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Why is it Dangerous to Exclude Arbitration as an Option? *

- Checklists and Comments Series for ACC Members –

Source:	German Law Firm Brödermann Jahn (Hamburg)
Series:	**Risk Management by Tools of International Commercial Law**
Sub-Series:	**Bridging between Common and Civil Law**
General Topic:	**Arbitration**
Categories:	Lead your Business (Risk Management)
Level:	Basic (*) – Intermediate (**) - Green (***)
Date of Release:	11 May 2017 DRAFT

*Disclaimer: This article is meant to **contribute to a discussion** (quasi as during an ACC conference). It does not replace legal advice. It is neither an academic nor comprehensive contribution, but rather an **expression of opinion** based on 30 active years experience from different perspectives in the changing world of international arbitration.*

Key "Take-Aways" for the Reader

This article addresses those who are **arbitration sceptics** (e.g. who tend to delete arbitration clauses).

Not agreeing to arbitration **can constitute professional negligence**, for example, if a ruling of the court with jurisdiction is not enforceable while an arbitration award would be enforceable (e.g. between Israel and Mexico; or Germany and China).

Done well, arbitration **can be quicker and more cost efficient**. There are ample examples. Also, with an arbitration clause it is possible to create a dispute resolver trained and capable of bridging cultural differences.

Categorically dismissing arbitration is therefore negligent. If you do not use arbitration under the specific circumstances of your case, it should be a **deliberate decision**.

Dear Reader,

Since antiquity, arbitration has been **a tool of commercial freedom** (as enshrined e.g. in Article 210 of Napoleon's Constitution of 1795). Many companies do not attain that freedom because they **do not concentrate on the tool of arbitration** and/or remain optimistic that arbitration won't be necessary. This attitude has proven costly for some companies, enduring several instances of state court litigation and then being unable to enforce a judgement.

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This contribution has been written following a **discussion with one of you at the ACC meeting 2017** in Lisbon. It was also written for those companies who have had **bad experiences** in their company history, or for lawyers who are **arbitration-sceptics** and tend to delete an arbitration clause when they see one.

Some things do change over time. Ignorance of the new tools of arbitration is no excuse to adhere to established behaviour. The world of arbitration may have changed since you last took the time to concentrate on this issue. There is a reason to take a fresh look at the matter.

1. With globalisation, arbitration has developed **multiple new facets** (why should the law develop less than our fast moving global society?). There are more than 1.000 arbitration institutions around the globe (200 of them alone in China). In any one given contractual situation, there is **more than one option** and they often have **different** advantages and disadvantages, as compared to each other and to national state court options. Arbitration has become increasingly diverse as demonstrated by **regional, market oriented and/or international arbitration centres** having increasingly emerged around the world in the last decade. They have different competences and operate under diverging rules. There is **no "one size fits all" approach to arbitration**.

2. Many **pitfalls of arbitration** have become **transparent**. For example, the **main driving cost** in arbitration are the lawyers' fees (the arbitrators represent on average only $1/7^{th}$ of the costs). There are ways to cope with this upfront in the arbitration clause (e.g. by pre-determining the number of briefs or shaping the **rules on discovery and privilege** and not leaving these issues to be dealt with in 'Procedural Order No. 1' when the parties are feeling more antagonistic).

3. It is a matter of proper **risk management** to assess the risk of a possible dispute (e.g. as a result of a change of control of your business partner), including the probable direct and indirect costs of the different alternative scenarios. A prominent example to consider, when making your decision on the appropriate dispute resolution system under the circumstances, are the possible **difficulties of recognition and enforcement** of state court decisions as opposed to arbitration awards (which can rely on the New York Convention on Recognition and Enforcement of Arbitral Awards of 1958). Depending on your risk assessment you should devote time to the arbitration clause.

