Is arbitration the equal of State justice?

Dr. Martin Svatoš

In the 21st century, there is no space to cast doubts upon the ability of "private justice" to play accurate role in resolution of parties' disputes. In contrary, one could wonder whether or not the level reached is of the same quality or not.

Instead of Introduction – Short Reflection on Mission Impossible

Before starting to answer the question, one has to ask himself whether it is possible to find out the empirical and correct reply. Is it a real goal of lawyers to present answers to philosophical topics related rather to their sentiment than to some empirical outcomes? The chances to get a straight question can be illustrated by the story of directors that met to hire a replacement for their retiring CEO. There were three applicants: an accountant, a mathematician and a lawyer. The board invited all three to participate in an interview. First one was the accountant and the directors asked him: "*What does one plus one equal?*" Without hesitation, he answered "*Two, of course*!" The second was the mathematician and directors asked him the same question. He wondered for a while and then replied: "*Well, it depends on your number base. Using the decimal system, the answer is two, of course. However, using the binary numbers, it is one-zero, which looks like ten*". Last one was the lawyer. The directors asked him the same question too: "*What does one plus one equal?*" The lawyer went over to the windows and closed and tested them. Then he went over to the door, locked and tested it, and came before the table around which the board was seated and said "*Tell me, gentlemen, what you would like it to be*?"

Although this introduction is anecdotic it illustrates that from the point of view of the lawyers, the correct answer would depend on the position of lawyer's clients. In the case of need to set the award aside, answer would be obviously NO. On the other hand, in the case of enforcement of an award, one would argue *in favorem* of arbitration. Thus, there is no chance to find the correct answer out...Or is there?

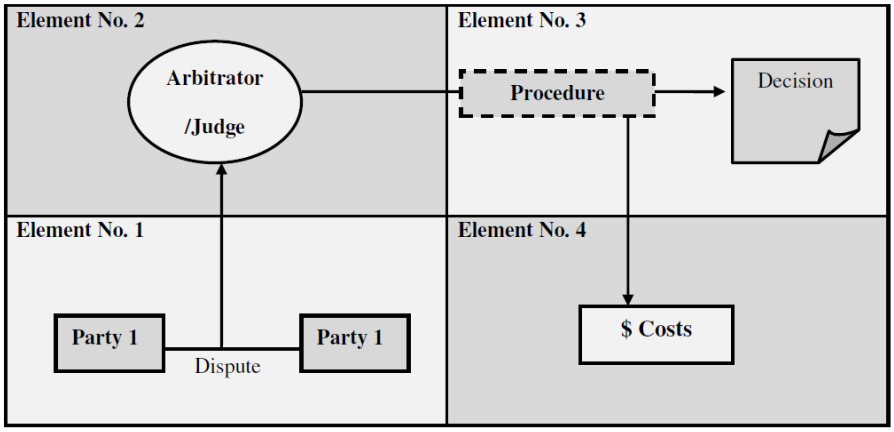
To find out, let's open the brackets: **[**Yes, there is still a way to answer the question in the right way: If one can stop being a lawyer and becomes a human being or rather legal philosopher. In that case, one can afford that luxury to lead the discussions and propose its own opinion based on the subjective summary of the advantages and disadvantages. This allows seeing where the weaknesses of the system are. To put it differently, this approach proposes a personal view without aspiration to provide an objective outcome. May be that this is precisely why this confession could be worthy...

Providing the Rules of Game

The merit of the rhetorical question raised in the title of this essay could be described as the evaluation between two justices – between the *state justice* provided by the state judge and the *private justice* provided by the private judge – arbitrator. Since *justice* could be described as the *fair and proper administration of laws,* the question is actually whether, given

all conditions and circumstances of international arbitration, the arbitrator is able to administrate the law in the same or better way than the state judge.

As it is true that a chain is only as strong as its weakest link, we will check one by one four link-elements that constitute the procedure of justice:



Elements of Justice

Firstly, there are the parties and their expectations and rights (Element No. 1). Secondly, there is another actor in the play - the third person appointed to hear and decide relevant legal matters (Element No. 2). Thirdly, this decision making called proceedings has its rules and qualities (Element No. 3) and finally, of course, there is no such thing as free lunch, thus one has to consider the costs of the proceedings (Element No. 4).

Given the limited space of this paper, we will only briefly address the main issues concerning all elements in order to appreciate the quality of both systems. Discovering that at least one of them does not work would mean negative answer and in contrary, if all four fit, the answer would be affirmative.

Element No. 1 - Question of parties' expectations

The first level addresses the problem of parties' position in a dispute related to their expectations and rights. As the international arbitration is primarily designated for the merchants and businessmen, we will focus on the specificity of the main desires of this specific group of users.

Generally speaking, parties appreciate victory. As this can be warranted neither in arbitration nor before the court we will focus on the two remaining general parties expectations. Businessman would appreciate when their dispute is resolved effectively and without big rumours. Since the effectiveness of arbitration is related to the proceedings' rules, we will address this concern later and we will now turn our attention to the second desire – to confidentiality.

