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The Perils of Partnering Abroad:

Ways to Avoid International Disputes, or At Least Minimize Their Danger Once They Have Arisen

Pieter H.F. Bekker, Partner, New York (pbekker@mwe.com)
B. Ted Howes, Partner, New York (bhowes@mwe.com)
McDermott Will & Emery LLP

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Today's Topics:

I. Litigation or arbitration? Which do you choose for international contracts?

II. How do you draft clauses to minimize the risks of litigation/arbitration and deter frivolous claims?

III. One overlooked method to shorten the international arbitration process: Bifurcation and the vehicle of summary disposition

IV. Dealing effectively with state-owned entities

V. Remedy maximization: How to profit from investment protection treaties

VI. China focus: Minimizing the danger of disputes with Chinese parties

I.
Litigation or Arbitration? Which do you choose for international contracts?

Poll

- **Question**: What dispute–resolution mechanism do you prefer to include in your international commercial contracts?
  - (**A**) Litigation
  - (**B**) Arbitration
  - (**C**) Other
  - (**D**) Don't Know

Disadvantages of Arbitration

- Common complaints:
  - Risk of Compromise Awards (“Splitting the Baby”)
  - Lack of Discovery
  - Lack of Summary Procedures
  - Jury Trial Not Available
  - Lack of Appeal
- Valid to consider in purely domestic disputes

BUT. . .

In International Contracts, the Advantages of Arbitration Far Outweigh the Disadvantages

Advantages of Arbitration over Litigation In International Commercial Contracts

Non-Distinctive Advantages:

- Speed
- Cost
- Privacy/Confidentiality
- Expertise/Characteristics of the Decision Maker(s)
  - Some added importance in international arbitration: language, nationality, etc.

Advantages of Arbitration over Litigation In International Commercial Contracts (cont.)

MORE important advantage: Neutrality

- Neutral Playing Field
  - Third-party country
  - No home-nation advantage
- Neutral Decision Maker(s)
  - Most arbitration rules require sole arbitrator or three-person Tribunal Chairperson to be of neutral nationality
  - Watch the choice of situs – it may dictate the Chairperson's nationality!

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Advantages of Arbitration over Litigation In International Commercial Contracts (cont.)

MOST important advantage: Enforceability

- 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- Multinational treaty by which signatory nation states agreed both to refer parties to arbitration when a dispute is subject to a written arbitration agreement (i.e., to prohibit their local courts from adjudicating such disputes) and to recognize/enforce foreign arbitration awards
- As of September 2007, 142 countries have ratified the New York Convention
- No comparable treaty for the enforcement of court judgments abroad
- Conversely: Do NOT arbitrate with any party that is from a nation that is not a signatory to the New York Convention (or whose assets are located in a non-treaty country)
- Scoreboard of adherence to NY Convention: <www.cailaw.org/ita>

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Conclusion:

A fundamental initial way to avoid or minimize international disputes is to agree to arbitration in your international contracts

- Causes adversary to worry far more about consequences of contractual breach
- Deters gamesmanship in the courts
- Increases predictability of result and, with it, chances of reasonable settlement

II.
How do you draft arbitration clauses to minimize the risks of arbitration and deter frivolous claims?

Two Steps

- Merely agreeing to arbitration is not enough
- How one drafts the arbitration clause is also critical to avoiding, or minimizing, future international disputes
  - **Step 1**: clause must be drafted to be enforceable and workable
  - **Step 2**: consideration of optional provisions designed to deter future disputes

Step 1

Step 1: Drafting an Enforceable, and "Workable", International Arbitration Clause

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Dangers of a Poorly-Drafted International Arbitration Clause

- May preclude arbitral jurisdiction altogether
- At very least, will lead to court challenges and added legal fees
- A defective arbitration clause is worse than a litigation forum-selection clause

Essential Provisions (must be included to make arbitration clause enforceable)

- Scope of Dispute to be Arbitrated
- Exclusivity of Arbitration as Dispute-Resolution Mechanism
- Reference to Applicable Arbitration Rules

Scope of Dispute to Be Arbitrated

- Clause must specify what disputes will be subject to arbitration
- Except in the rarest of circumstances, clause should cover “any and all disputes arising under or in connection with” the contract
- Piecemeal dispute clause is a recipe for conflict down the road

Exclusivity

- For arbitration clause to be enforceable, it must provide that arbitration is the exclusive dispute resolution mechanism
- Beware the distinction between "may" and "shall"
  - "any disputes arising under or in connection with this contract may be settled by arbitration" → unenforceable
  - "any disputes arising under or in connection with this contract shall be settled by arbitration" → enforceable

Reference to Applicable Arbitration Rules

- Every arbitration clause must refer to and incorporate procedural rules to govern the arbitration
- Procedural rules are distinguishable from the substantive law governing the contract
- Two Options:
  - Incorporate the procedural rules of a specific international arbitration organization (recommended approach)
  - “Ad hoc” arbitration (generally not recommended)

Reference to Applicable Arbitration Rules (cont.)

