
# *Is arbitration the equal of State justice?*

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Considered in juxtaposition to State justice, recourse to arbitration to resolve commercial, investment and inter-State disputes may be attributed, accurately or not, with characteristics ranging from confidentiality, efficiency and cost-effectiveness on the one hand, to secrecy, normative or economic imperialism, or simply bad law on the other. It may also be appreciated that one form of dispute resolution may be uniquely suited to deal with certain matters for which the other is simply not equipped. These impressions, while not entirely unfounded, belie not only the diversity of types and substantive areas of arbitration, but also the heterogeneity of "State justice" across different legal traditions and economic-political contexts, and even the notion of "State justice" itself.

"State justice" may be defined here as domestic judicial process, that is, the system of justice administered by courts within a State. It would be straining the ordinary meaning of "State justice" to have it refer also to international judicial process, which involves States as actors but not arbiters, and which does not specify the mechanisms by which States' rights and obligations are determined. In seeking to resolve their disputes (with other States or non-State actors), States may turn to bilateral or institutional diplomacy, international courts, and equally to arbitration. Yet the existence of international courts and tribunals makes plain the limited utility of confining the discussion to an evaluation of arbitration in all its forms vis-à-vis only *domestic* judicial process. Specifically, while domestic and international commercial arbitration (and perhaps even investment arbitration) may be discussed in relation to State justice, the appropriate counterpart for an evaluation of investment and inter-State arbitration would generally be international judicial process.

I suggest therefore that the true concern is whether arbitration is the equal of judicial process, and that a critical comparison of both dispute resolution mechanisms must first distinguish between the domestic and international levels of each. As will be seen, it is at the international level that the discussion is most interesting, as that is where the limits of both forms of dispute resolution are most clearly present. This is not to say that the question as formulated is of no import. Indeed, of key significance to a measure of their relative equality is the legitimacy of each form of dispute settlement. When private actors consider their options between say commercial litigation and commercial arbitration, the efficacy, efficiency and legitimacy of the decision is crucially important to the certainty with which they can conduct their affairs. In the court of popular opinion and the marketplace, therefore, the question as framed is of tremendous practical significance. I will thus discuss commercial and investment arbitration vis-à-vis domestic judicial process, before considering international judicial process in relation to investment and inter-State arbitration.

Equality, even if not a completely empty concept, is necessarily a relative rather than absolute judgment. The substantive criteria by which arbitration and judicial process are to be assessed provide some measure of objectivity in terms of the purposes of dispute resolution: (i) efficacy, including whether all the disputes that arise between subjects of the legal order can be resolved effectively and finally; (ii) efficiency in terms of time and cost; and (iii) legitimacy, which flows from the above two criteria but also includes the authoritativeness of a decision and general respect for the system of dispute resolution. In

the particular context of this discussion, equality might also merit some consideration of autonomy – specifically the degree to which arbitration can be considered equal to judicial process if and to the extent that it may be dependent on the latter for its efficacy, efficiency or legitimacy.

Short of an extensive empirical study across different jurisdictions, arbitral institutions and legal traditions, the answer to this question can only be proffered in terms of broad generalising observations. For example, the claim that commercial arbitration is inherently or universally cheaper and quicker than litigation is simply unsustainable, given arbitrators' fees and schedules, and the availability of summary judgment and other specific procedures before State courts depending on the facts and quantum of the claim in question. In international commercial disputes, however, arbitration may clearly be preferable to submitting a claim to the national courts of either party, or of neither party, which would also potentially involve unnecessarily complicated questions of conflict of laws. The fundamental premise of arbitration that parties are free to choose the law and procedural rules applicable to the settlement of their dispute, as well as to appoint the tribunal, is indispensable to the facilitation of international commerce. Moreover, arbitration would also be more appropriate for disputes concerning technical, specialised areas of law such as construction, shipping, sports and entertainment, where it would make more sense to appoint an engineer to the arbitral tribunal than to have a judge decide the case with the help of an expert witness, or where in the case of sports and entertainment it might be in the industry's collective interest to have a self-contained regime of dispute settlement for certain matters. In terms of State-administered justice,

the question of equality is thus actually one of appropriateness, and these examples suggest that the suitability of arbitration as a form of dispute resolution is not undermined by the fact that domestic courts retain supervisory and enforcement jurisdiction over the arbitral process and award. On the contrary, such curial jurisdiction, being limited to ensuring the impartiality and independence of arbitrators, and that the hearings have been conducted with due process, supports arbitration while recognising and respecting its autonomy, because the courts do not sit in appeal on the merits of decisions rendered by the arbitral tribunal.

