CHAPTER 1

To What Degree Should Access to Justice Be Secured in Arbitration?

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Access to Justice is not a new theme in legal theory and practice, it is a topic that has been subject of extensive academic and policy debate. However, the degree to which access to justice should be secured in arbitration is lacking examination. As arbitration becomes a more popular method of dispute resolution, expanding beyond the commercial circle, it is imperative to look at access to justice in arbitration more widely. Thus, this chapter looks at the general meaning of access to justice to evaluate if and how it can be guaranteed in arbitration. The study is done by scrutinizing the concept of access to justice and contextualizing it to the nature of arbitration. As arbitration is a procedure used to obtain justice, when the discussion about access to justice is taken within arbitration, procedural justice becomes a foundation to evaluate the degree in which access to justice can be guaranteed in arbitration. Therefore, procedural justice is also assessed together with the concept of access to justice and the nature of arbitration. At this point, a case is made that for access to justice to be guaranteed in arbitration, some form of procedural justice needs to be secured and the degree in which this is assured, will depend on the position and consent given by the parties in the arbitral process.

§1.01 INTRODUCTION

Access to justice is not a new theme in legal theory and practice; it is a topic that has been the subject of extensive academic and policy debate.[1] However, the degree to

* The author would like to thank Dr Ryan Hill and Dr Sufyan El Droubi for the comments on the early draft of this chapter. All mistakes of interpretation and translations are the author's own.

1. *See* §1.02 and §1.03.

which access to justice should be secured in arbitration is lacking examination. The analysis of access to justice in arbitration has mainly focused on specific types of arbitration,[2] without a theoretical basis to scrutinize the degree in which access to justice should be implemented generally in arbitration, be it domestic or international.

As arbitration becomes a more popular method of dispute resolution, expanding beyond the commercial circle, it is imperative to look at access to justice in arbitration more widely. Hence, this chapter will provide a conceptual analysis of access to justice to examine what is required in arbitration if access to justice is to be guaranteed. Access to justice is not just having physical or digital access to a system of adjudication, but also having a procedure securing a fair process. This leads the way to two components of access to justice: first the existence of means to have access; and second, fairness in the process adopted for adjudication, that is, procedural justice. Because arbitration is a procedure used to obtain justice, when the discussion about access to justice is taken within arbitration, procedural justice becomes a foundation to evaluate the degree in which access to justice can be guaranteed in arbitration.

Therefore, in this chapter, the case will be made that in arbitration, some form of procedural justice is essential if access to justice is to be secured in the arbitral process. To reach this conclusion, the chapter will start by looking at the development of access to justice as a concept in the context of the conventional system of law and adjudication at court. This will first be done by looking at the background of access to justice, and the modern foundations for its concept will be defined after. Once the conceptual understanding of access to justice has been explained in the context of adjudication in court, a distinction between court adjudication and arbitration will be discussed to set the scene for the analyses of the nature of arbitration. This will be done by describing the theoretical underpinnings that provide ways in which we might understand the nature of arbitration. At this stage, the debate will shift to a discussion of procedural justice where its theoretical aspects will be examined. The chapter will conclude that access to justice in arbitration should be guaranteed in different ways depending on the position and consent given by the parties in the arbitral process.

§1.02 BACKGROUND FOR THE DEVELOPMENT OF ACCESS TO JUSTICE

Historically, features of access to justice, such as the right to access to court, can be found in early legal instruments, going all the way back to the Magna Carta.[3] Other features, such as the right of an individual to effectively challenge a criminal charge in

2. For instance, *see* Jonnette Watson Hamilton, Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?, 51 McGill Law Journal, 693 (2006); Francesco Francioni, Access to Justice, Denial of Justice and International Investment Law, 20(3) The European Journal of International Law, 729 (2009), Mark D. Gough, 'Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice?', in David Lewin and Paul Gollan (eds) Managing and Resolving Workplace Conflict, Advances in Industrial and Labor Relations vol. 22 (Emerald Group Publishing Limited 2016) and Omri Ben-Shahar, The Paradox of Access Justice, And Its Application to Mandatory Arbitration, 83 University of Chicago Law Review 1755 (2016).
3. Clause 40 of the Magana Carta stated that: '[t]o no one will we sell, to no one deny or delay right or justice.'

court was secured already in the Sixth Amendment of the US Constitution 1791, which provides that anyone accused of a crime has the right to a trial and the '[a]ssistance of Counsel for his defence'.[4] Similarly, the French Constitution of 1791 stated that all citizens had the '[l]iberty to address individually signed petitions to the constituted authorities'.[5] These early examples were the beginning of a process to both furnish and regulate features of access to justice. They provided some principles of access to justice such as access to court and the right to be represented by counsel. However, at the time such instruments came into force, not all citizens were treated the same way and only certain classes of citizens had access to such rights.[6]

By the twentieth century, however, a shift was happening over both the place of justice within legal systems and its substantive requirements. For example, guarantees that those unable to afford legal representation will be able to have such representation given to them, free of charge, was being more broadly applied. In England, for example, the development started with the Poor Prisoners Defence Act 1903 which provided a *right* of legal aid for qualifying prisoners but restricted such right to trials on indictment. Seventeen years later, the Poor Prisoners' Defence Act 1930 expanded the reach of legal aid to preliminary inquiries and to cases heard summarily before magistrates' courts. Three years later, the Summary Jurisdiction (Appeals) Act 1933 regulated legal aid rights for criminal cases and sixteen years later, the law went beyond the criminal sphere. The Legal Aid and Advice Act 1949 created a system of legal aid in civil courts and civil proceedings in magistrates' courts. At this stage, in England, parties in criminal and civil cases were guaranteed the right to have legal representation supported by the state when they did not have the funds for it.

At the international level, in 1948, the UN General Assembly approved the Universal Declaration of Human Rights which calls for the right to court and a fair trial.[7] The right also appeared in the 1950 European Convention of Human Rights,[8] the 1966

4. The full wording of the amendment states: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.'
5. Title I of the 1791 Constitution. Original in French: 'La Constitution garantit pareillement, comme droits naturels et civils: … La liberté d'adresser aux autorités constituées des pétitions signées individuellement.'
6. For instance, slaves were not treated as citizens and women were not equal to men.
7. Article 8 of the Declaration states: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' Article 9 of the Declaration says: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'
8. Article 6(1) of the convention provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

International Covenant on Civil and Political Rights,[9] the 1969 American Convention of Human Rights[10] and the 1981 African Chart on Human and Peoples Rights.[11] Access to court, in these documents, did not simply refer to have means to access a court. They also carried within them conditions needed to ensure that any trial was fair, that justice is served through the outcome of the disputes, but also through the path to reach the outcome. As such, the conditions for fairness included such things as an independent and impartial tribunal, a public hearing, the right to present your case, the right to be heard and the right to be assisted by legal counsel. Notably, the documents clearly viewed ensuring justice as central to the trial purpose and process.[12]

This led the way to more fully defining the requirements of the right to access to justice and also, under what circumstances the right can be secured. The development of the right to access to justice consolidated the view that such a right is fundamental to promote democracy and fairness. A society cannot be just if its members are not able to seek remedies for the violation of their rights. In this sense, it is also relevant to mention that access to justice is part of sustainable development. The UN, in 2015, adopted the 2030 Agenda for Sustainable Development which 'provides a shared blueprint for peace and prosperity for people and the planet, now and into the future'.[13] The Agenda for Sustainable Development has seventeen goals, with number sixteen being to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.[14] On a domestic level, it is common to find within state constitutions a provision guaranteeing access to justice as a fundamental right.[15]

9. Article 14(1) of the Covenant says: 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.'
10. Article 8(1) of the convention says: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.'
11. Article 7(1) of the Chart provides: 'Every individual shall have the right to have his cause heard. This comprises: 1 The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; 2 The right to be presumed innocent until proved guilty by a competent court or tribunal; 3 The right to defence, including the right to be defended by counsel of his choice; 4 The right to be tried within a reasonable time by an impartial court or tribunal.'
12. Article 6(3)(c) of the ECHR states that everyone has the right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.
13. https://sustainabledevelopment.un.org/sdgs (accessed 16 June 2020).
14. https://sustainabledevelopment.un.org/sdg16 (accessed 16 June 2020).
15. For instance, the Angolan Constitution, Article 29(1) states: 'Everyone shall be ensured access to the law and the courts in order to defend their legally protected rights and interests, and justice shall not be denied to anyone due to a lack of financial means.' Similar provisions can be

Additionally, different government's bodies adopt policies to promote access to justice. In the US Department of Justice, there is an Office for Access to Justice.[16] It was established in 2010 with its goal to 'help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status'.[17] The EU has a similar approach and its Agency for Fundamental Rights has as one of its themes access to justice.[18] The agency 'seeks to provide evidence-based advice to policymakers at EU and National levels in order to improve awareness of and access to justice'.[19] In the UK, an important moment for the reassessment of access to justice came in 1996 when Lord Woolf published his report on Access to Justice.[20] The report aimed at changing civil procedures rules, reducing costs of litigation and excluding complexities, all of which were made to improve access to justice. The question of reducing costs was paramount and innovative, however, its effects were subjected to doubts.[21] A method to improve case management was to encourage the resolution of disputes through alternative dispute resolution (ADR) before they reached litigation.[22] The report does not specify the type of ADR, giving the idea that ADR should encompass all its different types of dispute resolution methods. Furthermore, it has been argued that access to justice should be a central concern of legal education.[23] Although universities are now providing some type of assistance to the public through law clinics, it is not common for the subject to be addressed as a core topic in the teaching curriculum.[24]

By recognizing justice as an entitlement owed to everyone, access to justice became an essential element of the rule of law.[25] In explaining the requirements

found in the Constitution of Bhutan (Article 21(1)); The Cape Verde Constitution (Article 20(1)); The Ecuadorian Constitution (Article 75); the Mexican Constitution (Article 17); The Finish Constitution (Section 21); The Dutch Constitution (Article 17); The Indian Constitution (Section 39A); and the Japanese Constitution (Article 32).

