trade – a Business View
- Focus on China – Update on Opportunities
- Accessing the China Market
- The Right “Partner” in China
- Documentation – Do’s and Don’ts in Contracts
- Protecting Your Intellectual Property in China
- Intellectual Property and the Foreign Corrupt Practices Act

International Trade – a Business View



International Trade – a Business View



FOCUS ON CHINA – The Opportunities and Pitfalls



Opportunity and Risk in China



- The Rise of RMB Private Equity Funds
- Consumer Brand Boom
 - Retailers
 - Franchises
- China's Corporate and Regulatory Environment Gets More Complicated
- Domestic Innovation Policy – Killing the Goose that Lays the Golden Egg?

Opportunity and Risk in China



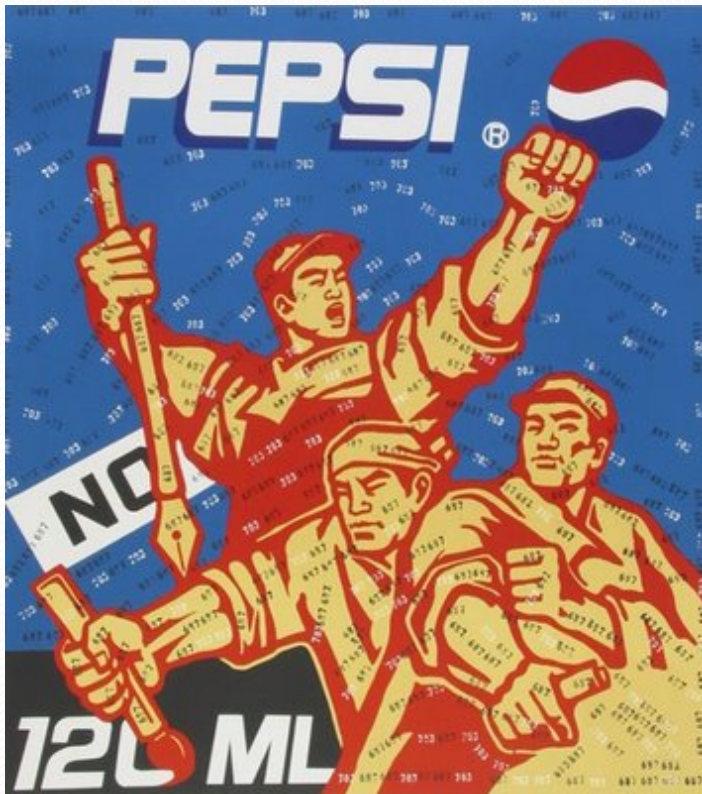
- China's Labor and Employment Laws and Policies Favor the Employee
- New Taxes Assessed to Expats for Chinese Social Security
- Structuring Equity Incentive Plans for Chinese Employees Is Problematic
- Increasing Costs Make Alternatives Attractive – Vietnam, Cambodia, even Mexico

Accessing the China Market



- Avoid Retail Risk: Distribution and Licensing Agreements
- Sell Directly to Third Parties from the US – Representative Office
- Sell from China to the Chinese market – Wholly Foreign Owned Enterprise (“WFOE”) and Sino-Foreign Joint Ventures (“Joint Ventures”)

The “Right” Partner in China



- Due Diligence is Key
 - Look for Chinese characters in the Name Card
- Look for State-ownership, Control or Origins in State-Owned Businesses
- Publicly Traded Company outside of Mainland PRC
- Network of Public Sources, Investigators, Tax-related Sources, Ex-military Intelligence

Contract Documentation in China Deals



- Use of “MOUs” and nonbinding “Letters of Intent” (“LOI”)
- Choice of law: consider US (NY or CA with arbitration clause); “neutral” laws – UK, Hong Kong, or Singapore; China and CIETAC arbitration
- Chinese contracts vs. US contracts – major differences
 - Civil code influence on details of contracts
 - Equitable remedies (i.e. injunctions) limited under Chinese law
- Joint Venture Contracts – Chinese law can trump certain provisions, regardless of how well they are drafted
 - Be prepared for re-negotiation, not enforcement

Protecting Your Intellectual Property in China



Protecting your Intellectual Property Globally



- Assess global intellectual property protection needs by market share in Asia
 - Consider trademark, patent, copyright and local internet domain site protection and strategy
 - IP licenses in China should generally be registered
 - Software that is licensed or sold in China is subject to registration
- Trade Secrets are most difficult to protect
 - Consider review of trade agreements in the region
 - Consider regional “Pixie Dust” assembly strategy

Intellectual Property – Chinese Pitfalls



- First to File / First to Use
 - “Chivas Regal 88” and the proof of a well-known brand
- Need separate applications for different categories of goods
 - Proposed amendment to Trademark Law allows single application for multiple categories
- Domain Names
 - Domain name squatters leverage first to file advantage for profit
- Litigation – defending the mark
 - Beware of infringer strategies to cloud title to trademark
 - Enforcement and litigation against online infringement difficult and costly
- Non-use of trademark for three years may lead to cancellation
 - Revocation by Trademark Office or third party application

China Intellectual Property and the FCPA



- Risk: Trademark registration and enforcement action may involve the Administration of Industry and Commerce (AIC), Customs, or judicial authorities
- The Foreign Corrupt Practices Act prohibits offering or giving anything of value to a foreign government official for the purpose of obtaining or retaining business
- Also prohibits offering or giving anything of value to a third person “while knowing” that any or all of it will be passed to a foreign government official
- “While knowing” includes “awareness of a high probability”
- “Government official” includes political parties, candidates for office and officials of public international organizations

Why is the FCPA Important Today?



- More than 1,000 SEC and DOJ lawyers in Washington D.C./Silicon Valley focusing on such cases
- If you're in business in the BRIC, especially China, you have a bulls eye on your back
- Extended supply chains expose companies to more FCPA risk
- It's not the bribe, it's the accounting

China – The Briar Patch of FCPA and Local Antibribery Law



- “On the ground” staff receive training, but often fail stress tests
 - Enormous pressure – “red envelopes” and “mooncakes with benefits”
- Hard to tell who is a “government official”
 - Doctors
 - Enterprises are owned by state owned enterprises
 - Communist party members/PLA
- FCPA local law exception is problematic – local law/practice

Thank you!

- Contact information:

Evan Chuck

Partner

Bryan Cave LLP

120 Broadway, Suite 300

Santa Monica, California 90401

(310) 576-2126

evan.chuck@bryancave.com

Our Global Offices

