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Justice in Arbitration: is it Equal to Justice Exercised by Courts?

Table of contents

I Introduction.....	1
II Different type of justice?	2
A Reasoning of court decision and justice in court proceedings	3
B Justice in arbitration proceedings	4
C The choice	5
III Conclusion.....	6
Bibliography.....	7
Biography	9

Abstract

In court proceedings judges, as well as arbitrators in arbitration proceedings, are required to make just and fair decisions. However, the concept of justice in these proceedings differs: while adopting a decision in the court proceedings, judges have to base their decision on laws and use logic as a tool for adoption of the decision. In arbitration proceedings, formal legality of the decision is not as important as the implementation of social justice: the arbitral award may not be well illustrated by legal norms or legal precedents but has to restore the real (or so called social) justice between the parties.

Keywords

Justice, court proceedings, administration of justice.

I Introduction

The principle of access to judicial protection is one of the most important guarantee of human rights protection established both in international and national legal acts. For example, Article 8 of the Universal Declaration of Human Rights¹ states that everyone has the right to an effective remedy by the competent national tribunals; also Paragraph 3 of Article 2 of the International Covenant on Civil and Political Rights² claims that each state has to ensure that any person claiming respective remedies shall have his right thereto determined

¹ Universal Declaration of Human Rights (1948).

² International Covenant on Civil and Political Rights (1966).

by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state; analogous rights are established in Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms³ and other legal acts.

Similar principles are usually reflected in national laws as well. For example, Paragraph 1 of Article 30 of the Constitution of the Republic of Lithuania⁴ specifies that a person whose constitutional rights and freedoms are violated has the right to apply to the court. Such principle is also established in Article 4 of the Law on Courts of the Republic of Lithuania⁵, Paragraph 1 of Article 5 of the Code of Civil Procedure of the Republic of Lithuania.⁶

From the above, two main features of judicial protection may be distinguished. First, mostly laws direct the right of settling the disputes to the national courts. And second, right to apply to court is usually protected according to international as well as national legal norms.

However, along with the evolution of legal systems and mankind, other means of dispute resolution have evolved. One of the best known dispute resolution mechanisms which do not involve the element of the state is arbitration.

By selecting to resolve the dispute in arbitration, the parties refuse submission of their disputes to the competent national body – the court. It means that they waive their right to judicial defence, guaranteed by the Constitution, laws and international conventions.

Arbitration as a method of dispute resolution is fundamentally different from the judicial dispute resolution. While solving the disputes by the means of arbitration, the dispute is administered by a third person, selected by the parties, which is not authorised to execute this function by the state. Whereas in court the dispute is adjudicated by a public body – the judge having official assignment to be the intermediary in judicial cases solved by means of national court. This leads to the conclusion that arbitration, unlike judicial proceedings, is a private dispute resolution method where the state has no authority.

Does it have any influence on the process of dispute solving, and especially – on the administration of justice in these proceedings? The analysis below shows that different type of proceedings may bring different colour to the sense of justice.

II Different type of justice?

It may not always be clearly established what is right and what is wrong. Respectively, one may not always identify what decision is just and fair.

³ European Convention on Human Rights and Fundamental Freedoms (1950).

⁴ Constitution of the Republic of Lithuania (1992, with further amendments).

⁵ Law on Courts of the Republic of Lithuania (1994, with further amendments).

⁶ Code of Civil Procedure of the Republic of Lithuania (2002, with further amendments).

However, during the ages there has always been the pursuance for what is right and fair.

Does justice always remain the same? May it gain new forms, meanings and texture in different situations? The answer is rather unclear.

Throughout the ages the definition of what justice is in reality has evolved and changed. Discussions about the essence of justice were initiated a very long time ago, and this concept was subject to changes of public order, political ideas, historical circumstances, etc. However, the essence of justice has not changed over the centuries. This has always been a conservative value, which has been recognized and nurtured at all times.

Justice could be characterized very differently – as a legal rule, while recognizing that every action shall be taken taking into account the criterion of justice; as a certain set of rules, which shall be implemented by everyone; as a virtue to be followed, or even as criterion for the decision making of judges and people of other legal professions. It is sometimes also considered as one of goals of law as a regulatory measure of social relationships. According to the doctrine of the Constitutional Court of the Republic of Lithuania, it can be implemented only by ensuring a balance of interests, avoiding the chance of instability and conflict of interests.⁷ The Constitutional Court has also repeatedly reminded that the only institution designed for administration of justice is the court.

