Arbitration and IP for EU SMEs

What Is Arbitration?
Arbitration is a private method of resolving disputes that provides an alternative to litigating in front of a state court.

How does it work?
- Parties should clearly stipulate which disputes they want to resolve through arbitration.
- It is essential to designate a specific, domestic arbitration institution, as it is required by Chinese law.
- It is recommended to include an arbitration clause in the contract; sample clauses are offered free of charge by arbitration institutions.

Advantages
- **Neutrality**: One major advantage of arbitration is increasing the neutrality in resolving disputes.
- **Expertise**: Arbitration offers a high level of expertise on the side of arbitrators.
- **Confidentiality**: Proceedings and arbitral awards are confidential.
- **Flexibility**: Parties can design how they would like their arbitration proceeding to look like.
- **Finality**: An arbitral award rendered by arbitrators is normally final and binding upon the parties.
- **Enforcement**: The New York Convention obliges the signatory states to recognize and enforce arbitral awards.

Disadvantages
- **Limited reach of arbitration**: An arbitration agreement binds only the parties subject to it, and some disputes cannot be resolved through arbitration (i.e. the validity of patents and trademarks).
- **Lack of appeal**: The finality of arbitration and the lack of appeal can be sometimes seen as a disadvantage, preventing some companies from entering such an agreement.
Arbitration procedure

In the context of Sino-foreign disputes, a couple of things need to be taken into account before making the choice.

**Selection of Institution**

Generally, parties can choose the arbitration institution they prefer most. However, in some cases you may have to arbitrate in China with a Chinese institution (i.e. if the SME uses a company registered in China or the other party in the dispute is Chinese).

SMEs should take into account that arbitrating outside of China can result in higher costs than arbitrating with a Chinese institution.

**Options for Arbitration in China**

- China International Economic and Trade Arbitration Commission (CIETAC).
- Beijing Arbitration Commission/Beijing International Arbitration Centre.
- Shanghai International Arbitration Centre.

Other common choices for Sino-foreign disputes are Hong Kong and Singapore.

**Procedure**

1. The claimant files a request.
2. The respondent files its response to the request.
3. The parties select their arbitrators.
4. Hearing.
5. The arbitrators make a decision and render an arbitral award.

**Special Features of Arbitrating in China**

- It is mandatory to designate a Chinese arbitration institution for the arbitration agreement to be valid.
- Strong element of mediation between the parties.
- Arbitral awards should be rendered within 6 months after the tribunal of arbitrators is formed.

**Key Take-Away Messages**

To arbitrate, you need an arbitration agreement

Arbitration is a consensual method and if you want to use it, you must have an arbitration agreement with the party against which you will seek to enforce your rights. It is much easier to agree to arbitration at the stage of negotiating and drafting of the entire contract, as opposed to when the dispute already exists.

Drafting of an arbitration agreement is essentially important

An arbitration agreement needs to have a number of important elements to be valid. For an arbitration in China, you specifically need to designate a Chinese arbitration institution. If you are not sure how to draft an arbitration agreement, use sample clauses provided by arbitration institutions or consult a specialist. Badly drafted clauses can lead to problems.

Select a reputable arbitration institution

Whether in China or elsewhere, choose a major, reputable institution that will be able to support your proceeding well. CIETAC, BAC/BIAC or SHIAC can be some of your choices in China. If you consider the options beyond China, make sure first that your dispute can be arbitrated outside of China at all.

Arbitrating in China can be a good solution

Arbitrating in China does not have to be something to be afraid of. You can have a good level of control over the proceeding through a careful drafting of an arbitration agreement. Quite to the contrary, arbitrating in China can have its benefits that can be missed when arbitrating outside of the country. This will be the case when, for example, the access to interim measures is sought.