

AGIC – BEIJING

- Key Indicators
- Falling market
 - Change in economic circumstances
- Focus on risk
- Preventative measures
 - Due diligence
 - Specific clauses
 - Security
 - PRC SAFE Regulations
- Post-contract
 - Dispute resolution
 - Enforcement



Today's climate....really ...



**DOWN 777.68 points. THE TALE OF
THE DOW'S LARGEST POINT LOSS
ON RECORD**

The Wall Street Journal
20 Sept. 2008

Minneapolis Star
29 Oct. 1929

**WAVE AFTER WAVE OF SELLING
AGAIN MOVED DOWN PRICES ON
THE STOCK EXCHANGE TODAY**

**SELL EVERYTHING AHEAD
OF STOCK MARKET CRASH**

RBS economists Guardian
12 January 2016

GLOBAL ROUT SCYTHES \$2.3tn OFF STOCK MARKETS

F.T. 9 January 2016

Australia-PRC Bilateral Trade – Global Context

- According to figures from PwC, Australia-China bilateral trade is (and will remain) one of the key bilateral trading partnerships in the coming decades. In 2013:

Ranking	Bilateral trade pair		Trade value (2013 US\$ bn)
1	China	US	491
2	China	Japan	279
3	China	South Korea	237
4	Germany	France	225
5	Japan	US	200
6	Germany	US	165
7	China	Germany	157
8	Germany	UK	143
9	Germany	Italy	134
10	China	Australia	125
11	UK	US	110
12	South Korea	US	104
13	France	Italy	96
14	China	Singapore	94
15	Hong Kong	US	92

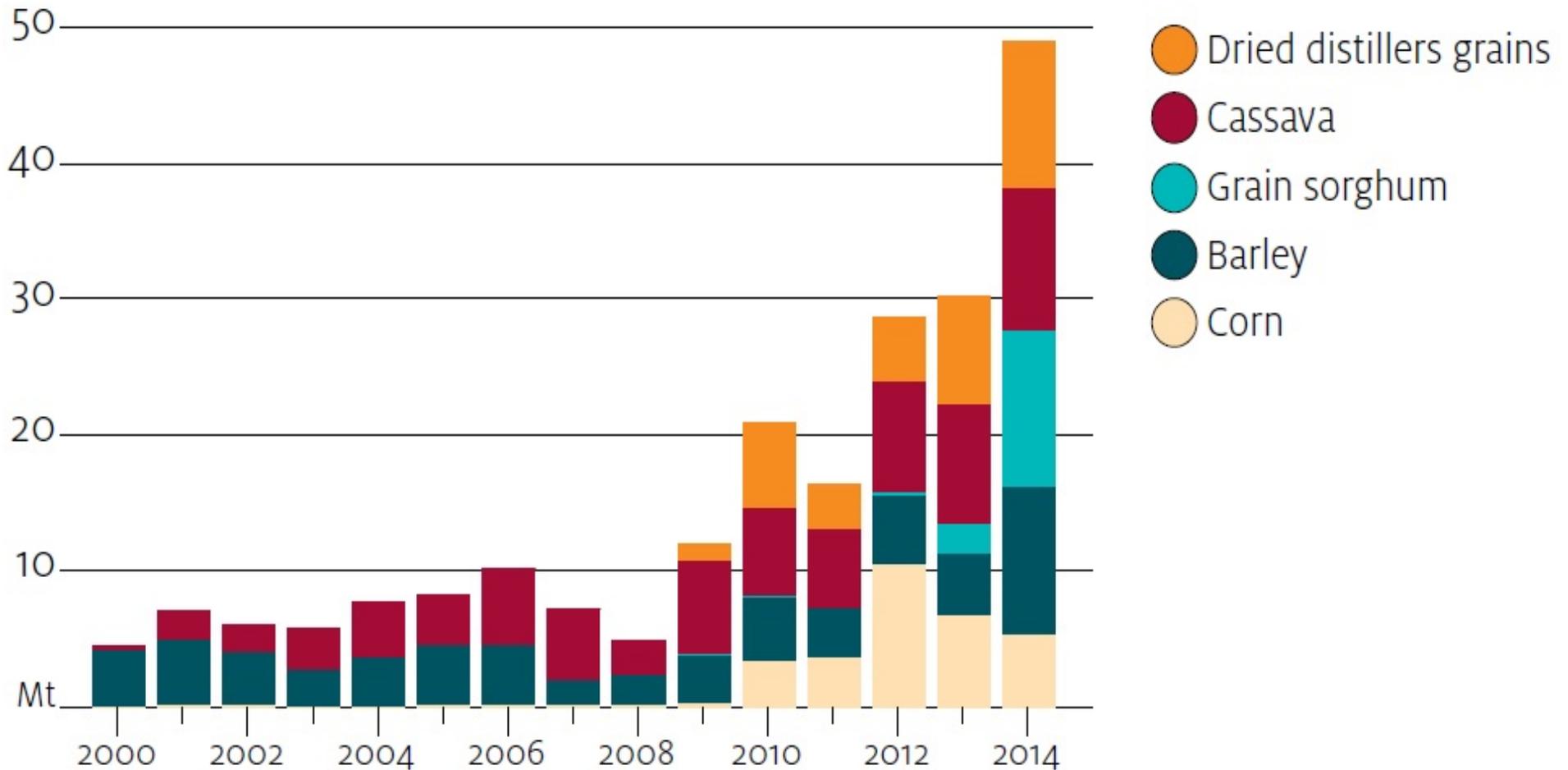
Australia-PRC Bilateral Trade – Global Context