Arbitral legal process is dependent on State justice, however, in the context of the recognition and enforcement of awards: this is where the State has the last word in whether a successful claimant's rights will actually be vindicated pursuant to an arbitral award. In determining whether an arbitral award should be set aside, just as in determining whether it should be enforced against assets within the State's jurisdiction, State courts have some measure of discretion in considering their public policy, which may be informed by international practice. This is a consequence of the State's *sui generis* nature: no arbitral tribunal can replicate or substitute the State's unique governing role in the social contract with its citizens and in the maintenance of public order that this entails. Nor can any arbitral tribunal exercise the coercive power that is lawfully available to the State in the form of legal restrictions on the freedom of movement of property and individuals, or in the sanction of contempt of court. The question then is whether this very significant reality renders arbitration unequal to State justice – and whether this question is meaningful at all. I would argue that to consider arbitration inferior to State

justice for this reason would be to miss the wood for the trees. Arbitration does not pretend to provide a complete and distinct alternative to State justice, but only to resolve disputes by a process according to the parties' agreement. The conception of State justice at its broadest may involve questions of constitutional law, individual rights, political process and participation, none of which is contemplated by arbitration. Arbitration is dispute resolution, not government. The fact that questions of recognition and enforcement remain in the realm of State justice thus should not be relevant to an assessment of whether arbitration is equally efficient, effective and legitimate as a form of dispute settlement. It may be observed, moreover, that international judicial process faces the same open question of enforcement that confronts inter-State (and potentially investment) arbitration: short of persuading the UN Security Council to recommend or sanction any measure, there is simply no concrete means to deal with the refusal by a State to comply with its obligations under an award or judgment notwithstanding its undertaking pursuant to a BIT, the ICJ Statute or the PCA Rules that it will carry out the relevant decision without delay.

The second key issue, also arising from the *sui generis* character of the State, is that of arbitrability. At both domestic and international levels, criminal matters at least are simply not arbitrable, and justice must be administered by State courts or the International Criminal Court or ad-hoc tribunals that are set up and run as courts: eg. the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Tribunal for Lebanon. This is in categorical contrast to the choice of arbitral process for the Iran-US Claims Tribunal, as well as the numerous

territorial, treaty and general public international law disputes that go before both the International Court of Justice and arbitral tribunals constituted under the auspices of the Permanent Court of Arbitration (to say nothing of the UNCLOS arbitrations), where the choice of arbitration or judicial process is determined strategically by the parties or *a priori* by the treaty under which the dispute arose. Yet, is the non-arbitrability of criminal or other matters to be taken as a deficiency in arbitration rendering it lesser than or inferior to State justice or international judicial process?

In the context of domestic State justice, it is trite that parties may not contract out of criminal law or other mandatory norms, and the public order and policy rationales for this rule are uncontroversial. The State has a prosecutorial function that a party to arbitration, being part of a private dispute resolution process, by definition does not. It is this function that the International Criminal Court and the other international criminal tribunals seek to fulfil, applying the substantive rules of eg. crimes against humanity, war crimes and genocide according to their constituting treaties (eg. the Rome Statute in the case of the ICC). The corollaries of this prosecutorial function, including the burden of proving guilt beyond reasonable doubt, do not admit of devolution to private parties or to tribunals constituted for the specific and *ad hoc* purposes of resolving the particular dispute at hand. The logistical (as opposed to legal) consolidation of claims before the Iran-US Claims Tribunal is in principle of a different nature to the institutional mandates of the criminal tribunals, which apply a coherent body of law to the facts of the respective conflicts. I submit, therefore, that the non-arbitrability of criminal matters is a function of the different purposes which arbitration and judicial process serve, and that this

difference in the nature of their ends is not itself relevant to their relative equality based on the criteria of efficacy, efficiency and legitimacy.

By the same token, the foremost virtue and indeed the raison d'être of investment arbitration, the depoliticisation of investment disputes, is not in itself a universal hallmark of superiority of arbitration over State justice. It is simply an acknowledgement and reflection that State justice is unsuitable for dealing with disputes concerning the State itself, and incompatible with the facilitation and encouragement of international investment.

Arbitration and State justice are thus complementary mechanisms of a global justice system that seeks to uphold the rights and obligations of all actors in the international community. More important than judging them against one another is to evaluate them in the light of their respective ends and to seek to improve them accordingly. The question posed alludes to an important goal: the reasonable popular perception that a decision rendered by an arbitral tribunal is as authoritative as one rendered by a court of law. The perception that arbitration is the equal of State justice – a matter of choice rather than of hierarchy – is useful in dismissing unnecessary and fruitless competition or rivalry between the two forms of dispute resolution and their respective institutions, individuals and interests. But this is not achieved by a tally of points based on a simplistic caricature of each alternative or a weighing of pros and cons; rather, it reflects the conclusion that while arbitration and domestic adjudication serve different purposes, they both serve the ends of justice and peaceful, effective dispute resolution.