- Which international arbitration organization do you choose for your arbitration clause?
- Not a critical choice, but some strategic considerations:
  - ICC: Most established and respected organization; best bet
  - LCIA: Good choice for large dollar disputes
  - AAA: Not just for American disputes
  - SCC and SIAC: Better for regional disputes
  - ICSID: Specialized rules applying only to investment disputes between a state and a national of another state

Highly-Recommended Provisions (should be included to make arbitration clause "workable")

- Place (or "Situs") of Arbitration
- Number of Arbitrators and Selection Procedures
- Applicable Substantive Law
- Language of the Arbitration
- Entry of Judgment Stipulation
- Provisional/Injunctive Relief
- Waiver of Appeal

Step 2: Consideration of Optional Provisions to Deter or Minimize Future Disputes

Guidelines for Optional Provisions

- Optional provisions are not essential to enforceability or workability of the arbitration clause
- But certain carefully-crafted optional provisions can, on a case-by-case basis, help to deter or minimize disputes down the road
- Be careful not to "overload" an arbitration clause with too many optional provisions

Negotiation or Mediation as Precondition to Arbitration

- Arbitration clause can be drafted to require the parties to engage in mandatory negotiation, conciliation and/or mediation of their dispute prior to the commencement of arbitration
- Advice:
  - To avoid one party abusing the negotiation/mediation process as a means to delay arbitration, set strict and short deadlines
  - Make sure that arbitration is mandatory -- not optional -- following the conclusion of any unsuccessful negotiation or mediation ("shall," not "may")
  - Require executives with decision-making authority to engage in any negotiations

Sample “step clause”

“The parties shall attempt to resolve any dispute arising out of or in connection with this Agreement (the ‘Dispute’) pursuant to the procedures specified below.

1. Negotiation

When a Dispute arises and negotiations between the regularly responsible persons have reached an impasse, either party may give the other party written notice of the Dispute. In the event such notice is given, the parties shall attempt to resolve the Dispute promptly and amicably by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for the matter. Within [7] days after delivery of this notice, the receiving party shall submit a written response. Thereafter, the executives shall promptly confer in person or by telephone to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored by the other.

Sample "step clause" (cont.)

2. Mediation

If the Dispute has not been resolved by negotiation within [20] days of the complaining party's notice, the parties shall endeavor to settle the dispute by non-binding mediation under the [e.g., the CPR Mediation Procedures] in effect on the date of this Agreement. The place of mediation shall be [city, country]. Unless otherwise agreed, the parties will select a mediator from [e.g., the CPR Panels of Distinguished Neutrals].

All negotiations and proceedings pursuant to paragraphs 1 and 2 above shall be confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality protections provided by applicable law. Further, all applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in paragraphs 1 and 2 of this Agreement are pending. The parties shall take any actions required to effectuate such tolling.

3. Arbitration

If the Dispute has not been resolved by mediation as provided herein within [60] days of the initiation of such procedure, such Dispute shall be finally settled by arbitration under the Rules of Arbitration of . . . [insert rest of arbitration clause]."

Deadlines and Time Limits

- While it may seem like a good idea to impose inflexible time deadlines on an arbitration, this is not recommended
  - Any deadline not met could lead to court challenges
- Deadlines should be subject to extension in the reasonable discretion of the arbitrators
- Example: "The parties agree that, except in extraordinary circumstances, the arbitration award shall be issued within six months of the date of the Request for Arbitration. However, the parties may jointly agree in writing to extend this deadline, or the arbitration Tribunal may unilaterally extend this deadline in its sole discretion if it determines that this is required in the interests of justice."

