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“Is arbitration the equal of State justice?”

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Is Arbitration the Equal of State Justice?

Are pears better than apples?

These are questions of a very simple form indeed, nevertheless, they have no simple answer as there are no definite no's or yes's.

However, I can argue for one answer or the other in an attempt to convince a novice reader, or in case I am paid for legal representation by one party, which I am not! . Otherwise, giving the reader the choice between the two after presenting the arguments for both arbitration and state justice is the better approach in the case of professional and experienced readers.

I would opt for the second approach and will attempt to be as objective as possible.

First, in answering this question we shall bear in mind that not all arbitrations are one in nature, not all interests at stake are the same, neither all parties are private ones or of international personality, nor the relief and remedies sought before arbitration tribunals are the same. Arbitration today is a set of various practices that offer answers which are final and binding to disputes of different nature.

In today's world, individuals, groups, corporations, organizations and sovereign states can be parties to arbitration, and indeed, their claims vary to a great extent.

A state can be brought to arbitration for compensation due to expropriation, or may itself bring another state to arbitration for claims on international borders, an individual can submit his claims for an arbitral tribunal against a corporation for insurance coverage, and a corporation can claim damages from another for breach of contractual undertakings. There is absolutely no "one arbitration" as such to compare to litigation.

Second, before answering our main question; whether arbitration is the equal of state justice, we shall ask: equal in terms of what?

the quality of the decision making? the procedural guarantees for the parties and fairness of the process? independence and impartiality of the decision-maker? experience of the decision-maker? timely remedies? the possibility for enforcement of an award vis-à-vis a court decision? putting an end to the dispute? the special needs of parties, e.g., confidentiality and customization of the proceedings? the types of disputes submitted under each? the cost of arbitration vis-à-vis the cost of adjudication?

let's discuss and think about each of the possible answers to know whether arbitration and litigation are equals,

Quality of Decision-Making

As to the quality of arbitral awards, it is fair to say that high quality of the decision is achieved in most arbitrations through the following. first, in most arbitrations, the parties are the ones who appoint the arbitrator and thus there are higher chances to get a qualified decision maker as a first step to obtain a high quality award, this guarantee is not available in adjudication in the judicial systems I am aware of, and despite the fact that judges are usually chosen among experienced legal practitioners, many are appointed for reasons other than experience!. Plus, cases go randomly to a judge in most national courts that the parties have no say in whom will dispose of their dispute of the courts' judges. Second, it is important to remind the reader that many disputes are of a technical nature and need peculiar skills by the decision maker, e.g., arbitration of disputes pertinent to telecommunications, construction, IP and medical malpractice. In Arbitration, one of the arbitrators can be an architect, a doctor, or a professional of any profession other than the legal one, which would lead to the resolution of the dispute in light of all technical facts by having an expert participating in all stages of the dispute resolution process and in the decision making. This scenario can only be envisaged in arbitration while in courts, in the best scenario, an *amicus curiae* can be asked for a non binding report and oral examination, which will later be evaluated by a legal professional, i.e., the judge.

In which of the two approaches would you have more trust if your dispute includes technicalities?

Procedural Fairness

Second, with respect to procedural fairness, arbitration and litigation can be similar to some extent. Most arbitrations are administered pursuant to the national laws of procedures of the venue of arbitration , similarly to adjudication, or alternatively, if arbitration is denationalized (found in many state to state arbitrations for instance), institutional arbitration rules of procedures may apply.

One may argue, despite the fact that arbitration is usually administered by these relatively-fair rules of procedures, state court judgments in their findings can reach "closer to the truth", as appeal or double tiered appeal mostly follow the judgment. In my opinion, this cannot be a good argument in light of the fact that arbitral awards are also scrutinized by state courts, even if not called an appeal. In most cases, courts scrutinize awards using the "procedural fairness approach" with a look into mandatory laws, or in some instances a full *de novo* scrutiny that both would eventually guarantee (not less than in judgments at least) that the final award is within what is reasonable and fair in terms of procedures, and within the limits drawn by the parties' agreement to arbitrate.

Such scrutiny can take place once, twice, or more under different legal jurisdictions, based on where and how many times is enforcement of the award sought. In most cases, both the court of the venue of arbitration and the court of the place of enforcement will have a second look to the award. In other words, national courts in most arbitrations between private parties wouldn't set the award loose from scrutiny, this is a guarantee for procedural fairness.

So, are these procedural guarantees equal to the ones in adjudication?

Impartiality and Independence

Third, as to the impartiality and independence of the decision makers, it's fair to say that both arbitration and litigation set high standards for these characteristics in the decision maker (arbitrator/judge), and both institutional arbitration rules and the laws of national courts I am aware of offer ways to challenge the judge/arbitrator for the

lack of independence, conflict of interests, current and/or previous professional involvement in the dispute, bias or other reasons. However, national laws are usually explicit and more certain on the grounds of challenge. On the contrary, arbitration rules in defining the grounds for challenging an arbitrator set standards which are unclear and sometimes ambiguous, such as the "justifiable doubts" or "reasonable doubts" to the independence or impartiality of the arbitrator.
I prefer the certainty of challenges in state courts in this case!