16. In https://www.justice.gov/archives/atj (accessed 04 April 2019).
17. *Ibid*.
18. In https://fra.europa.eu/en/theme/access-justice (accessed 04 April 2019).
19. *Ibid*.
20. Harry Wolf, Access to justice final report to the Lord Chancellor on the civil justice system in England and Wales (HMSO 1996).
21. There was a possibility that even if the recommendations were implemented, lawyers would still be able to use litigation for profit, diminishing the impact of the report. *See* A.A.S. Zuckerman, *Lord Wollf's Access to Justice: Plus Ça change…*, 59 MLR 773 787 (1996): 'Although Lord Woolf seeks to confer a power on lay clients to resist lawyers' tendency to push up costs, clients are unlikely to be more successful in this regard than they are at present…Clients find it difficult to resist costs, not for lack of information about costs but because they cannot judge for themselves whether any proposed investment in procedure is worthwhile. For making such a judgment they will, of necessity, continue to depend on their lawyers, and no improvement in information as to how the costs are calculated will change this.'
22. Wolf (*supra* n. 20) Section 2, Chapter 1 7(d) and 16(c).
23. Donald Nicolson, Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World, 22(1) International Journal of Legal Profession, 51, 52 (2015).
24. Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 Loyola of Los Angeles Law Review, 869, 905 (2009).
25. Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 Yale Journal of Law & the Humanities, 397, 411 (2012). The assessment of access to justice and the rule of law is also employed by the UN in the United Nations and the Rule of Law (in https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ (accessed 04 April 2019).

deriving from the rule of law, Lord Bingham argued that access to a procedure was the sixth principle of the rule of law because 'means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve'.[26] Moreover, '[Q]uestions of legal right and liability should be resolved by the application of the law and not by the exercise of discretion'.[27] The link between access to means of redress and the rule of law was debated in *R (On the application of Unison) v. Lord Chancellor*.[28] Deciding the case, the UK Supreme Court ruled that fees imposed by employment tribunals and employment appeals tribunals restricted access to justice. Lord Reed asserted that access to court, as a part of access to justice, was a constitutional right 'inherent in the rule of law'.[29] He explained that the meaning of rule of law is not always clear and there is an assumption that when the judiciary administer justice, it is merely providing a service to users; and 'the provision of those services is of value only to the users themselves and those who are remunerated for their participation in the proceedings'.[30] Rejecting this assumption, Lord Reed argued that access to courts is a mechanism to maintain the rule of law irrespective of litigants involved in specific cases. Laws are made by Parliament and, together with the common law, their applicability is assured by courts. Therefore, if there is no access to courts, 'laws are liable to become dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade'.[31] Accordingly, access to court, which is part of access to justice, is in the centre of the rule of law. It not only provides a path for parties to seek justice, but it has an *erga omnes* effect. Decisions made by courts will guide society on how the law is applied; therefore, restricting access to courts diminishes the rule of law and it removes from access to justice one of its basic principles. If courts cannot decide quarrels in society, it defeats the purpose of the rule of law and therefore there is no access to justice. Other relevant features in Bingham's analysis of the rule of law include that 'judicial procedures should be fair and open'.[32] Inherent, therefore, in the rule of law is an independent and impartial judiciary along with any procedural guarantees in the judicial process necessary to ensure justice can be delivered.

§1.03 UNDERSTANDING ACCESS TO JUSTICE

Access to justice means more than just getting a day in court. It also secures that justice will be an essential part of the procedure in court. In this sense, it is not enough to provide means for legal aid, it is also important to have a procedure shaped in a way that mitigates disadvantages between the parties. This inequality of arms between

26. Tom Bingham, *The Rule of Law* (Penguin Books 2011) 85.
27. *Ibid*.
28. *R (On the application of Unison) v. Lord Chancellor* [2017] UKSC 51. Though the case did not assess access to justice per se, it evaluated one of its main dimensions, the access to court.
29. *Ibid*., paragraphs 65 and 66.
30. *Ibid*.
31. *Ibid*., paragraph 68.
32. Bingham (*supra* n. 26).

parties demands a qualitative balance in the procedure and not merely getting through the courtroom door. Therefore, it is important for parties to have their day in court, but it is paramount that such 'day' will be following a procedure that is employed in a fair manner. This is the guarantee of procedural justice which makes the process fair and protects the right to access to justice regardless of the dispute's result.[33] To understand the concept of access to justice, this section will first look at the survey on access to justice made by Mauro Cappelletti [A]. From this evaluation, a critical analysis of its concept will be made [B] to set up the context of access to justice for its later study in arbitration.

[A] Cappelletti's Access to Justice Survey

The Florence Access to Justice Project, led by Mauro Cappelletti, provided a world survey about access to justice, with reports from twenty-three jurisdictions.[34] In this survey, Cappelletti evaluated how access to justice was being employed, at the time, through a comparative study based on data provided by the twenty-three reports. When defining access to justice, Cappelletti argued that it 'served to focus two basic purposes of the legal system',[35] being equal access to all and 'results that are individually and socially just'.[36] Proper access to justice, that is, an equal and just access, emerged from a new class of 'social rights'[37] which 'presupposes mechanisms for their effective protection'.[38] Access to justice needed to be effective and achieving such effectiveness was not simple.[39] Therefore, Cappelletti looked at barriers to access to justice gathered from the collected data and identified common obstacles. These included costs of litigation, capability of parties and problems with diffuse interests, such as consumer and environmental protection.[40]

To overcome these barriers, he proposed three major steps called waves of access to justice. The first wave was to foment access to justice to the poor.[41] If society was to secure equality of arms, access to legal remedies must be affordable to all. With legal aid, everyone, in theory, could have their day in court. However, this does not suffice. It is also necessary to have an adequate representation so a party could obtain a fair

33. *R (On the application of Unison)* (*supra* n. 28), paragraph 29, Lord Reed asserted: 'More fundamentally, the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication.'
34. Mauro Cappelletti and Bryant Garth, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, 27 Buffalo Law Review, 181 (1978).
35. *Ibid.*, 182.
36. *Ibid.*
37. Such rights were reflections of the acceptance and positive consolidation of the international human rights instruments enacted before the production of the report.
38. Mauro Cappelletti, *Access to Justice: Comparative General Report*, 40 Rabel Zeitschrift für ausländisches und internationales Privatrecht, 669, 672 (1976).
39. *Ibid.*, 673. The meaning of effectiveness in this context is to provide a 'complete equality of arms', which is utopian.
40. Cappelletti (*supra* n. 34) 186-196.
41. *Ibid.*, 197.

result to their claims. The second wave addressed diffuse interests, that is, not just the interest of the poor but the interest of anyone affected by a violation of a legal right.[42] This was to be done through the types of procedures encompassing several parties, such as class actions, in which collective rights are examined at the same time instead of each individual, on its own, starting a claim. The last wave, named access to justice approach,[43] analyses the implementation of the two waves, but it goes further. For the two waves to be effective, new legal procedures are required to facilitate disputes, and even prevent them from materializing. The proposals were to reform litigation procedures with more specialized courts and the use of ADR mechanisms, such as arbitration.[44]

The work of Cappelletti is commendable and it was the first of its kind. The first wave became one of the ways to analyse access to justice, but it is important to emphasize that access to justice has social and philosophical dimensions. Moreover, a critique needs to be made if one looks at access to justice solely in relation to those who cannot afford to pay for legal services, as if access to justice was only a problem of the less fortunate.[45] This is not an invalid view as it can appear that access to justice is only a problem if one of the parties is poor.[46] However, access to justice is not limited to being able to afford legal fees. It also embodies a proper and *effective* access to a court with a procedure that ensures certain fundamental conditions for justice, such as the rule of law. This can be seen in Cappelletti's idea of the third wave where effective access to justice requires an effective mechanism to provide justice in a fair manner. Other guarantees, such as due process, the right to present your case, and to challenge claims made against a person are paramount to assure access to justice and are thus, implicit components of access to justice.