- In 2030, Australia-China trade is expected to remain the tenth largest measured by value, although annual value of trade will increase by US\$80 million.

Ranking	Bilateral trade pair		Projected trade value (2013 US\$ bn)
1	China	US	716
2	China	Japan	390
3	China	South Korea	366
4	Germany	France	277
5	Japan	US	244
6	China	Germany	240
7	China	India	214
8	Germany	US	209
9	China	Singapore	208
10	China	Australia	205
11	China	Malaysia	189
12	China	Indonesia	179
13	Germany	UK	178
14	China	Brazil	165
15	China	Saudi Arabia	164

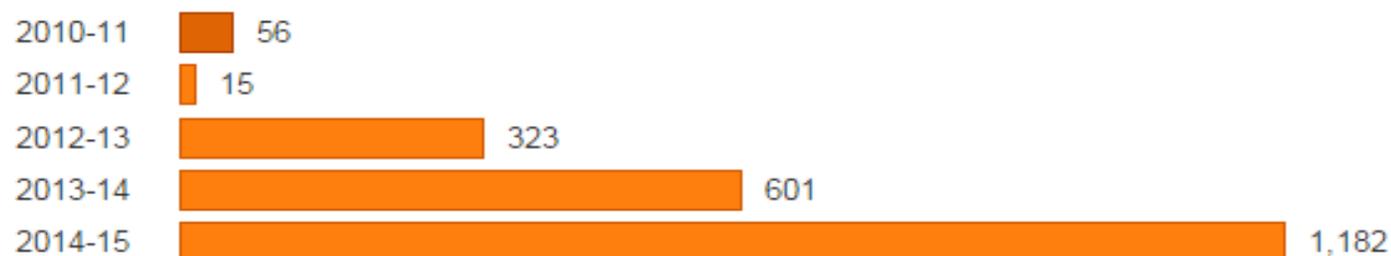
Chinese grain imports since 2000

- Huge increase in volume and diversification in type of grains imported by China (source: ABC)