Discovery Provision

- Discovery in international arbitration is very limited
- Parties can nonetheless draft arbitration clauses to permit whatever discovery they want: depositions, expert reports, interrogatories, requests for admission, etc.
- Example: "Prior to the final arbitration hearing, each party shall be entitled to (i) depose under oath no more than five of the other party's witnesses, (ii) serve no more than 30 interrogatories on the other party (including sub-parts) and (iii) serve no more than 25 requests for admission on the other party. All such discovery shall be conducted in accordance with the U.S. Federal Rules of Civil Procedure. Any witness that has been requested for deposition by one party, but not produced by the other party, shall not be entitled to submit any testimony in the arbitration."

Discovery Provisions (cont.)

- In general, added discovery is not recommended in arbitration
- But discovery provisions can, if carefully crafted, help to deter future disputes
- Consider your client's position in the event of a future contractual dispute, and ask yourself:
  - Will my client likely be making a claim, or defending against a claim?
  - Who is likely to have more documents and/or witnesses to examine?
  - Will my client likely have more or less money than the other side at the time of any dispute?
  - Is discovery obtainable in the home state of the other party?

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Shifting of Legal Fees and Costs Between the Parties

- Under most international arbitration rules, arbitrators have the discretion -- but not the obligation -- to order the losing party to pay the attorneys' fees and costs of the prevailing party
- In practice, arbitrators are reluctant to shift fees/costs except when losing party takes position in bad faith
- Through appropriate language in the arbitration clause, you can make the award of fees/costs mandatory:
  - "The arbitrator(s) shall award all costs and expenses incurred by the prevailing party in the arbitration, including all administrative fees, reasonable attorneys' fees and expert witness fees, to the prevailing party."
- Premise: A party who knows it will have to pay the other party's legal fees is less likely to assert frivolous claims or defenses

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Limiting or Permitting Certain Types of Damages

- Limitations on Consequential damages
  - Recommended if your client is selling a business under the contract
  - Example: "The arbitrations are precluded from considering or awarding any consequential or indirect damages to any party in any arbitration conducted hereto."
  - Avoids large-dollar claims and, thus, can promote settlement
- Permitting Punitive Damages
  - Generally not permitted in arbitration
  - Parties can nonetheless agree to empower the arbitrators to award punitive damages
  - Practical way to deter bad-faith conduct by other party and, thus, avoid disputes

Security Provisions

- Arbitrators lack the power to order one party, at the commencement of an arbitration, to deposit funds into an escrow account to cover a potential, future arbitration award in the other party's favor.
- If you are concerned that the other party may try to hide its assets to avoid any future arbitration award, you may consider adding a security provision to the agreement.
- Options:
  - Purchase price hold-back provision (when your client is purchasing an asset from the other party)
  - A provision requiring the other party to deposit a certain fixed sum, in an interest-bearing escrow account, either (1) at the time of contract for a fixed period of time and/or (2) in the event that your client commences an arbitration against the other party

Security Provisions (cont.)

- Example: "Upon the appointment of the complete arbitration Tribunal, [adversary] shall be ordered and required, upon [client]'s application to the Tribunal, to make a security deposit in the amount of $_____ to cover part or all of any future arbitration award that may be rendered in [client]'s favor. This security deposit shall be held by [name of arbitral organization] in the same manner that it holds deposits from the parties covering costs of the arbitration and, in the event an arbitration award is rendered in [client]'s favor, [name of arbitral organization] shall release all or such portion of the security deposit to [client] as may be necessary to satisfy the amount of the award (in the event the arbitration award exceeds the amount of the security deposit, the entire security deposit shall be released to [client] and the remaining balance shall be paid by [adversary]). It is understood and agreed that the above-identified sum is merely a provisional security fund, and does not represent a limit on the amount of damages that [client] would be entitled to seek or recover in any arbitration. The above-identified sum is neither intended to be a liquidated damages penalty nor an estimate of the damages that would be due [adversary] in the event of a breach of this contract."

- Adversary may refuse to abide by provision, but at risk of angering the arbitration organization or the Tribunal.

III.
One overlooked method to shorten the international arbitration process: Bifurcation and the vehicle of summary disposition

Availability of Procedural Devices to Dismiss Adversary's Claims

- Motions to dismiss and summary judgment motions are generally not permitted in international arbitration rules
  - Most rules are silent on such procedural devices
  - Most rules obligate arbitrators to hold evidentiary hearings
  - Example, ICC Article 20(2): "After studying the written submissions of the parties and all documents relied upon, the Arbitration Tribunal shall hear the parties together in person if any of them so requests. . . ."
- Strong tradition for international arbitration Tribunals to hold an oral hearing on all issues, and reach one decision on the merits of all claims/defenses, at end of case
- Result: Sometimes unnecessarily prolonged process

Availability of Procedural Devices to Dismiss Adversary's Claims (cont.)