In relation to confidentiality, the critics of arbitration focus on the transparency of the proceedings as the principal condition of democratic system and of the principle of rule of law. However, one has to take in consideration the specific milieu of international commerce. Since the merchants often deal with secret information, the confidentiality of the dispute resolution that will prevent the rivals to gain sensitive information is one the main goal of companies. Furthermore, one cannot disregard the goodwill and the reputation of the companies and its influence on stock-market. Furthermore, this kind of

criticism seems unfounded since the quality of decision is not dependant on the consequent publication.

Thus, it seems that arbitration suits better the expectations of merchants in international commerce.

Element No. 2 - Question of quality of judge

Sometimes arbitration is regarded as being only as good as the arbitrators are. As this is well known to the critics, they focus on the personality of arbitrators in comparison with honourable state judges. Indeed, the quality of the person that is going to decide the dispute is crucial. On the other hand, the same criterion goes obviously for the state judicial system. Some scholars yet treat the arbitrators as less capable to ensure the justice to the parties than the national judges are because of the absence of the system of control of arbitrators and because of the absence of experience and professionalism or even morality.

None of this criticism is accurate. Firstly, there is a system controlling the arbitrators– system of challenge and of civil and criminal responsibility. Secondly, concerning the absence of experience and professionalism, there is a kind of *preselecting control* applied in the both systems. Thus, the judges in the lower level are considered as being less experienced than the judges in higher one. Consequently they are either excluded of hearing of more complicated cases or at least controlled by possibility of an appeal. Arbitration works on the very similar principle. More complicated cases are in general assigned to more experienced arbitrators. This will be the case especially in institutional arbitration.

Finally concerning the professionalism, one has to look at the place the most experienced and well known arbitrators are recruited from: They are the professors of the best universities or *of counsels* of the largest international law firms. On principle, this cannot be the case of national judges.

Last challenge to figure out is the question of morality. However, morality is not depending on the fact whether one is a judge or an arbitrator, but rather on the individual personal qualities. In contrary, one can add the notion of "national neutrality" that can be expected in the case of arbitrators and that can be hardly anticipated in the case of national judges.

Thus, the arbitrators are at least as eligible to be chosen to decide the disputes in international commerce as the national judges are. In fact, it seems they are even more accurate.

Element No. 3 - Question of quality of proceedings

Another argument on quality of arbitration proceeding raised by critics is the proceedings itself. This illustrates the well known *maxim* that justice can be safeguarded only by the regular and orderly progression of a lawsuit.

Thus, according to some critics, arbitration is not able to secure the due process of law. Furthermore they mentioned that it is able to serve as a tool of fraud. Indeed, arbitration was misused several times. However, this cannot be regarded but as an exception. In general, the softness of the procedural law, the fact that parties appoint the arbitrators or that there is in general no appear cannot mean the absence of due process *per se*. This is safeguarded by the provision of national statutory law and even by the New York Convention.

In contrary, regarding the object of arbitration – the commercial relations - the softness and privileging of parties' autonomy can be regarded as advantages that cause efficiency of arbitration proceedings desired by merchants.

Element No. 4 - Question of economy of justice

As the justice that is not accessible is not justice, the question of economy of justice and of the costs is of a paramount importance. Justice is only as efficient as it is inexpensive and fast. Traditionally, both of these qualities were underlined in relation to arbitration. However, this is no more correct. Arbitration may be or may not be fast. Anyway, it is not cheap. The costs have increased in recent years being represented by the arbitrators' fees, legal fees and experts' fees...

However, sometimes it seems that the observers criticising arbitration and the expenses overlook the real costs of the state justice. Neither costs related to the legal representation before the courts is low. Furthermore, it is not only the legal costs for counsels and experts since there is also the system itself that has to be financed. State judicial system is a huge body whose expansive administration is paid by taxpayers. Furthermore, this system is usually overloaded and any further cases mean new problems to resolve and new costs to pay. In contrary, the arbitration institutions are in general private non profit bodies. Furthermore, if these institutions produce a profit they would pay the taxes in the public budget.

One could say that costs caused by judicial system should be regarded as fixed costs however this is not accurate. One has to admit that in general cases resolved in arbitration are the complicated ones. Let's imagine the situation that all cases handled by arbitration would pass to the courts. Some of the judicial systems would immediately collapse and the rest of them would at least become hard-pressed. In the end, the tax payers would pay bigger amount not let alone the impact on the economy and investments flows in general. Thus one more example of general effectiveness of arbitration – the litigating parties cover all expanses, not only part of them as is the case in state justice...

One can raise the question whether this argument would persuade the CEOs or in-house lawyers: Probably, they would found this argument not persuasive. However, this does not mean that this fact is correct and undeniable.

Conclusion

So where is the rub and what is is the correct answer to the question whether *arbitration is the equal of State justice*? Seeing all the pros and contras, one can see that arbitration is perfectly able to secure justice in international commerce and in international law in general and that in some elements is even more eligible to do so. The answer is that arbitration is only a system...an excellent, interesting, challenging and amusing milieu! But

do not forget this is a subjective point of view given by arbitration admirer... So let's close the brackets.**]**

The correct answer is: "*Tell me, gentlemen, what you would like it to be*?"