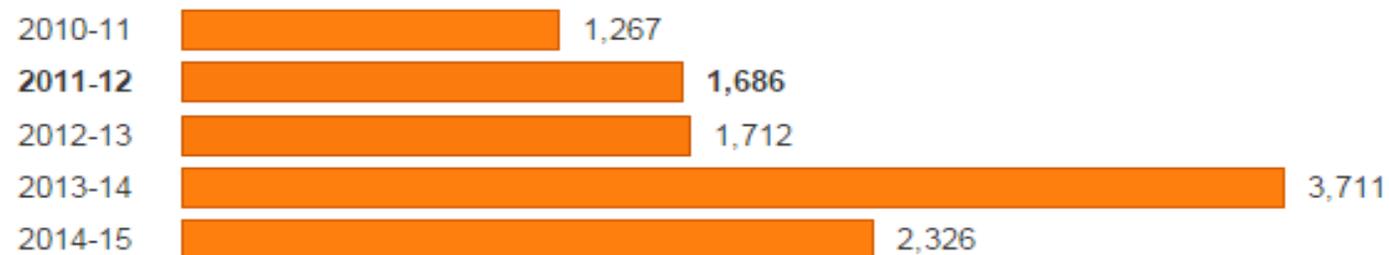


Aus-China grain trade: sorghum and barley

- Australian sorghum exports to PRC ('000 tonnes):



- Australian barley exports to PRC ('000 tonnes):



Grains and oilseeds

International Grains Council price indices
Jan 1st 2010=100



Source: IGC

5-year global wheat prices (US\$) – tradingeconomics.com



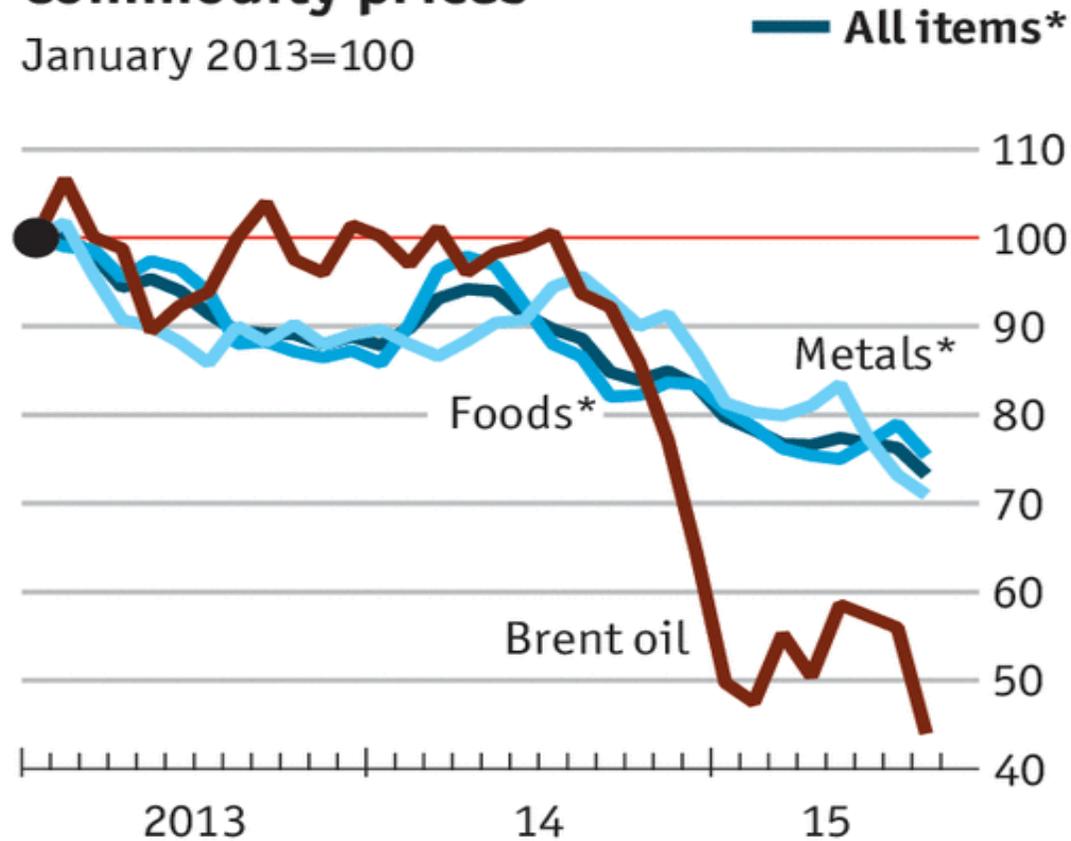
SOURCE: WWW.TRADINGECONOMICS.COM | CBOT

5-year global canola prices



Commodity prices

January 2013=100



Sources: *The Economist*;
Thomson Reuters

**The Economist* price index

The end of the Supercycle? Panamax rates



2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015

Focus on price risk ('price majeure')



