Laureate of the Academy Prize

Finalist

“Is arbitration the equal of State justice?”

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Diversity. A key issue in the world of today, potentiated by the globalization movement, intensified through the development of the Internet, the major increase of transfer of capital and products worldwide and the mitigation of frontiers to people, ideas, and goods. Such a characteristic can be found in many facets of the pluralistic hodiernal society, the law has to absorb such tendency, and as the relations between individuals have intensified, the conflicts have also disseminated. As a consequence, the dispute settlement system, in its various possibilities, has to follow such development. In this sense we wonder, is arbitration an equal to State justice?

Firstly, we must clarify that in the present text we considered State justice as the law applied by State courts aiming at the settlement of disputes. As for the actual question, the answer, almost instinctively, is no. Arbitration is one thing and State Justice is another, they both function in parallel so as to accomplish their function of social pacification through the exercise of its jurisdiction.

The institute of arbitration should be understood as part of a multiple system of dispute resolution methods, in which every single dispute has an adequate mean for its settlement, being it the adjudication to State courts, arbitration, conciliation or mediation.

That said, the consequent questions would be: what is the difference between State justice and arbitration? Is justice different when it is applied by State courts than when it is applied by arbitrators? If so, why is it different? Those are the questions we start to address.

Justice is a value in itself, it is known that it has substantive and procedural

implications or representations. For the purpose of the present article we are going to further analyze the second one. Due process, the right to be heard, impartiality and jurisdiction are generally considered as elements of procedural fairness, being it for the State courts or arbitration. In an even more ample hermeneutic, based on the tri-dimensional theory of law, we could say that justice, or the procedural fairness, emerges trough the application of law under a legal order grounded on formal, empirical and axiological validity.

In this sense, there should not be differences between the multiple methods of dispute settlement, however, in reality, there are in fact many specificities and those are the actual reason for the existence of such a multiplicity of methods.

The State justice is often associated with the principles of stability and predictability, as the judges are bound by their national legal order, they are generally prevented to apply the law of other countries, they must respect the hierarchy of the norms existent in the legal system of their country, they must be conscious of the precedents when they are faced to a conflict. The jurisdiction of the judges is founded on the provisions of the domestic law, and their decisions may be subject to appeal and other sources of review, what can entail time-consuming proceedings.

That is not the case in arbitration. Its legitimacy lies in the consent of the parties expressed in the *clause compromissoire* or the agreement to arbitrate, and more than that, its legitimacy as a private mean of dispute settlement lies in its recognition as such by various national legal orders, organizations and institutions. As a consequence, the arbitrators are not bound by a single national legal order, they have more freedom to form their conviction. Because of that, arbitration is more often related to the principles of flexibility, adaptability and expeditiousness, as the decision rendered by an arbitral

tribunal is binding on the parties and cannot be subject to appeal.

It is also important to stress that judges are part of the judiciary, that together with the legislative and the executive are essential parts of the organization of the modern State. As a consequence, the judge has an intrinsic duty to protect the public interest, they are an extension of the State, and are generally directed so as to ensure its interests.

Arbitration, on the other hand, is essentially based on independence and impartiality of the arbitrators. Because of that, it should be much more difficult to exist a situation of conflict of interest in the constitution of an arbitral tribunal.

Lets imagine two situations so as to illustrate the positions above, the first one: a situation of a State of a non-democratic government, in which the judges are appointed by the leaders of such regime, or at least suffer the influence of the executive power, in that situation the State courts would never render decisions against the interest of the State or of its officials. Another situation, quite common, is the one in which there is just one judge in a determined city, which was chosen by the parties as the proper forum for the resolution of eventual disputes arising from a contract. It happens that such judge is actually a friend of one of the parties and therefore it is almost certain that he would rend a decision if favor of his friend.

Both situations are virtually impossible to occur in arbitration, firstly because of the existence of the arbitral legal order, and as a consequence the arbitrators, if chosen properly, are not subject to political or economical influence of State officials and others, nor are bound by one single national legal order. Additionally, impartiality and independence are essential to arbitration and are constantly ensured by arbitral institutions around the world.

That said we consider the first question, by appointing the main differences between arbitration and State justice, answered. Passing to the second question, which is if justice is different when it is applied by State courts rather than when it is applied by arbitrators, we will begin to analyze the aspects related thereof.

Since there are differences between the institutes, a logical consequence would be the existence of differences in the application of the law by arbitrators and judges. As we stated in the beginning, the world of today is characterized by diversity, or plurality, as a consequence there are an enormous multiplicity of individuals, companies, products and interests, within this context it is natural that conflicts may arise.

The form that the State courts lead with the disputes is very different from the arbitral practice. The judges cannot choose which law to apply, they have to apply the mandatory law of their respective country. Additionally, they usually don't have a specific formation on the merits of the dispute and have a massive number of conflicts to resolve, therefore they cannot enter profoundly in every single dispute in the same way. Moreover, as described above the judges are not completely impartial when the State, or sometimes State officials, is involved.

On the other hand, arbitration is much more susceptible to such diversity, as it is capable of dealing with all sorts of differences (of nationalities, applicable laws, procedural devices, legal mindsets, interests) in a comparatively more effective way. The reason for this is the fact that arbitrators are not bound by any legal national order, they can analyze and decide by themselves which law to apply in order to better solve the dispute. They can resort to transnational choice of law rules and or directly apply substantive transnational rules. The arbitrators can even apply the so called "soft law", such as the *IBA Guidelines on the Taking of Evidence in International Arbitration* and

many others, what would be very difficult for the judges. There is even the possibility for the arbitrators to issue a decision *ex æquo et bono*, in potential disrespect of codified laws while aiming to better reach fairness on their decisions, even though such situation have been contested by many jurists.

Additionally, arbitrators are often professors, lawyers, jurists of excellent formation and specialization on the subject matter of the dispute, that are specially dedicated to a limited number of cases. Because of that, they are more capable to analyze the dispute in depth and render a better decision for a complex case involving large amounts.

However, it must be highlighted that the jurisdiction of arbitrators has limits, as they cannot decide cases related to criminal law, public safety and *lois de police*, generally considered as the administrative actions taken by the executive power so as to ensure the primary public interest. In cases related to such aspects, the State courts are the only one competent. The State courts are also more susceptible to access justice in cases where there is an unbalance of powers between the parties under dispute, and the judiciary can usually waive the costs so as to allow poor people to properly fight for their rights.

Finally, one should bear in mind that there a few situations of intersections, or even symbiosis, between arbitration and State justice, as the arbitrators don't have the power to enforce their own decisions, what must be requested to the State courts by the interested party, additionally arbitration has always been accompanied by some sort of control, sometimes exercised by the State courts, even though such control is very limited, most generally so as to prevent exceed of authority, jurisdiction, mission and powers by the arbitrators.

In conclusion and answering the last question of why arbitration is different from State justice, such difference is a matter of adequacy and lies in the fact that arbitration is the proper forum for the vindication of certain rights or interests and State courts are a natural forum for other kinds of claims. Both are adequate, the choice of which depends on the case at hand. Nonetheless, it should be highlighted that arbitration is not merely an alternative or a substitute of adjudication, but so as the former it is an effective system of administration of justice and social pacification.