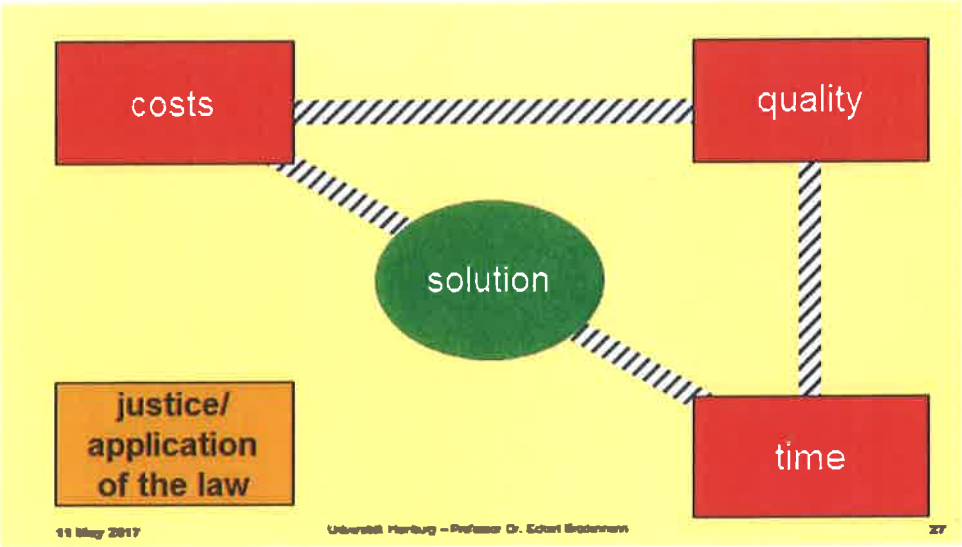
For example, in a complex construction negotiation a few years ago (state contract in Africa), the arbitration clause was the one clause, **without which** it would have been wise to **walk away from the deal** (local state courts would have given an inacceptable advantage to the contract partner).

Next to the clear description of the mutual obligations, the choice of law (which provides the legal frame) and the limitation of liability and - e.g. in M&A scenarios – the representations and warranties, the **dispute resolution clause is the most important clause**. It provides the legal **backbone to the contract**. Its importance trumps even the choice of law. It is easier to work around a strange law than to cope with a detrimental **mind-set of the decision maker**, a state court or an arbitration tribunal.

4. But **there is more** (apart from the traditional advantages such as '**confidentiality'** etc. which you find in the books on arbitration).

   In arbitration, you can **shape the scene**. You can decide upon the **choice of venue** (often with substantial and important differences in the local arbitration laws). You can lay the basis for a **fast track or in-depth solutions**, on including mediation or leaving it out. You can **control the costs** by agreeing on parameters for the arbitration (e.g. by providing for a sole arbitrator until a certain amount in dispute; or by limiting the amounts of briefs or number of pages to be exchanged [*I just saw a brief of 1.600 pages in a state court litigation …*]).

   Today's list of arbitration options reads like a very **sophisticated menu**. Take the time, concentrate, and make the best of it. Before making any decision, you may want to concentrate on the parameters on any dispute resolution. **Decide upon the blend** that is best for your company under the circumstances you face, bearing in mind the following parameters:



In that context, you may also want to consider the extent to which your decision maker needs any special competences: e.g.

- technical or industry know how,
- **comparative legal know how** necessary to **bridge between civil and common law**,
- language skills to read foreign documents (which reduces translation costs), or
- experience as **project manager** of an arbitration, with a firm hand on the steering wheel when it comes to coping with tactical delaying manoeuvres under the auspices of 'due process'.

In particular when **discovery** is an option or a risk (depending on your perspective), arbitral tribunals can develop very **flexible approaches** – and you can ensure that they are being used by shaping the arbitration clause.

If you decide on a **choice of court clause** you do not have these options.

5. I have seen (and drafted) arbitration clauses between one line and 28 pages (as an annex to a high level multijurisdictional construction agreement). Again, there is **no "one-size-fits-all"**. I have seen arbitrations spanning 4 and 5 months (both in small matters and in substantial matters with witness evidence taking). And I have seen parties jointly requesting to have a year more time for document production. Whatever is the best for your company, you can **shape the regime** or at least make sure that the right mind-set of dispute resolver copes with your company's problems when the risk substantiates that you do need to go through arbitration.

6. **Better than any arbitration** is **choosing the right business partner** in the first place. The arbitration clause is only your safety net.

7. As to the details of an arbitration clause, there are about a dozen of decisions to make and circumstances to consider. That is for another article (last December, I spent four hours with the head of the legal department of an international organisation, just to discuss the options for future arbitration templates.) If you are active internationally, you may consider preparing **different solutions for different regions of the world**.

Dear reader, I have succeeded if I have peaked your curiousity to look forward to subsequent comments on arbitration.

With best regards,

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