- Chances of obtaining summary disposition of claims in international arbitration are better than one might expect
- Most international arbitration rules give arbitrators wide discretion to conduct the arbitration
  - ICC Art. 20(1): "The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."
  - LCIA Artic. 14.2: "The Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration."

Availability of Procedural Devices to Dismiss Adversary Claims (cont.)

- Most international arbitration rules also empower arbitrators to "bifurcate" the proceeding and, thus, decide certain issues first
  - LCIA Art. 26.7: " The Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal."
  - ICDR Art. 16(3): "The tribunal may in its discretion. . . bifurcate proceedings. . . and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."
- Lesson: Don't let tradition stand in the way of a good motion to dismiss

Recommended Strategy for "Motions to Dismiss"

1. Identify the claims of your adversary (if any) that are susceptible to dismissal as matter of law or undisputed fact
   - Example: claims barred by statute of limitations
   - Example: claims prohibited by the unambiguous wording of contract
2. Seek bifurcated decision on such claims by written application to the Tribunal as early as possible
3. Be prepared to consent to a limited evidentiary hearing, even for claims you believe are dismissible as matter of law

Recommended Strategy for "Motions to Dismiss (cont.)

- What's to lose?
  - If the arbitration Tribunal gives you permission to make motion to dismiss, you may knock out your adversary's case early on, or at least knock out a large and frivolous claim (and perhaps induce settlement)
  - If Tribunal refuses on technical/tradition grounds, your request will at least serve to highlight the weakness of adversary's claim to the panel
  - Little harm in trying

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Recommended Strategy for "Motions to Dismiss" (cont.)

- Only way to insure the availability of motion to dismiss device is to draft the right directly into the arbitration clause.
- Example: "The arbitration Tribunal shall have the authority to hear and determine, in a preliminary phase of the arbitration, any issue of law asserted by any party to be dispositive, in whole or in part, of any claim, including any assertion that any claim is not timely by reason of the applicable statute of limitation or otherwise, pursuant to the filing of motions to dismiss or other such procedures as the arbitration Tribunal may deem appropriate in its discretion. The parties agree that any award rendered by the arbitration Tribunal in such a preliminary phase of the arbitration will be final and binding on the parties, and not subject to appeal, even if the award disposes of all of the claims in the arbitration."

IV.
Dealing effectively with state-owned entities

Two basic questions when dealing with sovereign states or state-owned entities

- (1) Is recourse ***available***?

  Do you have a valid arbitration agreement with the appropriate state party?

- (2) Will an eventual award be ***enforceable***?

  An award is useless if it cannot be enforced by the foreign investor

1. Availability of a remedy

- Litigation or arbitration?
- Depends on jurisdiction (nexus with forum) & consent
- Arbitration with privity: Institutional or *ad hoc*?
- Take what you can get!
- Always include a fall-back agreement. Example:

  "In the event that, for any reason, [arbitration institution A] or any tribunal operating under its auspices denies jurisdiction with regard to any dispute, then such dispute shall be subject to arbitration according to the rules of [arbitration institution B]"

2. Enforceability

- An award against a sovereign state or a state-owned entity is useless if:
  - there are no courts willing to give effect to the award obtained against the sovereign party, or
  - there are no assets available for enforcement

2. Enforceability (cont.)

- Have the countries involved ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards?
- Importance of the place of arbitration
  - Select a neutral seat (e.g., Switzerland; France)
  - Avoid agreeing on a seat within the host State
- Importance of the chosen law
- Neutralize potential local anti-arbitration injunctions

2. Enforceability (cont.)

- Every contract with a State entity should include a comprehensive waiver-of-immunity clause. Example:

  "To the extent that [State entity] may in any jurisdiction claim for itself or any of its agencies, instrumentalities, assets, properties or revenues immunity from service of process, suit, jurisdiction, execution, discovery relating to any issue of immunity, attachment (whether in aid of execution, prior to judgment or award or otherwise) or other legal or judicial process or other remedy, and to the extent that in any such jurisdiction there may be attributed to [State entity] or any of its assets, properties or revenues such immunity (whether or not claimed), [State entity] hereby irrevocably and unconditionally waives any and all such immunity to the fullest extent nor or hereafter permitted by the laws of such jurisdiction. [State entity] consents generally for the purposes of the State Immunity Act of 1978 of the United Kingdom to the giving or any relief or the issue of any process and agrees that the waivers set forth in this clause shall have the fullest scope permitted under the Foreign Sovereign Immunities Act 1976 of the United States of America or the sovereign immunity law of any other relevant jurisdiction and are intended to be irrevocable for purposes of such Acts or such law, as the case may be. The parties hereto agree that this agreement and all the transactions contemplated hereunder constitute and shall be deemed to constitute purely private and commercial activities."