42. *Ibid.*, 209.
43. *Ibid.*, 223.
44. *Ibid.*, 232.
45. Catherine R. Albiston and Rebecca L. Sandfur, *Expanding the Empirical Study of Access to Justice*, Wisconsin Law Review, 101, 110 (2013).
46. Instruments with the label access to justice tend to give such impression. For instance, the Hague Conference on International Private Law in its 1980 Convention on International Access to Justice that regulates legal aid. Article 1 of the convention states: 'Nationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State. Persons to whom paragraph 1 does not apply, but who formerly had their habitual residence in a Contracting State in which court proceedings are to be or have been commenced, shall nevertheless be entitled to legal aid as provided by paragraph 1 if the cause of action arose out of their former habitual residence in that State. In States where legal aid is provided in administrative, social or fiscal matters, the provisions of this Article shall apply to cases brought before the courts or tribunals competent in such matters.' The same approach is taken by the Access to Justice Act 1999 in the UK. *See also* Deborah L. Rhode, *Access to Justice* (Oxford University Press 2004) 3, and Maurice Hayes, *Access to Justice*, 99 (393) Studies: An Irish Quarterly Review, 29, 30-31 (2010).

[B] Conceptualizing Access to Justice

Access to justice is not a straightforward concept. Cappelletti thought that access to justice should be equal access for all with just results. Such access derived from the emergence of social rights. Thus, the more social rights individuals have, the greater the need for a process that guarantees an adequate path to attain justice. Lord Bingham saw access to justice as a feature of the rule of law. His point was not far from Cappelletti's in the sense that it is imperative for means to be implemented, in a timely and cost-effective manner, and for disputes to be resolved fairly, when parties are unable to solve quarrels without the interference of a third party. As a result, one interpretation is that access to justice needs expansion to secure the protection of social rights, whereas the other view is that access to justice is paramount for the operation of the rule of law. Additionally, access to justice engages with public interest, as it is in the interest of the public to have the capacity to seek redress for violation of their rights. Another complication with the concept of access to justice is that its features cannot be mixed with its main idea. Access to court is part of access to justice but the latter is larger than the former. From the discussion so far, it can be said that access to justice has two main areas of concern: access to some form of procedure for dispute resolution; and conditions that the procedure adopted for dispute resolution will be able, as far as possible, to produce a just outcome.

Starting with the first area of concern, access to justice secures that parties will have access to the dispute resolution procedure. This means that parties must be able to have access to courts, whether physically or, in modern times, in a digital format. The adjudication process should be available to all if they would like to access it. That is when access to justice looks at legal aid. Legal representation is needed to claim such right and legal fees are not cheap, hence, means should be provided for individuals to have funds to obtain access to courts. This is when legal aid, normally supported by the state, comes to play as one of the sources to assure poor parties can have their right to access some form of procedure for dispute resolution. In this sense, a distinct approach to how access to the courts should be achieved is presented by Cornford[47] where he argues that 'the work of private legal profession would have to be socialized'. [48] This claim he supports through a comparison with access to the National Health Service (NHS) in the UK. The right to health is a social right, hence, it is the government's duty to provide healthcare that is accessible to all. The UK approach is that this is achieved by, among other things, ensuring that access to the NHS is free. Using the same argument, the implementation of the socialized access to justice would have to be done by socializing the Bar, 'turning it into a salaried public service'.[49] Cornford also argues that the solicitor's profession would be socialized and in a similar structure as the

47. Tom Cornford, 'The Meaning of Access to Justice', in Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique (eds), *Access to Justice Beyond the Policies and Politics of Austerity* (Hart 2016).
48. *Ibid*., 36.
49. *Ibid*.

socialized Bar, there would be free advice for actions such as 'mediation, conveyancing, writing wills, notarization of documents, etc'.[50] This view is about funding access to courts and as a result, providing access to justice free at the point of delivery. The idea has its merit, but Cornford recognizes that achieving the socialization of the legal profession is unlikely.[51]

The second area of concern deals with procedural conditions to assure a just outcome. Here access to justice involves a number of basic rights which are essential for justice to be achieved. There is initially, a requirement of a legal system conforming to the rule of law. As ramification of the rule of law, the procedure must deliver guarantees of natural justice and the right to a fair trial. In that sense, due process must be in place by giving the parties the opportunity to have participation rights such as right to be heard, right to call witnesses, right to challenge any charge against one, right to have an impartial adjudicator, to be able to understand the process (transparency) and, in a timely manner, to have a decision for their dispute. Additionally, it is important to remove obstacles that can be used in the procedure to shake the balance between the parties. If there is evidence of inequality of arms between the litigants, access to justice should secure that procedure tools can be used to bring procedural balance to the parties in the dispute. A weaker party might be able to have access to court but if in court, such party is not protected, it will be pointless to just get through the courtroom door.

Access to justice involves the support of access to courts, financial care for legal representation, the rule of law and due process. A legal system providing these things through its adjudication processes, therefore, would meet the requirements of access to justice for those making use of this avenue of dispute resolution. What, however, of ADR mechanisms? Is the situation the same or the requirements identical to ensure these too deliver access to justice? To answer such questions, the differences between court litigation and arbitration need to be addressed.

§1.04 ARBITRATION AND COURT LITIGATION

In this section, a summary of the differences between arbitration and court litigation will be made. The aim is not to cover every aspect of arbitration and court litigation but to contextualize both forms of dispute resolution in relation to access to justice. This is started by answering the following question: Are the same conditions appropriate for ensuring access to justice where arbitration, rather than adjudication at court, is the chosen method to resolve a dispute?

At first sight, the answer would be 'why not'! The common factors between arbitration and litigation in court would lead to the conclusion that the same conditions should be present in both mechanisms of dispute resolution. Both systems require access to a procedure, the possibility of an outcome in favour of either party (not a

50. *Ibid*.
51. *Ibid*., 38. Cornford states: 'Socialisation of the legal profession will not happen because there is no political will to do it and, what is simply the reverse side of the same coin, political opposition to it would be strong.'

predetermined outcome) and the need to deliver what a reasonable person can identify as justice (even if a party is not happy with the outcome). Nevertheless, when the differences in arbitration and litigation in court are highlighted, the 'why not' might not be an obvious answer. Characteristics of the arbitral procedure have the potential to interfere with or displace some of the procedural requirements expected at court litigation, yet these features are, in many cases, key reasons people choose arbitration over adjudication.

Litigation in court is the standard form of dispute resolution. Understanding how access to justice operates in court can normally be found by reference to case law, legislation and various procedural rules relating to different aspects of law, such as civil, criminal, family, etc. Also, constitutions will secure access to justice to parties as well as the rights deriving from access to justice. As a result of this constitutional right, policymakers will implement measures indorsing and guaranteeing access to justice. Thus, in court, access to justice is assured to the parties by law. A good example can be found in the Fourteenth Amendment of the US Constitution when it states that '[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law'. The due process clause is there to assure a fair process and that parties in court litigation, will be entitled to procedural safeguards. A process in court is covered by standards giving the parties a day in court with a public hearing and a right to a remedy. Once a claim is triggered, the adjudicator has to follow the procedures established by law and they cannot deviate from access to justice guarantees.

In arbitration the sources of access to justice are not entirely the same. The arbitral case law does not have an effect of a binding precedent. It can have a persuasive character; nevertheless, it is not the same as a court case embodied by the principle of *stare decisis*. Additionally, confidentiality is an attractive feature of arbitration, making the content of the decisions unavailable to the public. The features of access to justice in arbitration can also be found in domestic or international legislation. In domestic legislation, it is common for an arbitration act to state that parties will be treated equally, that they will have the opportunity to present their case, that arbitrators have to be impartial and independent and that decisions should be reasoned.[52] In the international arena, for example, the same rights can be found in the Model Law[53] and the OHADA Uniform Act on Arbitration.[54] Furthermore, if the arbitration is institutional, it is likely that the rules of the institution will provide for the matching safeties found in domestic and international legislation.[55] Be that as it may,

52. *See* for instance: Sections 1036, 1042(1), 1046 and 1054(2) of the German Code of Civil Procedure; Articles 18 (1)(ii), 25 and 39(2) of the Japanese Arbitration Act 2003 and Article 15(3), 26 and 43(2) of the Egyptian Arbitration Act 1994.
53. Articles 12, 18 and 21(2) of the Model Law.
54. Articles 7, 9 and 20 of the OHADA Uniform Act on Arbitration.
55. At least this can be seen in well-known arbitral institutions such as: ICC Arbitration Rules 2017 Articles 11, 22(4) and 32(2); LCIA Arbitration Rules 2014 Articles 5.3 and 14.4(i) and SIAC Arbitration Rules 2016 Articles 14.4 and 32.4.

access to justice in arbitration differs from access to justice in courts because arbitration originates from the agreement of the parties. If the parties decide that court adjudication is not how their disputes will be solved and, thus, they agree on an arbitral procedure to settle their impasses, they will have the opportunity to influence more the process adopted in arbitration as opposed to the one in court. In arbitration, parties have more input in the arbitral process with, for instance, the capacity to choose the arbitrators, agree upon deadlines, apply a law different from the jurisdiction where the arbitration is taking place and decide how evidence will be assessed.