Common Industry Clause

If the Force Majeure Event delays or prevents the delivery of the Cargo to the Port area, the:

- a) obligations of the Seller under this Contract will be suspended until the termination of the Force Majeure Event; and
- b) Time during which the Seller is required to effect the delivery will be extended by the same number of business days as the number of business days in respect of which delivery or forwarding of the Goods was so delayed or prevented.



- Change in economic circumstances?
 - Generally, a change in economic circumstances is not an excuse for non-performance.
 - This is so, even if performance is now significantly more expensive than anticipated at the time the contract was made.
 - Courts have consistently refused to apply force majeure to falling/rising markets.
- **Example:**
 - Thames Valley Power Ltd v Total Gas & Power Ltd [2006], where there was a sharp increase in the price of the commodity being supplied, and FM clause containing wording: "If either party is by reason of force majeure rendered unable wholly or in part to carry out any of its obligations ..."*
- Well known freight and commodity markets fluctuate and traders take these risks

- **Example:**

Tandrin Aviation Holdings Ltd v Aero Toy Store LLC [2006]

Court:

"It is well established under English law that a change in economic/market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a force majeure event"

- Buyer of an aircraft sought to justify its refusal to accept delivery (and pay the balance of the purchase price) on the alleged:

"unanticipated, unforeseen and cataclysmic downward spiral of the world's financial markets" thereby triggering the force majeure clause in the contract.

- General words are not sufficient to protect against a "price majeure" situation!
- Party relying on FM must prove:
 - An event falling within the clause
 - Non-performance or delay beyond the party's control
 - Event not reasonably foreseeable at the time of the contract
- Pay attention to the wording of any clause
 - e.g. a supplier prefers "*hindering supply*" over "*preventing delivery*"
- Tactical and commercial considerations
 - Be alert to the notice provisions in the contract:
 - What?
 - When?
 - Is this feasible?

- Commercial resolution:
 - Only grant a concession under reservation of rights in respect of the counterparty's original breach of contract.
 - i.e. in the event of default, 'innocent' party can rely on the breach of contract from the beginning.
 - Extensions usually attract some consideration and are therefore binding, a party would otherwise lose the right to sue on the original terms.



- ‘Without Prejudice’
 - Ensure that a defaulting counter-party is held to be in breach of contract in open correspondence while negotiations/settlement discussions continue on ‘without prejudice’
 - ‘innocent party’ can then rely on its contractual rights.
- N.B. some jurisdictions do not recognise ‘without prejudice’ / open correspondence distinction
- Do continue to perform your contractual obligations
- Insist that any agreed amendments are clearly documented
- Is time of the essence? Restate contractual deadlines

- Multi-tiered dispute resolution clauses – an area to watch.

- Notices / communications between the parties
 - Contractual requirement on language
 - Contractually-allowed method(s) of giving notices
 - Open vs “without prejudice” (无损权益) communications

- Right to set-off
 - Do you have the right to set-off at all?

- Signing of contracts
 - Does the contract require to be signed?
 - Governing law of the contract

Focus on risk: Beware of 'technical breach'

- **Risk:** buyer seeks to terminate contract 'on a technicality'
- Minimise the risk:
 - Comply with **all** strict terms of the contract
 - Respect **all** time limits: eg nominations, shipments periods etc.
 - Comply with **all** contractual specifications



Focus on preventative measures: negotiation stage



- Key issues:
 - Good documents are crucial.
 - Evidence all contractual terms in writing
 - Consider an 'entire agreement clause'
 - Full notes of telephone calls and meeting
 - Email recap of discussions
 - Know your counterparty
 - Effective due diligence - group structure
 - Legal counterparty
 - Authority to sign – name cards, company chops, history
 - Be alert to challenging jurisdictions
 - Enforcement issues
 - Political regimes / sanctions
 - Consider the implications of the law and jurisdiction clause

Focus on preventative measures: specific clauses.