2. Enforceability (cont.): Due Diligence at the Drafting Stage

- Does the State entity have the requisite authority and capacity to enter into an arbitration agreement and to waive immunity by contract?
  - Authority: Power of Attorney
  - Capacity: Reaffirm in the contract
  - Obtain independent Legal Opinion
- Importance of the State entity's municipal law procedures & formalities re approvals/authorizations
- Include an express acknowledgment preventing the State entity from claiming procedural irregularities later
  - Sample Covenant: "Following the due execution of this Agreement, [State entity] agrees not to invoke the provisions of the internal law of [State] as justification for its failure to perform any obligation assumed hereunder (including, without limitation, its obligations under the Dispute Resolution and Waiver of Immunity clauses included in this Agreement)."
- Clearly define the entities covered by the contract in the "Definitions" section

V.

Remedy maximization: How to profit from investment protection treaties

Arbitration "without privity"

- Check to see whether the jurisdictions involved are parties to any bilateral or multilateral treaties from which you may be able to profit
- There is a difference between signing a treaty and ratifying it!
- "Mixed" investor-State disputes: Direct recourse in investor's own right for treaty-based claims (distinguish contract-based claims)

Poll

- **Question**: To what extent does the existence of an investment protection treaty influence your company's decision on which market to invest in?
  - (**A**) A very great extent
  - (**B**) A limited extent
  - (**C**) Not at all
  - (**D**) Don't know

“Treaty Shopping” & Deal Structuring

Strategic structuring can ensure that an investment benefits from the protection of an effective investment treaty should a dispute arise between the investor and the host State

"Treaty Shopping" & Deal Structuring (cont.)

Example: Partnering in the East African Union

Question: Where do you domicile your investment vehicle?

- Kenya: BITs with Germany (D), NL, UK
- Uganda: BITs with D, I, NL, CH, UK
- Tanzania: No BITs
- Rwanda: BITs with Belgium & D
- Burundi: BITs with D, UK & Mauritius

Treaty-based Recourse: The Options

- Options based on source of protection: Multilateral or Bilateral?
- Difference in procedural context:
  - Largely controlled by public international law
    - E.g.: ICSID (World Bank) & PCA arbitration
  - Largely controlled by commercial law
    - E.g.: ICC etc.; ICSID Additional Facility

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Recourse Under Multilateral Investment Treaties (MITs)

Example: NAFTA (Canada, Mexico, and U.S.)

- Guarantees treatment “in accordance with international law” (NAFTA Article 1105)
- “Chapter 11” arbitrations by investors against host States
- Involving decisions of local as well as federal authorities terminating or otherwise interfering with an investment
- Decisions of domestic courts are attributable to the country in which they sit
- Awards are subject to the 1958 New York Convention

Multilateral Investment Treaties (cont.)

Example: The Energy Charter Treaty (ECT)

- <www.encharter.org>
- Came into force on April 16, 1998
- Parties are most countries of Europe and CIS
- Includes protection in respect of any investment of an Investor of one contracting party associated with an "economic activity in the energy sector"
- Provides for Investor-State settlement of investment disputes, among others through binding international arbitration, at the initiative of the Investor (Article 26)
- Four arbitral options:
  - ICSID (World Bank) arbitration
  - ICSID Additional Facility arbitration (if either home of host State of Investor is not a party to the ICSID Convention)
  - *Ad hoc* arbitration pursuant to the UNCITRAL Arbitration Rules
  - Arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce

Recourse Under Bilateral Investment Treaties (BITs)

- Treaties between two countries aimed at promoting foreign investments and providing reciprocal protections for foreign investors
- Over 2,200 BITs concluded
- Differing definitions (investment; investor)
- Differing procedural and substantive laws
- Differing time periods
- Applicability of exhaustion of local remedies rule?
- Nationality is key: structuring the deal

Recourse Under BITs (cont.)