State courts are bound by due process. The same should be said about arbitration, but the differences between litigation in court and in arbitration could not, at first sight, lead to the conclusion that access to justice in courts is employed in the same manner in arbitration. While litigation in courts and arbitration fulfil the same goal (that is, to provide a binding mechanism to solve disputes) when a conflict is submitted to court, the procedure adopted does not enjoy the same flexibility if the dispute would have been submitted to arbitration. In arbitration, parties can decide upon the procedural measures to be adopted by the tribunal,[56] if there should be hearings in the procedure[57] and that the award does not need to be reasoned.[58] Such differences would indicate that the way access to justice is applied in courts could not follow the same steps in arbitration. After all, the flexibility of arbitration could reduce the degree in which access to justice is guaranteed. This is not entirely accurate: access to justice should be respected in arbitration. However, this cannot be done by adopting the identical procedural dimensions of access to justice in a court procedure. What is better, is to attune the access to justice perspective to the different nature of arbitration, which is a private method of dispute resolution and rooted in the consent of the parties. Although arbitration and litigation in court deliver a procedure by which disputes can be resolved, the procedure is not the same. Consequently, access to justice in arbitration will have similar parameters to that in court but it might not be employed in the same manner.

Furthermore, relying solely on court litigation is no longer sustainable.[59] As the world population increases, more disputes will arise, and other forms of conflict

56. This is the case of Article 22(2) of the ICC Arbitration Rules 2017: '(2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.'
57. This is the case of Section 52 of the Hong Kong Arbitration Act (Arbitration Ordinance (Cap. 609): 'Article 24 of UNCITRAL Model Law (Hearings and written proceedings) Article 24 of the UNCITRAL Model Law, the text of which is set out below, has effect – "Article 24. Hearings and written proceedings (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.'
58. This is the case of Section 1054(2) of the German Code of Civil Procedure: '(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 1053.'
59. *See* for instance Vivek Maru, *Access to Justice and Legal Empowerment: A Review of World Bank Practice*, https://openknowledge.worldbank.org/bitstream/handle/10986/18102/518430NWP0Acce10Box342050B01PUBLIC1.pdf?sequence=1&isAllowed=y (accessed 10 May 2019).

resolution should be used to ensure a timely resolution of disputes. This was predicted by Capelletti's third wave and that is where arbitration initially found a place in the access to justice debate. At the time of the access to justice project, arbitration was not as popular as it is today. Also, arbitration was seen as a quicker and cheaper process to solve disputes,[60] hence, promoting it as an alternative to court was a good solution to foment access to justice. Nevertheless, arbitration is no longer perceived to be fast or cheap; on the contrary, it has become an expensive form of out-of-court litigation.[61] Today, purely commercial disputes, such as one between two multinational companies represented by multinational law firms are ordinary in arbitration. As a result, because the parties are well represented and making a clear choice of how their dispute resolution system will be employed, they are aware that access to justice in arbitration might not be applicable in the same manner as in court litigation. To better understand this proposition, it is necessary to look at the nature of arbitration.

§1.05 THE NATURE OF ARBITRATION

Arbitration is not a new technique, in fact, arbitration has even been traced back to ancient Roman law, albeit within a different framework.[62] Its function is to provide a mechanism to settle disputes outside of court. Ultimately, arbitration, just as litigation in court, aims at providing justice. A feature of arbitration that sheds light into its nature is that it allows a private arbitral tribunal to provide a final and binding decision to the parties' quarrel. But being a private tribunal, it cannot enforce its decisions. It needs a court to assure that its awards will be enforced. However, to decide, an arbitral tribunal needs to have authority to do so. The capacity to arbitrate originates from an agreement between the parties stating that disputes arising out of a transaction will be submitted to arbitration. The agreement is made by the parties and it gives them freedom to decide the format of the arbitral process by choosing the applicable law, selecting the arbitrators, assigning a seat for the arbitration, etc. Moreover, it allows the parties to remove the exclusive jurisdiction of the judiciary to solve disputes. If this agreement is breached and one of the parties seeks relief in court, the innocent party can challenge the jurisdiction of the court based on the agreement. These features are necessary for the functionality of arbitration. As a mechanism opposing litigation in court, arbitration has to provide a system that is not only attractive for parties but is also efficient. This is when arbitration, in the international scenario, becomes appealing. The possibility of subjecting a dispute arising out of an international contract to a private tribunal instead of a domestic court, in a neutral venue, gives the parties some security. It is common for parties not to trust the judiciary of a foreign country.

60. Bruce L. Benson, *To Arbitrate or to Litigate: That is the Question*, 8 European Journal of Law and Economics, 91, 94 (1999).
61. *See* Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty is It?*, 32 Journal of International Arbitration, 689 (2015) and Louis Flannery, Gautham Chandrakumar, Krystal Lee and Alastair Kwan for GAR, Arbitration costs compared, https://globalarbitrationreview.com/editorial/1178433/arbitration-costs-compared (accessed 22 February 2019).
62. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (England, Sweet and Maxwell 2007) 4.

As such, the nature of arbitration can be seen to be contractual and private. It is contractual because it comes out of an agreement between the parties and it is private because the dispute is not solved by a public entity. But for arbitration to take place, it is necessary to have a law regulating the arbitral activity and guaranteeing that arbitral decisions will be enforced in court. Thus, arbitration needs to be allowed within a territory of a jurisdiction. Also, if arbitration is international, different laws can be used as the applicable law and it can take place in a neutral forum. The result is that arbitration becomes delocalized and, perhaps, it creates a legal system of its own, independent from courts.

The attachment or detachment between courts and arbitral tribunals is the essence for understanding the nature of arbitration. On the one hand, the state will allow parties to submit disputes to arbitration, and therefore the arbitrator will resolve the impasse; that is, the arbitrator exercises a public function by putting an end to a dispute. On the other hand, arbitration originates from a contract in which parties agree to submit their dispute to arbitration, demonstrating a private and contractual angle to arbitration. The discussion about the nature of arbitration seems very academic,[63] and conceivably with minor implication in practice, but, analysing the different theories regarding the nature of arbitration is necessary to clarify in what way access to justice should be applied in arbitration.

When looking at how the nature of arbitration has been studied, Lew, Mistelis and Kroll identified four theories.[64] The first theory, called the jurisdictional theory, determines that arbitration is permitted if the jurisdiction in which arbitration is taking place has the power to regulate it.[65] This signifies that arbitration is allowed because there is a law establishing its function; a specific jurisdiction permits a private tribunal to administer justice and therefore, the legal nature of arbitration is jurisdictional. The arbitrator has a similar role to a judge, and they will apply the local law. The second theory opposes the jurisdictional approach. The contractual theory argues that arbitration has a contractual character depending completely on the parties' agreement; that is, the consent of the parties.[66] It is irrelevant if a state is regulating arbitration as it originates from the parties' intention to have a dispute arbitrated. Its root is freedom of contract, the contract being the arbitral cornerstone. Without it, there is no arbitral procedure. The arbitrator will be the authority to find a solution to the dispute and their power emanates from the contract which opted to exclude the solution of disputes from the judiciary. The third approach, the mixed or hybrid theory, combines the jurisdictional and the contractual theory as arbitration depends on both features of the two theories.[67] It is a fact that arbitration comes out of a contract, however, it cannot function alone. To make sure that arbitration is effective, there is a need for jurisdictional support, not only by regulating arbitration, but also to assist in the enforcement of the arbitral decisions. Last comes the autonomous theory stating that arbitration

63. Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 72.
64. *Ibid*.
65. *Ibid*., 74.
66. *Ibid*., 77.
67. *Ibid*., 79.

developed independent from a jurisdiction or a contract and it can operate outside the jurisdictional limitations of a legal system.[68] This theory presents arbitration as a system of its own, independent from constraints of any legal system. Arbitration will start with the parties' agreement but once the process commences, it has its own rules, dynamics and procedures, all delocalized and detached from a legal system. Under this theory, arbitration is seen as having grown into a non-national and transnational procedure, reflecting what is sought by its users; that is, an autonomous system unchained from national or international legal systems.