One of the mechanisms developed throughout the ages for pursuance of what is right and fair – recurrence to the bodies administering disputes. Everyone should agree that the courts shall adopt just and fair decisions, since one of the main functions of the courts is administration of justice. Does the concept of justice differ in the proceedings of court and arbitration? The analysis below shows that sometimes actions to be taken in the court proceedings as well as the decisions taken by the court which could be called just and fair, may not be called equally in arbitration proceedings.

A Reasoning of court decision and justice in court proceedings

No one could deny that settling the dispute in court has to be done in line with principles of justice, equality and fairness, following the letter of the law.

There could be no doubts that a court decision should be well reasoned, balanced upon the factual circumstances and supported with legal background, i.e. legal norm. There exist several ways of legal reasoning, e.g. deductive reasoning where a court deduces certain propositions from other propositions which constitute the judgement of the court; or analogous reasoning where the court relies on the precedent created in the past and applies such precedent to a specific current situation.

⁷ Constitutional Court of the Republic of Lithuania, rulings of 3 December 2003, 24 December 2008, etc.

It is agreed that a court judgement has to be logical, i.e. following the rules of logic a court should apply a specific legal norm or precedent. Logical interpretation of law relates to the principle of legal certainty: a court judgement should be predictable and based on a logically applied legal norm.

A judge may not create a new legal norm. Strictly observing the principles of logic, a judge must apply to the dispute relations the legislator's formulated legal norm, i.e. he legitimates his decision as a judge. Consequently, even though conceiving that a judge's decision is affected by a number of external factors, the requirement of the logic-based legal reasoning traditionally remains as a standard or goal.⁸

Traditionally, a judge is required to apply a legal norm based on logic and supported with various arguments: this secures the impartiality of a judge, legal certainty, and non-trespassing of the sphere of the legislator. In decision-making a judge deals with the facts (i.e. external factors) and a legal norm (i.e. internal factors). The first step a judge should take is to determine the facts and apply an appropriate legal norm based on such facts. Thus, a judge's decision-making process is theoretical leaving no space for his individual experience, rationality and personal values. A judge's work is cognitive when he is establishing facts, and logical – when he applies a legal norm.

All these circumstances must secure the impartiality and objectivity and, besides, they imply that in each situation there is only one possible fair solution.⁹ Consequently, logic "propels" a judge to look for a sole fair decision forgetting about the existence of other legal values. In other words, judges are compelled to draw the conclusions based on logic which leaves no alternatives for them.

Of course, to its essence, such principles of adoption of decisions in court proceedings are not objectionable since it brings equality and fairness among the parties – all the parties to the dispute become equal before the law and no side factor may affect the judge's decision. At least this should be the principle of decision making in the court.

B Justice in arbitration proceedings

While courts are the administrators of justice in its formal meaning, there are no imperative legal acts which prescribe the disputes settled in arbitration to be solved fairly. It is expressed above that usually in the court proceedings there is no space for judge's personal experience and thoughts as they have to base their decision solely on the ground of (i) law; (ii) precedent and (iii) logic.

⁸ S. J. Burton. *An Introduction to Law and Legal Reasoning*, Boston, Toronto, Little, Brown and Company, 1985, p. 2-9

⁹ C. Varga. *The Nature of Judicial Application of Norms* // C. Varga. *Law and Philosophy. Selected Papers in Legal Theory*, Budapest, 1994, p. 295

Meanwhile in the arbitration proceedings, the space for personal values and business experience is left.

Rules of different bodies of administering the arbitration disputes have their rules, which regulate the work principles of the respective arbitration court (or arbitration panels); however, there are no common rules for arbitration proceedings in general. Sometimes when the arbitrators are allowed by the parties, they may solve the dispute *ex aequo et bono* or as *amiable compositeur*, which means that the arbitrators may establish what is right only by relying on their inner feeling of justice.

Of course, there exist certain substantial values: life (and health), knowledge, behaviour, sense of aesthetics, sociability (friendship), pragmatism and religion. No arbitration decision which would go beyond all reasonable considerations may be recognized and enforced by the courts if such action should be needed. However, while adopting the arbitration decision, the arbitrators do not have to make a deep analysis of the legal norms to be applied in the case (of course, without violating the principles of public order, etc.), neither they have to go through all the possible court practice, nor their decisions have to derive from consistent line of logical as well as legal arguments, etc.