On the other hand, arbitration gets a mark for its "disclosure" tradition, where arbitrators are asked to give written confirmation to their independence and impartiality and disclose any doubts thereto, and to which an arbitrator can be held liable for non disclosure and thus eliminated, a tradition very efficient in guaranteeing independence and impartiality but is unfamiliar to judges in adjudication.
Also, with regard to the bias anticipated from decision makers in the disputes submitted to arbitration or litigation, any reasonable person dealing with international transactions would feel more comfortable to use arbitration rather than litigation in the national courts of the opposing party. Bias caused by nationality is always possible, public opinion can also have significant influence on the litigation proceedings, fear of peculiarities of foreign laws shall not be underestimated too. Arbitration is always the better venue for dispute resolution in the abovementioned cases, it allows you to choose the arbitrators, the applicable laws, and the seat of arbitration.

Time and Cost Effectiveness

As to time and cost of arbitration vis-à-vis adjudication, simply from my observations, none is as cheap or as fast as the parties wish.
Notwithstanding the fact that most arbitrations are seen by the business community as a luxurious mean for dispute resolution, it is also true that multi-tiered litigation (in most jurisdictions) is not less expensive than arbitration in terms of the legal costs.
On the other hand, in terms of the cost of enforcement, it is always cheaper to execute a state-court judgment where it was made in comparison with a foreign award (with the need to go to a second and maybe third jurisdiction for enforcement).

Litigation can be a better choice in most cases if a party has no abundant financial resources or if the dispute is low in value or is local in nature, but in terms of bigger transactions of transnational nature, the higher cost of arbitration, even of institutional arbitration should not be a serious obstacle. Cost concerns are not always present in the picture, and in any case shall be dealt with on a case by case basis, taking into consideration the type and value of the dispute, and the financial capacity of the parties.

As to timely remedies, although many contemporary practitioners criticize arbitration for the increasing time required to conduct its proceedings, arbitration is still widely viewed as the fast alternative to adjudication in most countries. In my country, some monetary disputes have taken over 10 years in judicial proceedings before the court of first instance alone, and this is not unique in light of what I have been told by foreign practitioners about other courts worldwide. In terms of pace, arbitration is the man!
However, in another context, state courts can be more effective in taking precautionary and interim measures, such as attachment of assets, as the competence of arbitral tribunals to take such measures can be controversial, and if established, would need longer time compared to state-courts' interim judgments.

Flexibility of The Process

In evaluating how responsive are litigation and arbitration to the special needs and wishes of the parties, e.g., confidentiality of the process, denationalization of the award and proceedings in transnational dealings, maintenance of future amicable relations between the parties, waiver of the right to appeal, participation in the constitution of the tribunal, States accepting arbitration but not tolerating being under the jurisdiction of foreign courts, and many other examples, only arbitration is responsive to these needs!
Generally, arbitration gives the parties the power to customize the whole dispute resolution process in a manner that would satisfy all parties. On the contrary, state justice dictates the features of this process on a one size fits all basis. In most cases,

parties before state courts cannot opt out of the system designed by national legislators if they submit their disputes to these courts.

Also, sovereign states, international bodies and international businesses, have found refuge in arbitration for their hesitation/rejection to resolve their disputes in national courts. Arbitration has been more successful so far in addressing investor-state, state-state, international transactions and sport disputes. In my opinion, the success of a system is not only measured by its ability to end disputes, but also by its ability to keep pace with changes in the market and needs of the clients and its ability to invent new means to resolve disputes.

Enforcement

Finally, in terms of enforcement of the decision, it is important to remind of a key fact that there is still no international convention for enforcement of state courts' judgments, Nevertheless, there are some bilateral and regional conventions that attempt to overcome national laws' peculiarities pertinent to the enforcement of foreign judgments. On the other hand, enforcement of arbitral awards is usually easier in light of the numerous conventions for enforcement of foreign arbitral awards, e.g., the New York Convention of 1958 with over 145 signatory states and the Washington Convention (ICSID) with over 155 signatory states.

State courts usually raise no objections to the enforcement of foreign arbitral awards unless there is manifest excess of powers by arbitrators or violation of mandatory laws or public policy of the enforcing state. However, these same courts can act more sensitively and aggressively towards judgments of other foreign courts, which leads to a higher opportunity for rejection of enforcement.

Despite the aforementioned privilege for awards over judgments, we shall keep in mind there is no guarantee for enforcement of the two, parties can end only with a piece of paper called a decision !.

In the end, arbitration and litigation are simply apples and pears, different in nature and features, and each can operate better in a specific context, some fits what the other doesn't fit.

Nonetheless, and after all the progress achieved in international arbitration, it would be more precise to wonder…

Is State-Justice the Equal of Arbitration?