Another format used is to address the legal foundations of arbitration.[69] Paulsson presents four propositions for the legal foundations: 'the territorial thesis, the pluralistic thesis, the autonomous legal order and arbitration independent of national law or judges'.[70] The territorial thesis has the same idea as the jurisdictional nature of arbitration. It preaches that arbitration cannot have effect if there is no permission for it to materialize.[71] The pluralistic thesis goes beyond the territorial limitations and sees arbitration as combination of legal orders insuring its efficacy. Despite the confusion that a multitude of orders can create, 'an unknown set of potentially relevant legal orders corresponds to the reality of international life'.[72] The third of Paulson's proposals is that arbitration has produced a legal order of its own, not depending on a territorial basis or on a combination of legal orders. It has developed its own unique system with its own rules and principles. The last proposal, like the autonomous theory of the nature of arbitration, embraces an arbitral system but it preaches that, from time to time, some help from the judiciary is needed. Arbitration would work mainly, but not solely, on its own, akin to 'private social systems which secure the enforcement of rights and obligations defined by its constituting groups'.[73]

When assessing the judicialization, governance and legitimacy of arbitration, Sweet and Griesel present another viewpoint to the nature of arbitration.[74] They looked at three models of arbitral governance to assess the judicialization of arbitration: contractual, judicial and pluralist-constitutional.[75] The idea was that agency plays a role in the models, thus, the contractual model has a principal giving power to an agent, the former being the parties and the latter being the arbitrators.[76] This has a contractual nature but it is a peculiar form of agency as the arbitrators – the agents – have power over the principals, being more like a trusteeship.[77] The judicial model states that the arbitrator is an '[a]gent of a larger arbitral legal order, which is comprised of transnational firms, investors, arbitration houses, states and other

68. *Ibid.*, 81.
69. Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013).
70. *Ibid.*, 30.
71. *Ibid.*, 32-33.
72. *Ibid.*, 38.
73. *Ibid.*, 45.
74. Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration* (Oxford University Press 2017).
75. *Ibid.*, 24-25.
76. *Ibid.*, 26.
77. *Ibid.*

stakeholders'.[78] Again, agency is present but this time on a larger scale, breaking the contractual limitation and reaching beyond privity of contract. The pluralist-constitutional model looks at transnational governance, assessing how arbitration is not attached to one legal system but a myriad of systems, being national, international and transnational.[79] The constitutional aspect of the model relies on two facts, the first is that some instruments employed in international arbitration, such as the NYC and the ICSID convention have been ratified by many countries and they 'perform inherently constitutional functions'; the second is that the same instruments 'are foundational elements of an evolving international economic constitution grounded in general principles and fundamental rights'.[80]

The different perspectives offer similitudes. Jurisdictional, judicial and territorial approaches are all based on the idea of a positive law regulating and allowing arbitration to take place within a sovereign state. This follows a legal positivist perception such as Hart's rules of adjudication whereby individuals 'who are to adjudicate' can be recognized, *and* the procedures followed in adjudicating can be demarcated.[81] The fact that arbitration originates from a contract cannot be ignored but to see the contract as the sole source of arbitration is to disregard the fact that arbitration might depend on local courts to be effective. There is merit in saying that arbitration is completely autonomous as it has created a body of precedents gathering principles from diverse jurisdictions; nevertheless, it is hard to see arbitration completely detached from the machinery of a state. At the very least it needs a local court to enforce its decisions.[82] Ignoring completely the jurisdictional character of arbitration can be concerning because, in an extreme scenario, it could completely exclude the application of rights that, for instance, guarantee access to justice to the parties. The hybrid theory, the pluralist-constitutional model and Paulsson's last foundation of a system that depend on the judiciary from time to time but are independent, present a reasonable concept. This context provides legitimacy to arbitration as it is grounded by rules enacted to ensure its application.

For a rule to be legitimate, reference must be made to 'a community's evolving standards of what constitutes a right process'.[83] Legitimacy of rules can be achieved if it presents four indicators: 'determinacy, symbolic validation, coherence and

78. *Ibid.*, 25.
79. *Ibid.*, 30.
80. *Ibid.*, 31. The authors assert that there are 'constitutional understandings of the international legal system which presuppose a substantive body of higher law norms that are binding on all international judges, including arbitrators'. As a result, the common elements of this higher norm are '*jus cogens* norms, human rights, including property rights and procedural guarantees associated with due process and access to justice.'
81. H.L.A. Hart, *The Concept of Law* (3rd ed., Oxford University Press 2012) 97.
82. There is a possibility of even excluding the participation of a court during the enforcement if the parties in arbitration have an independent contract guarantee to pay for the amount established in the award. For a theoretical framework of such possibility *see* Cristián Gimenez Corte, *Lex Mercatoria, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement*, 3(4) Transnational Legal Theory, 345 (2012).
83. Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press 1997) 26.

adherence'.[84]The first indicator requires the rule to be clear and transparent so 'one can see through the language of a law to its essential meaning'.[85] Once arbitration is regulated by the state or arbitral bodies, using international rules with a constitutional character recognized by the international community, the procedure is likely to be transparent or at least based on rules accessible to all. The second indicator relates to authorities. A rule has a symbolic validation by showing that authority 'is being exercised in accordance with right process that it is institutionally recognized and validated'.[86] The authority will be the acceptance that the arbitral tribunal is constituted by the agreement of the parties, protected by law and applied in a manner that combines different approaches. The third indicator requires that a rule 'whatever its content, be applied uniformly in every similar and applicable instance'.[87] The combination between the contract and the jurisdiction would lead to a coherent application of the rules; moreover, arbitration has also been subject to the pluralist view whereby rules from different legal systems have constituted a body of law proper to arbitration. Last, the adherence indicator makes the connection between a primary rule, which establishes the obligation, and the secondary rules, which govern the execution of the obligation in a community.[88] Merging the theories would create the adherence and would fulfil the last stage of its legitimacy.

The debate about the nature of arbitration explains how this method of dispute resolution gained so much relevance and continues to expand in application.[89] The purely commercial context of disputes is no longer a monopoly in arbitration and, although the autonomous theory is a well-established concept, the development of arbitration to other fields of law such as consumer, employment, family disputes and sports disputes, where equal footing between the parties is not clear, might not welcome the independence enjoyed in commercial disputes, principally when it comes to guaranteeing access to justice.

§1.06 ACCESS TO JUSTICE AND ARBITRATION

So far, this chapter has analysed the concept of access to justice to establish that it requires access to some form of dispute resolution procedure and throughout this procedure, certain conditions should be met to ensure, as far as possible, a just outcome. After looking at the concept of access to justice, the differences between arbitration and court litigation were addressed to contextualize the assessment of the nature of arbitration. It was shown that the court system is established by law and in

84. *Ibid.*, 30.
85. *Ibid.*
86. *Ibid.*, 34.
87. *Ibid.*, 38.
88. *Ibid.*, 41.
89. *See* for instance the 2018 International Arbitration Survey: The Evolution of International Arbitration, made by the School of International Arbitration at Queen Mary, University of London, in http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 22 February 2019), where '97% of respondents indicate that international arbitration is their preferred method of dispute resolution'.

this sense, it is rather rigid when compared to arbitration. Also, arbitration, which derives from a contract, has its focus on the parties' agreement and liberty to determine a procedure to be applied in the dispute resolution mechanism. This gives the parties more flexibility when compared to court litigation. Such flexibility can be seen in the theories underpinning the nature of arbitration. Although flexibility is one of the reasons for arbitration to be an attractive method of dispute resolution, it can have a potential to interfere or displace procedural requirements that would be expected in court. Because arbitration is a procedure employed to deliver justice, and access to justice requires a procedure, before looking at access to justice in arbitration, we will first examine the debate about what procedural justice is [A]. Once procedural justice has been theoretically conceptualized, this section will finally propose how access to justice should be secured in arbitration [B].

[A] Procedural Justice

Studies on procedural justice have been done through legal theory and legal and social psychology. In relation to legal theory, this section will look at the work of Rawls in his assessment of pure procedural justice [1]. Concerning legal and social psychology, the work of several psychologists will be examined in relation to their studies about how lay people perceive procedural justice [2].