- Consider including some/all of the following to minimise risk:
 - Insolvency clause
 - Events of default clause
 - Rights of set-off i.e. allowing set-off of sums due under other contracts.
 - Rights of termination:
 - Insolvency – Material Adverse Change
 - Termination provision – buyer’s failure to accept shipment in a long term supply contract
 - Price escalation/review provisions: market fluctuations:
 - Price calculation review formula
 - Ensure clear – disputes common

- Types of security:
 - Pledges – security over assets
 - Charge – security over assets (floating/fixed)
 - Legal charge – mortgage
 - Guarantees (corporate or personal) – personal security
 - Set-off agreements – personal security



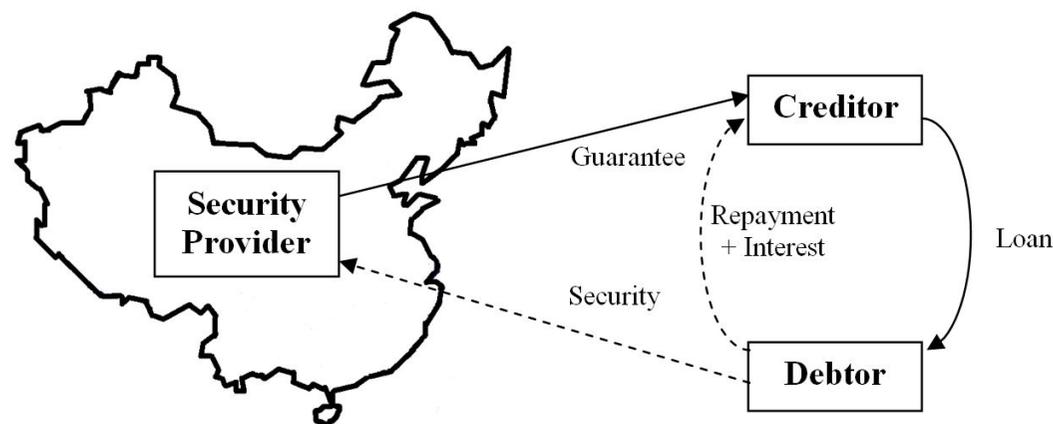
N.B. watch registration requirements and formalities

Cross-border security and guarantee – the new SAFE regulations

- Came into effect on 1 June 2014
- Substantially relaxed the previous restrictions on the giving of cross-border guarantees and security ("**Cross-border Security**")

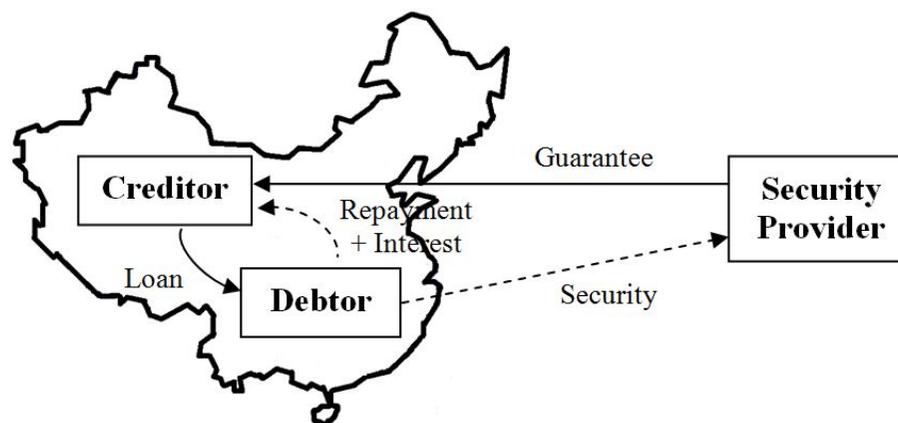
Classification into 3 categories (each with separate guidelines):

(1) Guarantee/security provided by an **onshore guarantor/security provider** for a debt owed by an **offshore debtor** to an **offshore creditor** (**Outbound Security** or “内保外贷”);