Modes of international arbitration under BITs:

- *Ad hoc* arbitration under the Arbitration Rules of the UN Commission on International Trade Law (UNCITRAL)
- Administered arbitration by a variety of institutions (AAA/ICDR; ICC; LCIA; Stockholm; etc.)
- World Bank's International Centre for Settlement of Investment Disputes (ICSID)
  - Double keyhole: BIT jurisdiction + ICSID jurisdiction
  - Scoreboard of adherence to ICSID Convention: <www.cailaw.org.ita>
  - Strategic deal structuring to satisfy key conditions: "investment" & "national"
  - ICSID awards are binding and not subject to appeal
  - Each Contracting State, whether or not a party to the dispute, is required by the ICSID Convention to enforce the pecuniary obligations imposed by an ICSID award as if it were a final judgment of the State's courts

Recourse Under BITs (cont.)

Common types of claim (remedies):

- The host State failed to guarantee “fair and equitable treatment”
- The host State expropriated a foreign investment without payment of prompt, adequate, and effective compensation

Non-Treaty Consents to Int'l Arbitration

- National investment laws/statutes sometimes provide advance consent to international arbitral jurisdictions
- A reference to a BIT in the governing law clause of a contract may constitute consent to the ICSID arbitration that the BIT provided for
- Access through most-favored-nation clauses of other treaties

Having More Than One Bite at the Apple

- If the investor has initiated domestic litigation or contractual arbitration, does it still have available the alternative of treaty arbitration?
- Treaty claim or contract claim?
- Forum shopping

VI.
China focus: Minimizing the danger of disputes with Chinese parties

Problems in Resolving Disputes with Chinese Entities

- Litigating in U.S. courts normally not an option
  - Chinese contracting entities normally do not hold assets overseas
  - Chinese courts have no obligation to enforce U.S. court judgments
- Litigating in Chinese courts is the worst option
  - Judges not independent
  - Governmental interference, especially at local level
  - Low damage awards

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Problems in Resolving Disputes with Chinese Entities (cont.)

- Arbitration inside mainland China (not including Hong Kong) is also a bad option
  - Only Chinese arbitral institutions permitted to administer arbitrations inside mainland China
  - Rules of the Chinese International Economic and Trade Arbitration Commission ("CIETAC") favor Chinese parties
  - Chinese courts can modify, or reverse, a "foreign-related" arbitration award rendered inside mainland China
    - Although China is a signatory to the New York Convention, no obligation to enforce arbitral awards rendered inside mainland China
    - Thus: effective right of Chinese party to appeal to local judges!

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Problems in Resolving Disputes with Chinese Entities (cont.)

- Arbitrating outside mainland China: the best of several bad alternatives
  - Fact: Chinese courts frequently refuse to enforce foreign arbitral awards based on expansive views of the exceptions to the New York Convention
  - But: Chinese courts getting better
    - Arbitration Research Institute survey: 71% of foreign arbitration awards are enforced in Chinese Courts (in some manner)
    - 1995 Chinese law requires Supreme People's Court to review all local court judgments refusing enforcement of foreign arbitral awards
- For now, Hong Kong is as safe a situs as other foreign New York Convention states
  - "Special arrangement" reached between Beijing and Hong Kong in 2000
  - Hong Kong award may even get more deference from Chinese Courts

Strategy for Safest Chinese Dispute-Resolution Mechanism

- If Chinese entity has fixed and sufficient assets in U.S., consider mandatory U.S. court forum-selection clause
- If not, number one negotiation goal: avoid agreeing to arbitration inside mainland China
- Also, if possible:
  - Avoid Chinese law (New York or English law preferable)
  - Consider security provision
  - Obtain assistance of U.S. firm with China presence

Strategy for Safest Chinese Dispute-Resolution Mechanism (cont.)

Recommended: Three-step negotiation process

1. Starting negotiating position: demand arbitration in U.S. or Europe under Rules of ICC or other western institution
2. Assuming Chinese party responds by demanding CIETAC arbitration in mainland China, negotiate "compromise" solution: arbitration in Hong Kong under the HKIAC rules
    - Alternative compromise: Arbitration in Singapore under the SIAC Rules

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Strategy for Safest Chinese Dispute-Resolution Mechanism (cont.)

3. If Chinese party is adamant, and you lack leverage to negotiate different result, agree as last resort only on CIETAC arbitration inside mainland China, but with following protections:
   - Demand arbitration in English language (to offset CIETAC default rule of Chinese language)
   - Demand that arbitral Chairperson be of neutral nationality (CIETAC allows and routinely appoints Chinese Chairpersons)
   - Demand right to select arbitrators outside the official CIETAC "Panel" of arbitrators
   - Demand flexible extension to six-month award deadline