[1] Rawls Pure Procedural Justice

In legal theory, Rawls provides us with a concept of pure procedural justice which, in his view, to be understood, first needs an analysis of the distinction between perfect and imperfect procedural justice.[90] For Rawls, perfect procedural justice would require 'an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it'.[91] Rawls exemplifies this view with a division of cake where the person dividing the cake will do this in an equal manner, making the largest share possible and getting for themselves the last piece.[92] The example demonstrates two characteristics of procedural justice. The first is 'an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed'.[93] The second is that 'it is possible to devise a procedure that is sure to give the desired outcome'. [94] Rawls concludes that perfect procedural justice 'is rare, if not impossible, in cases of much practical interest.'[95] Moving to imperfect procedural justice, Rawls argues that it would have the same independent standard as perfect procedural justice but, in this variant, 'there is no feasible procedure which is sure to

90. John Rawls, *Theory of Justice* (Harvard University Press 1971) 85.
91. *Ibid*.
92. *Ibid*.
93. *Ibid*.
94. *Ibid*.
95. *Ibid*.

lead to it'.[96] An illustration of imperfect procedural justice is a criminal trial that, despite having rules governing the trial, the proceedings can generate a wrong result such as a guilty person walking free or an innocent person being found guilty.[97] Rawls next envisages what he calls pure procedural justice. This version excludes the independent standard for the outcome; 'instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that such procedure has been properly followed'.[98] This can be seen, for example, with gambling, where several individuals will make a bet and the distribution of money, when the game ends, is fair, or at least not unfair, because the rules of the game were followed and the established procedure was carried out rigorously.[99] In other words, '[i]t is as if the procedure by itself makes the outcome just'.[100]

[2] Procedural Justice in Legal and Social Psychology

In legal and social psychology, the first examination of procedural justice was made by Thibaut and Walker who concluded that, in legal proceedings, parties are as concerned about the procedure employed as opposed to the outcome to be obtained.[101] Individuals that could take part in deciding the procedure, having some control over it, would ultimately consider that the result of the dispute would be fair.[102] The participation in the process which produces the outcome of the dispute gives the impression that, regardless of the result, as long as the process is accepted by the parties, the result is just. Later on, Leventhal outlined that for a procedure to be considered fair, six procedural justice rules would need to be met: consistency rule, bias-suppression rule, accuracy rule, correctability rule, representativeness rule and ethicality rule.[103] The rules are based on perceptions of individuals in the procedure. Thus, lack of consistency would lead the individual to see the procedure as unfair. This rule is connected to the principle of equality of opportunity.[104] Bias needs to be avoided because a person 'is likely to believe that procedural fairness is violated when there is unrestrained self-interest or devotion to doctrinaire views'.[105] The process must be founded in a decision with quality and accuracy, informed by proper sources and competent

96. *Ibid.*, 86.
97. *Ibid.*
98. *Ibid.*
99. *Ibid.*
100. William Nelson, *The Very Idea of Pure Procedural Justice*, 90(4) Ethics, 502, 503 (1980).
101. John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (John Wiley & Sons Inc. 1975).
102. *Ibid.*, 118.
103. Gerald Leventhal, 'What Should Be Done with Equity Theory', in Kenneth J. Gergen, Martin S. Greenberg and Richard H. Willis (eds), *Social Exchange Advances in Theory and Research* (Plenum Press 1980) 39.
104. *Ibid.*, 40.
105. *Ibid.*, 41.

authorities.[106] Correctability means the opportunity to rectify errors during the process.[107] Representativeness is the ability that parties should have in the decision-making process and, the ethical rule declares that 'allocative procedures must be compatible with the fundamental moral and ethical values accepted by that individual.'[108] Last, Lin and Tyler introduced the concepts of group-value model[109] and the relational model.[110] The first model outlines that a procedure should be created on the basis of the values adopted by a group.[111] As the procedure is based on the values of the group, the procedure will be accepted as fair, even though the parties in the procedure will not take an active role in the decision-making. Thus, an individual would be more concerned about the procedure in itself as opposed to the outcome obtained by the procedure.[112] The second model states that although the procedure will have sources in group values, the group transfers the power to an authority to make decisions. The procedure in itself will give a structure to the authority to decide, thus, the authority to decide moves from the group to one individual.[113] This signifies that fairness in the procedure is linked by perceptions between the authority and the parties subject to the authorities' decision. This relation is based on features of the procedure such as 'judgments of neutrality, trust and dignity'.[114]

[B] Can Access to Justice Be Secured in Arbitration?

Access to justice and arbitration are not incompatible. On the contrary, for the smooth operation of arbitration, guaranteeing access to justice is essential.[115] Access to justice is not just being given the opportunity to have a dispute decided by a third party, be that an adjudicator belonging to a judiciary or an arbitrator. It is having the 'day in court' together with guarantees that the procedure to be followed will assure procedural justice and, from that, a just outcome.

The concern regarding arbitration is that access to justice might appear to be at odds with the nature of arbitration or, at least, not an essential requirement. For example, arbitration, due to its contractual nature and its autonomous stance, could be an arena to disregard access to justice. That is to say, if arbitration is contractual, up to what point can or should the parties in the contract be able to restrict access to justice by reducing its features? This becomes very relevant where there is an imbalance of power between the two parties. For example, a stronger party, through an arbitration

106. *Ibid*.
107. *Ibid*., 42-43.
108. *Ibid*., 43-46.
109. E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (Springer Science + Business Media 1988).
110. Tom R. Tyler and E. Allan Lind, 'Relational model of authority in groups', in Mark P. Zanna (ed.), *Advances in Experimental Social Psychology* vol. 25 (Academic Press 1992).
111. E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (Plenum 1988) 231.
112. *Ibid*., 1.
113. Tyler (*supra* n. 110) 117.
114. *Ibid*., 143.
115. Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56(3) Modern Law Review, 282, 287 (1993).

agreement in a contract, could impose upon a weak party the idea of a mandatory day in court (in this case, a hearing in the arbitral procedure), but with a procedure that is one-sided. If the nature of arbitration is of a system of its own, the guarantee that access to justice will be respected relies on the users of the system and what they agreed upon. If the balance of power in the system does not have a requirement of equity in any arbitration agreement to be decided, again, access to justice can be removed at the discretion of the stronger party. If arbitration has some reliance on a court system, similar to Paulsson's idea that arbitration is an independent system that from time to time needs the help of a judiciary, this can be mitigated by the chance to challenge a lack of access to justice in the arbitral procedure. This would also be in line with the pluralist-constitutional model as the instruments applied in arbitration protect features of access to justice.

A delocalized arbitral framework might work well for commercial disputes involving business to business. Under Rawls' perspective of pure procedural justice, the procedure will make the result just, as long as the parties have agreed and have followed it. In arbitration, parties might have an option to choose the procedure to be adopted, but this choice is not unlimited; there are laws guaranteeing features of access to justice even when the procedure is private.[116] Moreover, if the parties have chosen an arbitral institution, the rules of such institutions will provide for assurances of access to justice such as the right to be heard and an independent and impartial tribunal.[117] However, due to the freedom that arbitration offers the parties to choose the rules to settle the dispute, it appears that arbitration could apply several independent standards to decide if the result obtained is just. Be that as it may, the independent standards in arbitration should not be based on unfair procedures. That would defeat the purpose of arbitration. If the parties have freely agreed the method for the procedure to be followed, and such method is considered fair, the outcome should be fair because the procedure would also be fair. This could be seen in traditional commercial arbitration. If the parties are financially able to be represented by a counsel who clarifies the implications of arbitrating disputes, the parties will be aware of the ramifications generated by removing the exclusive jurisdiction of courts. In doing so, if the parties follow a procedure they have established and accept that in this procedure access to justice is not secured in the same way as it is in court litigation, the result is likely to be fair. This will not necessarily generate unfairness in how justice is being delivered. On the contrary, it will respect the parties' intention and freedom of contract which is translated into the method that parties have contracted to solve a dispute. It will be imperative that minimum principles of access to justice will be present, such as

116. For instance, section 33(1) of the 1996 English Arbitration Act that imposes the tribunal to 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent', Article 594(2) of the Austrian Code of Civil Procedure which stated that 'parties shall be treated fairly. Each party shall have the right to be heard'; and Article 18 of the Chilean International Arbitration Act (Ley 19971/2004) which guarantees that parties should be treated equally and that 'each one of them should be given full opportunity to assert their rights.'
117. *See* SCC Arbitration Rules 2017 Articles 18 and 23(2) and SIAC 2016 Arbitration Rules 14 and 24.1.

having an impartial adjudicator and the parties being be able to present their case, but at same time, parties can agree on how strict the application of such principles will be. The main aspect of a fair process here is that the parties decided together the procedure to be adopted.

Compared to Rawls' theory, the studies in psychology seem more objective since they touch on how the participants in the procedure perceive the process which was used to achieve justice. This shows one of the biggest differences between arbitration and court proceedings, namely, the choice dimension. Parties must have confidence in the system they are choosing, whereas, with the courts, confidence is assumed by its monopoly/structure in spite of the fact parties have neither say in the make-up of the court or its procedures, nor is there need for any contractual agreement to comply with the findings as the court has automatic jurisdiction irrespective of the parties' agreement.