Thoughts expressed above regarding the application of legal norms in court proceedings by invoking logic shall not mean that logic does not take any place in arbitration proceedings. Of course, logic occupies a significant place in any kind of decision making – however, in arbitration proceedings it is rather business than legal logic. Otherwise if logic is not invoked in decision making at all, the parties (especially the “losing party”) may try to avoid the execution of the decision by challenging it, etc. Also, it would be difficult to foresee how a person should act in a specific situation and what business solutions shall be made in order not to cause adverse consequences to himself, etc.

C The choice

Question arises, why do persons still trust their disputes to arbitrators if there is no guarantee that the dispute will be solved fairly?

The answer is rather simple. The biggest paradox lies within the fact that sometimes the parties have a reason not to trust the type of justice implemented by the courts, even though it is implemented strictly according to the letter of law. The incentive to choose arbitration as the means of settlement of the dispute usually is given by the fact that arbitrators unlike the judges are not forbidden by the law to invoke the external factors while adopting their decisions. A repetition must be made that arbitrators are assigned by the parties, not by the state. Therefore they may perform their duties according to their will. The only thing to risk is the reputation of the arbitrator which is usually protected with vigilance at these competitive times.

Social justice will always be the strong side of dispute settlement in arbitration: the arbitrators will always try to adopt a decision which is well reasoned, showing the right business-approach. The pursuance for the right and just decision will usually be based on common understanding of business principles, combining it with sense of legal notion.

However, one common feature of adoption of decisions in these different proceedings could be found: obviously no lawyer, scientist or practitioner doubts that a court judgement, as well as an arbitral award, is born under the influence of diverse factors and events. In the court proceedings it is usually done through formal application of a legal rule (by deduction method) or precedent, in arbitration – through business-approach analysis and aim to recreate social justice. A judge, as well as the arbitrator, has in mind a just and fair result which predetermines his choice of the line of reasoning. Therefore it could be concluded that both judges and arbitrators have their predetermined choices of decisions to be made, and seek for them in different ways and methods. The only difference is the line of the legal reasoning, which has to be formal and weighed by legal arguments in the court proceedings, whereas in the arbitration proceedings – the reasoning is not as important as the fairness and result of the decision itself.

III Conclusion

After having analysed the main principles of decision making in both arbitration and the court, one very important conclusion shall be made.

The process of adoption of the decision in court proceedings is usually based on the assumption that the decision of a court shall be made without court's interference into the legislator's sphere and most importantly – impartially.

A litigating person who is interested in the outcome of the proceedings expects that the decision-making will not be affected by any subjective factors, that a judge will be objective and apply the law properly. More generally, it means that the general public wants to know what competence is granted to a judge to act as a representative of the state authority and take a binding decision which affects an individual's freedom and property and can be enforced by the state. The general public wants a court decision to be a lawful exercise of the state authority. A judge has strictly defined limits of his competence; he has to legitimise his verdict and take a lawful decision. For these reasons, a judge is obliged to resolve a dispute based on the law and not on the personal scale of values which is not recognised by laws.

When a judge's decision is evoked by application of law only, it is not the decision of an individual but the decision of the state which takes effect through such individual, which means the exercise of powers. In the traditional concept of the requirement of lawfulness it is understood as formalism in dispute resolution. Legal formalism provides an abstract and formal model of lawfulness. Legal reasoning and decision-making of a court can be verified through the prism of this formal model. Hence the requirement arises for a judge to apply the law as a syllogism and use the rules of logic as the latter eliminate subjectivity, attitude of

a judge and the scale of values. Putting it more simply, in order to be a lawful a court judgement should be the only decision logically ensuing from a legal norm. Legal formalism says that a decision in each case is prompted by law and logic, and not by values of a judge.¹⁰

Meanwhile in the arbitration proceedings the legal formalism is not as well developed and not required to such extent. The most important tool to be invoked by the arbitrator during the process of adoption of arbitral awards is common sense. In other words, arbitrators have to use more rational than legal arguments, base their decisions on reasonable background.

The arbitrators are not as restricted by the legal rules and formal requirements for adoption of the arbitration decisions. The arbitrator is usually not banned from relying on its own moral values or social policy criteria when establishing the position of the existing law. The arbitrators are sometimes even encouraged to adopt the decision by following their inner perception of justice, i. e. *ex aequo et bono* or as *amiables compositeurs*.

This does not mean that the arbitrators shall not take into account the legal norms and their interpretation. Conversely – it is very important for the arbitrators not to make any faults of law and adopt a decision which is not violating the public order, since such decision might be challenged by the parties. Another issue to consider is the reputation of the arbitrator, which is usually very important – the market of arbitration services, as well as any kind of legal services, is very sensitive for the issues of reputation and standard of ethics.

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Biography

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