- Classification into 3 categories (Cont'd)

(2) Guarantee/security provided by an **offshore guarantor/security provider** for a debt owed by an **onshore debtor** to an **onshore creditor** (**Inbound Security** or “外保内贷”);



(3) Any cross-border guarantee/security other than (1) or (2)

- The previous case-by-case approval requirement is abolished
- Still required to be registered with the local SAFE within 15 days of issuance
- However, the failure to register will **NOT** affect the validity/enforceability of the Outbound Security
- What can an offshore creditor do to ensure the registration of the Outbound Security?
- Consequences to the onshore security provider for failure to register

- Arbitration - the preferred method of commercial dispute resolution
 - Private and consensual process.
 - Freedom of choice of qualified and experienced arbitrators
 - Choice of institution - examples:
 - CIETAC (China International Economic and Trade Commission)
 - China Maritime Arbitration Commission (CMAC)
 - Beijing Arbitration Commission
 - HKIAC (Hong Kong)
 - Grain Trade Australia (GTA)
 - Australian Centre for International Commercial Arbitration (ACICA)
 - SIAC (Singapore International Arbitration Centre)

- Which tribunal should determine a dispute?
- Issue to consider:
 - Commercial strength
 - Cost
 - Arbitrators
 - Fair determination?
 - Rules of evidence?
 - Ease of enforcement?
- Arbitration is covered by a parallel regime – notably, the New York Convention.
- New York Convention provides for mutual recognition and enforcement of awards from, and between, 120+ contracting states:
 - Includes: Hong Kong, PRC, Australia, Singapore, Indonesia, Japan
 - Refusal to enforce only in limited circumstances, eg invalid arbitration agreement, or no opportunity to present case, or against public policy

- “Foreign arbitral awards” for the purpose of enforcement in China:
 - Awards enforceable under the New York Convention (NYC)
 - Awards not enforceable under the NYC
 - Awards made in Hong Kong, Macau or Taiwan

- Both Australia and Singapore are contracting states to the NYC

- The Memorandum of Understanding Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and HKSAR signed in 1999 (and announced by the Supreme People’s Court in 2000)

- Between 2010 and 2014, the Chinese Courts did not refuse to enforce any HKIAC Awards

- Chinese government's “*active and supportive policy*” towards the recognition and enforcement of foreign arbitral awards –
 - Jurisdiction of the Intermediate People's Court (IPC)
 - The “reporting system” established in 1995 – in effect, the IPC can only refuse recognition or enforcement with the agreement of the Supreme People's Court (SPC)
 - SPC issued regulations in 1998 – IPC to render rulings on whether to recognise/enforce an Award within 2 months after acceptance of the case; after an Award is recognised, the enforcement of the Award has to be completed within 6 months of the ruling

Enforcement of foreign arbitral Awards in China (3)

- The IPC may review foreign arbitral awards, but only of a procedural nature without examining the merits
- Seven grounds for refusing recognition/enforcement under the NYC
- The grounds for refusing recognition/enforcement of Hong Kong Awards mirror those applicable to NYC Awards
- In recent years, cases suggest a positive trend that the Chinese Courts are adopting a pro-enforcement attitude
- Time limit to apply for recognition/enforcement – 2 years

- Hong Kong – HKIAC
- User-friendly forum for international dispute resolution.
- Arbitration with minimal court intervention.
- Final and binding – Cap.609 adopted Model Law position on appeals.
 - Appeals from arbitration in very limited circumstances only.
- Enforcement in China
 - Special arrangement for enforcement of Hong Kong awards
 - Pre-reporting procedure

Conclusions:

- Do take default seriously at the outset.
- A fall in the market prices, even if dramatic, not a defence.
- Avoid committing technical breaches.
- Don't forget to mitigate.
- Do defend your position with appropriate protective clauses.
- Comprehensive due diligence:
 - Counterparty and place of performance
 - Law and jurisdiction
 - Enforcement
- Do keep a constant eye on your market drivers.

And to end with ...



“Stock prices have reached what looks like a permanently high plateau”

Irving Fisher

(3 days before the 1929 market crash)

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