The psychological approach has also been considered in the context of ADR and arbitration.[118] Even when the examination is about ADR, there is a view that arbitration fits the psychological perspective better than other ADR procedures. For example, if procedural justice is about the parties having some ownership over the procedure, mediation would meet the rules proposed by Leventhal. Nevertheless, Collet argues that in an example of divorce, if one party agrees to submit the dispute to mediation and the settlement obtained was heavily influenced by the other divorcing party, it would not matter that there was participation in the process as one of the parties would still feel that there was no procedural justice.[119] However, in arbitration, even though the parties contribute to the process, the decision is made by a third party and not simply mediated through a third party. Therefore, instead of being disappointed and consequently seeing the decision as unfair, the dissatisfaction will be directed at the arbitrator or the arbitration process instead of the other party.[120] In this sense, looking at the relational approach, the outcome might be disappointing but not the process in itself. Moreover, arbitration is a form of ADR which closely mirrors court litigation. In court litigation, the fairness in the adopted procedure is essential for the parties to understand the court system but also to interpret this experience 'into a subjective valuation of the court system as a whole'.[121]

For the parties in arbitration to feel that the arbitral process is fair, it is suggested, therefore, that factors used to assess procedural justice in courts should be applied to

118. For ADR, *see* Neil Vidmar, *Procedural Justice and Alternative Dispute Resolution*, 3(4) Psychological Science, 224 (1992) and Rebecca Hollander-Blumoff and Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, Journal of Dispute Resolution, 1 (2011). For arbitration, *see* Jaunius Gumbis and Miglé Petkevičiene, 'Application of selected elements of procedural justice in arbitration', in Marianne Roth and Michael Geistlinger (eds) *Yearbook on International Arbitration and ADR* vol. V (Neuer Wissenschaftlicher Verlag 2017).
119. Jessica L. Collett, *Is Procedural Justice Enough? Affect, Attribution, and Conflict in Alternative Dispute Resolution*, 25 Justice, 267, 275 (2015).
120. *Ibid*., 276 and 278.
121. Kevin Burke and Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44(1-2) Court Review, 4, 6 (2007-2008).

arbitration, such as neutrality and trustworthiness of the decision-maker, the opportunity to present your case and courtesy.[122] However, this simple transfer of factors from court to arbitration may not be sufficient. For example, the elements of procedural justice in court were described as 'judicial protection, impartiality, guarantee of court instances and respect for previously formed precedents'.[123] Because of the private nature of arbitration, it would fail to meet at least three of these elements. When a dispute is submitted to arbitration, judicial protection is somehow waived. Although parties can resort to court to assist in some aspects of arbitration, it is not the local judiciary that will decide the dispute. Furthermore, arbitration is not subjected to appeals; the attractiveness of arbitration is that it will provide a final binding decision. Last, arbitration has no link to the principle of *stare decisis*, thus, precedents are non-binding. While there is a lot of debate to the way impartiality is employed in arbitration,[124] this requirement is fairly guaranteed in arbitration.

Be that as it may, arbitration cannot be used as a tool to restrict people from seeking redress or from achieving justice.[125] To do so would make arbitration worthless as a dispute resolution procedure. Expanding the same situation mentioned above, if traders impose arbitration clauses on consumers without their consent, and create an arbitral procedure that is one-sided, can there be proper access to justice? For example, in the UK, when a person parks their car in a private car park, be it a residential or commercial car park, and a parking ticket is issued, depending on the operator of the car park, the person can submit an appeal to the Independent Appeals Service (IAS).[126] The IAS ADR rules for appeals are arbitration rules for consumer disputes.[127] The procedure is online, which saves time and makes it easy for consumers to access it. Nonetheless, there is nothing in the IAS ADR rules stating that the arbitrator has to act impartially. Rule 5.2 states that '[a] single Arbitrator will claim the Arbitration using the IAS' automated "case queue" and confirm to the IAS that he has no conflict of interest in the matter in dispute'. Having no conflicts does not, however, create an obligation to act impartially. Moreover, there is no hearing as the process is done

122. Hollander-Blumoff (*supra* n. 118) 14.
123. Gumbis (*supra* n. 118) 43.
124. *See* Drew J. Hushka, *How Nice to See You Again: The Repetitive Use of Arbitrators and the Risk of Evidence Partiality*, 5 Penn State Yearbook on Arbitration and Mediation, 325 (2013); Catherine A. Rogers, *A Window into the Soul of International Arbitration: Arbitrator Selection, Transparency and Stakeholder Interests*, 46 Victoria University Wellington Law Review 1179 (2015); Thomas Schultz, *Arbitral Decision-Making: Legal Realism and Law & Economics*, 6 Journal of International Dispute Settlement, 231 (2015); Van Harten, Gus, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50(1) Osgoode Hall Law Journal, 211 (2012) and Nancy A. Welsh, *What Is '(Im)Partial Enough' in a World of Embedded Neutrals?*, 52 Arizona Law Review 395 (2010).
125. *See* this discussion in Chapters 2, 3, 5 and 6.
126. Their service is provided online. *See* https://www.theias.org/home (accessed 21 February 2020).
127. Rule 2.1 of the IAS Arbitration (ADR) General Rules And Procedures provides: '2.1 Where an Initial Appeal is made against a Trader and where that trader has indicated to the consumer and the IAS that they are willing to engage in Arbitration, the Trader is joined in Arbitration under these Rules automatically.' In https://www.theias.org/the-ias-arbitration-adr-general-rules-and-procedures (accessed 21 February 2020).

online.[128] The absence of a hearing is not a limitation to access to justice, but in the case of consumers, this should be made clear from the beginning so that the consumer would have a choice whether or not to venture into a documents-only dispute resolution system. Otherwise, in such circumstance, because the parties in the dispute are not familiar with the procedure that has been imposed on them, they might perceive it as unfair. [129] Viewing the procedure as fair is essential when there is no equal footing in a dispute.[130]

The same question has also been addressed outside the consumer sphere. The Canadian Supreme Court, in *Uber Technologies Inc. v. Heller*,[131] had to decide if Uber drivers can be considered employees under the Ontario's Employment Standards Act 2000. The service agreement between Uber and its drivers, which was a standard form imposed to all Uber drivers, had an ICC mediation-arbitration clause with the seat of arbitration in Amsterdam and Dutch law as the contractual governing law. To start the dispute resolution process, it was required an upfront administrative and filing fees of US$14,500, in addition to legal fees and cost of participation. The fees reflected most of the claimant's annual income. The claimant argued that the arbitration agreement was

128. Rule 2.4 of the IAS Arbitration (ADR) General Rules and Procedures says: '2.4 Arbitrations will be conducted on a documents only basis and there will not be an oral hearing.'

129. Margaret Jane Radin, in *Access to Justice and Abuses of Contract*, 33 Windsor Yearbook of Access to Justice 189-190, 177 (2016), presents several reasons why consumers would have aversion to mandatory arbitration clauses: 'first, the arbitrators are repeat players for the firms, and it is at least widely suspected that they rule in favour of the firm most of the time; second, arbitration is private and secret, so that if a firm were to lose a waiver case to a consumer, it could still deploy the same waiver with every other consumer; third, arbitration creates no precedent, so that even if Consumer A wins an arbitration case and succeeds in disallowing a waiver, the firm can still deploy the same arbitration clause against Consumers B through Z; and, fourth, as interpreted by the US Supreme Court, arbitration must be strictly between the individual and the firm, so aggregative actions are prohibited. This means that many injuries – those that depend on aggregative actions for redress just cannot be remedied. The US Supreme Court, in effect, said that it is just too bad.'

130. In *Seidel v. TELUS Communications Inc.* 2011 SCC 15, the majority of the Canadian Supreme Court decided that an arbitration clause in a consumer contract was void according to Section 3 of the British Columbia Business Practices and Consumer Protection Act 2004. Such provision makes it void any agreement waiving rights, benefits or protections in the Act. As the claim was based on Section 172 of the Act, which allows the parties to directly petition the Supreme Court, staying proceedings because of the arbitration clause would restrict the right under Section 172. The interest aspect of the decision in relation to access to justice can be found in the dissenting opinion of the court. Although the prevailing opinion, at paragraph 22, starts by saying that '[t]he underlying issue in this appeal is access to justice', the reasoning concentrates in the interpretation of the above mentioned provisions and does not develop the access to justice question. The dissenting opinion, on the contrary, argues that arbitration preserves access to justice. At paragraph 54 the decision states: 'Given the current structure of consumer protection legislation in British Columbia, submitting a consumer's dispute with their mobile phone service provider to arbitration is entirely consistent with the important public purposes of protecting consumers, vindicating their rights and promoting access to justice.' And at paragraph 149 it says: 'Our colleague argues that in the consumer context, the principles of access to justice require a public form of relief that is not limited to the parties to the consumer transaction in issue, and also require that the claims themselves be adjudicated in only one public forum: the courts. We would respond to this argument by observing that access to justice is protected both by the broad powers given to arbitrators and by the representative action provided for in the BPCPA.'

