# Arbitration Proceedings or Courts for International Transactions?

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Over recent decades international trading has increased faster than the global economy as a whole. The reasons are the up-turn in particular in Asian emerging markets, the rapid development of raw materials markets and the international division of work as well as the resulting investment projects.

International contracts with parties from the most varied or cultural, language and legal backgrounds are therefore more frequent. Let's take as a practical example the construction of a large refinery in the Middle East by a Japanese construction company using Pakistani workers via a sub-contractor in Singapore, whereby the technology comes from the US, safety technology from Germany and all of the steel parts from Brazil. Of course for large-scale projects such as delivery transactions with many intermediate points, there is higher complexity, vulnerability to problems and the difficulty of agreeing on solution mechanisms in the event of conflicts. This relates to the legal system to be selected for the contracts, the language, but above all to which institution should resolve any dispute. Even strong companies will only rarely be able or willing to insist on the law and court of jurisdiction at their head office.

This applies in particular if it is not possible to enforce judgements due to a lack of reciprocity, e.g. in relationships between Germany and China, India, Russia or even partially in the USA. This also applies if court systems are corrupt, nationalistic or inefficient - as can be seen from the OECD statistics below - which is the case for example for proceedings in India which take significantly longer.

For such reasons, arbitration is ever more popular in international transactions. Even inside Germany arbitration courts are preferred when it concerns particularly complex or confidential transactions and the parties themselves search out expert and impartial arbitrators. Arbitration proceedings are always single-stage with no appeal or revision instance, which makes the duration of the proceedings

more calculable. It is less well-known that the German civil law code considers arbitration proceedings as fundamentally equivalent to court proceedings; it has regulated this including enforcements in Paragraphs 1025-1066 of the German Civil Procedural Regulations (Zivilprozessordnung - ZPO).

**When should the contractual parties choose arbitration proceedings?**

If the contract language is not German, expensive translations are required in national courts for documents or witness statements and if another legal jurisdiction has been selected, their rules must be demonstrated to a court by experts. In contrast, arbitrators can call on judges with precisely these legal and language skills. For complex technical disputes, proceedings before specialist arbitrators are often more appropriate than before a state judge determined by rules of procedure. In contrast to partially open court proceedings, an arbitration court is recommended if the parties want to maintain confidentiality in particular with regard to competitors, as is usually the case for licensing issues or calculating valuations after company takeovers. Due to a lack of guarantee of reciprocity, it is often difficult to enforce a state judgement in the country where the debtor has their assets. In contrast, arbitration judgements can be enforced via the New York Convention in over 150 contracting states. Local courts may only reject enforcement for serious formal deficiencies.

Arbitration proceedings are always recommended if the parties want a tailor-made process. For example, using continental European principles complemented by such Anglo-American elements as the obligation to provide documents or witness preparation and in one or even two specific languages. The interest in a professional, efficient completion that is guaranteed by such internationally established arbitration organisations as the German Institution of Arbitration (DIS) is frequently key.

In the case stated above as an example, the parties could agree on the generally familiar English law to accommodate parties familiar with the Common Law from the USA, Pakistan and India. American law and courts tend to be avoided as "pre-trial discovery", "punitive damages" and jury decisions make the outcome and costs uncertain, especially because each party must bear their own costs even if they win. The arbitration institution may be the ICC and the arbitration location Paris because France is a civil law state and not involved in the transaction. In addition, as English as the language for the proceedings, it could be agreed that no arbitrator may have the nationality of the parties, the chairman must be a Swiss lawyer and both assessors must be internationally qualified engineers relating to plant construction with arbitration experience.

**Reasons for choosing state courts**

The choice of a court system with a good reputation and competency in the contract language is recommended in particular when there is an expectation that a judgement can be enforced there. In general, a contractual Schiedsparty should choose courts if the opponent is not likely to constructively participate in arbitration proceedings but will attempt to torpedo it with legal "guerilla tactics" by repeatedly calling on normal courts. They could, for example, attack the validity of the arbitration agreement, the appointment and impartiality of the arbitrators, intermediate judgements by the arbitration court and finally the ability to enforce the arbitration result. If temporary protection measures, the enforced hearing of witnesses or oath taking could also be required, state courts are recommended. But this always requires the consent of the other party.

Leaving the issue of jurisdiction or arbitration clause open is not recommended because a party fearing a lawsuit could raise the negative affirmative action that there are no claims against it in a jurisdiction that it is happy with – where proceedings take a long time or there are corrupt judges. Constructively run arbitration proceedings however cost less than court proceedings over multiple levels but the parties can waive the use of legal means in advance. It is also not correct that arbitration proceedings are more expensive than court proceedings, especially because the costs of the arbitration institution and arbitrators are significantly lower than the legal costs incurred by the parties. However, a state judge will be more able to prevent excessive procedural delays or unnecessary evidence gathering than an arbitrator appointed by the parties.

The establishment of Dispute Boards has proven its worth to avoid the costly backing out of legal proceedings as per the practice for large national construction projects. So a permanent arbitration centre is set up for international projects in which defects can be determined during the project with a neutral chairperson and representatives of the parties and assigned if possible. It is important especially for international delivery and project contracts that legal rules cannot be copied after agreement on all materials issues as a "midnight clause" somewhere from form books or old contracts. At the start of the negotiations, when all of the participants still expect a problem-free outcome, the legal clarifications must be made and their relevance is not expected by the counterparty.

Early involvement of the legal department or external advice in the early phases costs only a fraction of the money and time that must be invested in optimal arbitration and court proceedings during the dispute. A poorly worded "pathological" arbitration clause and ill-considered choice of law can exponentially increase the complications and costs.

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