131. 2020 SCC 16.

not valid whilst Uber stated that the claim should be settled by arbitration. The majority of the Canadian Supreme Court understood that the clause was not valid.[132] It started by looking into the application of the Ontario International Commercial Arbitration Act or the Ontario Arbitration Act to the dispute. It concluded that the case was about a labour dispute which is not covered by the Ontario International Commercial Arbitration Act but by the Ontario Arbitration Act. Therefore, under Section 7(2)(2) of the Ontario Arbitration Act, a refusal to stay proceedings can be done if the arbitration agreement is invalid. From this point, applying the doctrine of unconscionability, the Supreme Court did not stay proceedings because the arbitration clause in the service agreement was invalid. They stated that '[t]here was clearly inequality of bargaining power between Uber and Mr. Heller',[133] and that the service agreement was an in or out contract, with no other option given to the claimant. Moreover, the court asserted that '[t]here was a significant gulf in sophistication between Mr. Heller, a food delivery man in Toronto, and Uber, a large multinational corporation',[134] and at no moment, the claimant was made aware of the costs incurred into agreeing to have any dispute arbitrated in the Netherlands. As a result, the conclusion was that '[b]ased on both the disadvantages faced by Mr. Heller in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid'.[135] Brown J agreed that the clause was invalid but under a different perspective. His view was that the arbitration agreement was not valid because it undermines 'the rule of law by denying access to justice, and are therefore contrary to public policy'.[136] He asserted that

> [a]ccess to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty.[137]

The *obiter* makes a clear statement that a clause imposing arbitration where inequality of bargaining power is evident, restricts access to justice. Therefore, the clause is against public policy because it limits the capacity to have access to adjudication and also access to a fair procedure to solve the dispute.[138]

A similar setting can be found in sports arbitration. Athletes wishing to participate in a competition might have to sign an agreement that any sports' dispute will be

132. Wagner C.J. and Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ formed the majority. Brown J agreed with the majority but in different terms and Côté J. dissented in favour of staying the proceedings.
133. *Ibid.*, at 93.
134. *Ibid.*
135. *Ibid.*, at 98.
136. *Ibid.*, at 101.
137. *Ibid.*, at 112.
138. Brown J at 115 said: 'None of this is to say that public policy requires access to a court of law in all circumstances. As this Court has recognized, "new models of adjudication can be fair and just" (*Hryniak*, at paragraph 2). But public policy does require access to *justice*, and access to justice is not merely access to a resolution. After all, many resolutions are *un*just. Where a party seeks a rights-based resolution to a dispute, such resolution is *just* only when it is determined *according to law*, as discerned and applied by an independent arbiter.'

submitted to arbitration at CAS. It is an 'in or out' agreement because non-adherence would result in not joining the competition. This question has reached the ECtHR in *Mutu et Pechstein v. Switzerland*.[139] The cases were about challenges to CAS decisions. Pechstein and Mutu questioned CAS awards that restricted the two athletes from competitions due to doping. The challenges to the awards reached the ECHR where it was concluded that arbitration clauses in sports agreements between athletes and sporting bodies are compulsory and therefore, the arbitral procedure should provide the guarantees established in Article 6(1) of the ECHR.[140] At this point, the, Strasbourg Court asserted that CAS was a tribunal established by law for the purposes of Article 6(1) and that compulsory arbitration is only valid as long as it respects that article. The interesting aspect of this decision is that arbitration in sports disputes without consent is not necessarily unlawful, but it needs to secure the principles of Article 6(1); that is, 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. What the ECHR provided is that basic features of access to justice should be guaranteed in sports arbitration. The reason for this is clear, in sports disputes; on one side there will be an athlete and on the other side there will be a sporting body on which the athlete heavily depends, otherwise, the athlete cannot perform their trade. Thus, where the inequality of power is evident, to assure proper access to justice, the standards in Article 6(1), which are applied in courts, must equally be respected in sports arbitration.

In this context, Rawls' pure procedural justice might not be the best approach for disputes with inequality of arms, that is, when arbitration is imposed on parties. Parties in such conflicts are not familiar with arbitration and for them to trust the system, a strong guarantee of procedural justice should be made. In this sense, Lin and Tyler's relational model can be useful. The fairness in the procedure is based on the relationship between the authority and the parties. To do that, robust principles of access to justice must be present. In arbitration, parties will contribute to the process used to solve the dispute. Nonetheless, if parties are not in equal footing, they need to trust that the system being used will mitigate this. If parties can participate in the procedure by presenting their case, having an impartial tribunal, being heard and treated cordially, the likelihood will be that they will see the process as fair. Inequality of arms does not mean that if parties submit a dispute to arbitration, there is no access to justice. Yet, to ensure that access to justice is provided in such cases, access to justice cannot be subjected to much flexibility, it will need safeguards in place like those that seek to achieve access to justice in court. Moreover, some benefits to the weak party should be made part of the arbitration rules. For example, where there is ambiguity in an agreement, interpretation should be analysed to favour the party that did not draft the ambiguous rule and the onus of proof should favour the weak party. Additionally,

139. App no. 40575/10 and no. 67474/10 (ECHR, 02 October 2018). The case is also addressed in Chapters 2, 4 and 8.
140. (*Supra* n. 8).

where a party cannot afford the costs of the arbitration, some form of legal aid needs to be in place to assist the less fortunate party.[141]

There will always be an individual that, regardless of the fairness in the procedure, will feel that the result of the dispute is unfair if they are the losing party. This, however, does not render the procedure unjust. You can compare this feeling with seeing the team you support in a sports event. If the team loses in a fair game because they did not perform well, although you might be unhappy, the result will be perceived as acceptable. Conversely, if the team loses because the referee did not detect a violation of the rules of the game by the opposing team, which then led to that team winning, you feel cheated.

§1.07 CONCLUSION

When thinking about access to justice, there should not be a 'box ticking' approach adopted; that is, if you get your day in court it is fine and the access to the justice box is ticked. It is common that parties, after experiencing court proceedings, will not 'feel that justice has been done'.[142] Access to justice should be more than just assuring that parties have their day in court. It requires that they have a fair day in court in which the outcome is neither predetermined nor manipulated in favour of one party over the other. Securing that parties can get to a court is a fundamental guarantee, but if it is done proforma, it will be a disservice to the right of access to court.

Arbitration is similar to litigation in court as both forms of dispute resolution aim at providing a solution to a dispute. However, as it has been shown, they are not bound by the same rules. Moreover, they should not be subject to the same rules as this would defeat the purpose of arbitration. Arbitration is a form of ADR, and following Cappelletti's proposal, it is a tool for the third wave of access to justice. It is a private method to solve disputes that, although it resembles court litigation, it provides the parties with certain benefits not available in court.[143] At the same time, access to justice in arbitration functions as a procedural justice guarantor. The expansion of arbitration will generate disputes with inequality of arms between parties, thus, a differential approach is required. This perspective will focus on the parties in arbitration. If the nature of arbitration will be completely delocalized, this approach might not work for disputes where there is a presumption of inequality of arms. When individuals are involved in disputes, their perception of the dispute and associated feelings are essential to determine how they will conclude that the process is fair. Hence, when an

141. Furthermore, Jill I. Gross, in *Arbitration Archetypes for Enhancing Access to Justice*, 88 Fordham Law Review, 2327, 2319 (2020), proposes four conditions to enhance access to justice in arbitration, she says: 'In order for a subtype of arbitration to enhance parties' access to justice … it is critical that the process: (1) cost less and take less time than litigating the same claim in court; (2) result in a published, explained award; (3) does not strip the rights of the parties to assert any claim, remedy, or procedure that would be available in court; and (4) permit the parties to be represented.'
142. Deborah L. Rhode, *Access to Justice*, 69 Fordham Law Review, 1785, 1786 (2001).
143. Parties can choose the arbitrators, they can choose the seat of the dispute, the language of the dispute and the rules guiding the procedure of the dispute.

arbitral dispute involves parties that are not on equal footing, a stricter view of access to justice is required. This view will be mirroring access to justice applied in courts and there should be little room for reducing access to justice. But if it is a business-to-business dispute, where the parties are well informed about the consequences of arbitration, a flexible approach to access to justice need not be unfair. On the contrary, it might reinforce the view that the parties' intentions were recognized and respected. There is no reason for arbitration to reject access to justice; quite the reverse, the flexibility of arbitration permits it to embrace access to justice.

Currently, institutions, parties, legislators and all users of arbitration should assure that disputes submitted to arbitration will respect the rights deriving from access to justice. The expansion of arbitration should be welcomed and not feared. Nevertheless, if such growth does not guarantee effective access to justice, the work devoted to the promotion of arbitration might backfire, rendering an important method of dispute resolution obsolete. Perhaps, with the development of technology and artificial intelligence, in future, conceivably a machine will guarantee the right of access to justice when there is clear inequality between parties.[144] But for now, when disputes are submitted to arbitration, the arbitral procedure should secure the preservation of access to justice, so it generates more public trust in this method of dispute resolution.

144. For the role of artificial intelligence in arbitration *see* Christine Sim, *Will Artificial Intelligence Take Over Arbitration?*, 14(1) Asian International Arbitration Journal 1 (2018) and Maxi Scherer, *Artificial Intelligence and Legal Decision-Making: The Wide Open?*, 36(5) Journal of International Arbitration 539 (2019).