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ARBITRATION FROM THE PERSPECTIVE OF ENVIRONMENTAL DAMAGE

A ARBITRAGEM NA PERSPECTIVA DOS DANOS AMBIENTAIS

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Abstract
This research analyzes the (in)applicability of arbitration when faced with conflicts arising from individual and collective environmental damage. Thus, using the deductive method and bibliographical, legislative, and doctrinal research techniques, we sought to answer the following question: is it possible to use arbitration to resolve individual and collective damages resulting from environmental harm? This research is justified by the importance of environmental protection, as preserving the environment is a collective right and duty for current and future generations. Likewise, arbitration is a complementary process to state jurisdiction that is constantly being developed and improved in the Brazilian legal system, especially in

Resumo
Esta pesquisa analisa a (in)aplicabilidade da arbitragem quando se está diante de conflitos oriundos de danos ambientais individuais e coletivos. Para tanto, este artigo foi elaborado com base no método de abordagem dedutivo e nas técnicas de pesquisas bibliográficas, legislativas e doutrinárias, com a finalidade de responder o seguinte questionamento: é possível se valer da arbitragem para solucionar danos individuais e coletivos que advém de lesões ao meio ambiente? A pertinência da pesquisa justifica-se em razão da relevância do tema envolvendo a proteção ao meio ambiente, já que é direito e dever de todos preservá-lo para as presentes e futuras gerações. Igualmente, a arbitragem é um procedimento complementar à jurisdição estatal em constante desenvolvimento e aperfeiçoamento no ordenamento jurídico brasileiro, sobretudo no âmbito das

environment matters. In conclusion, the use of arbitration in Environmental Law is limited to available patrimonial conflicts, making it inapplicable when the dispute involves the environment as a diffuse and unavailable right.
Keywords: arbitration; environmental damages; environment.

relações que giram em torno do meio ambiente. Conclui-se, portanto, que a utilização da jurisdição arbitral no Direito Ambiental está limitada aos conflitos disponíveis e patrimoniais, de modo que resta impossibilitada quando o conflito resulta do meio ambiente enquanto direito difuso e indisponível.
Palavras-chave: *arbitragem; danos ambientais; meio ambiente.*

Introduction

The Brazilian Federal Constitution of 1988 guarantees the protection of an ecologically balanced environment, establishing a shared duty for both public authorities and society to defend and preserve it for present and future generations. Despite this responsibility, numerous actions by individuals continue to harm the environment, resulting in environmental damage. To address such harms, individuals may seek measures beyond the judiciary, notably through arbitration—the primary focus of this research.

This study delves into the nature of arbitration, particularly as defined by the Arbitration Law (Law No. 9,307/1996), with emphasis on property and disposable rights eligible for arbitration. Moreover, as the research centers on arbitral jurisdiction concerning both individual and collective environmental damage, it is necessary to assess the environment comprehensively to determine whether arbitration is a suitable mechanism for resolving conflicts stemming from environmental damages.

This article examines the (in)applicability of arbitration as a heterocompositive method for resolving conflicts stemming from environmental damage, analyzing the issues of disposability and patrimoniality of rights. The research investigates the question: Is arbitration feasible for resolving individual and collective claims arising from environmental damage?

In exploring arbitration within environmental relations, the study aims to achieve the following objectives:

a) To examine the constitutional protection of an ecologically balanced environment as outlined in the Brazilian Federal Constitution of 1988, focusing on the concept of environmental assets and the complexity of damages to both micro and macro assets.

b) To analyze arbitration as a heterocompositive method for

conflict resolution and as a public policy instrument for enhancing access to justice, while discussing foundational concepts from the perspective of disposable, property-related conflicts.

c) To investigate the applicability or inapplicability of arbitration in individual and collective disputes over environmental damage, especially in relation to the (non)disposability and (extra)patrimoniality of rights.

To achieve these aims, the research employs a deductive methodology, beginning with theoretical frameworks and legislative analysis—moving from general principles to conclusions for each specific premise. The study relies on bibliographic, legislative, and doctrinal research, drawing on books, articles, journals, and laws pertinent to the topic.

This research is justified by the significant importance of environmental protection, which is essential for maintaining a healthy quality of life and constitutes both a right and a duty for everyone. Additionally, arbitration offers a complementary, rapidly evolving alternative within the Brazilian legal system. As a mechanism parallel to state jurisdiction, it provides a faster, effective, and less bureaucratic process for addressing conflicts related to environmental damage.

Following this foundational discussion of arbitration as a heterocompositive mechanism for resolving individual and collective environmental disputes, the study proceeds to specific analyses within the research.

1 The environment from the perspective of individual and collective environmental damage

The Brazilian Federal Constitution of 1988 enshrines environmental protection as a fundamental legal principle. Several key infraconstitutional laws further support environmental preservation[1], including Law No. 12,651/2012 (the New Forest Code), Law No. 6938/1981 (National Environmental Policy Act), Law No. 9433/1997 (National Water Resources Policy), Law No. 9605/1998 (Environmental Crimes Act), Law No. 9,985/2000 (National System of Conservation Units Act), and Law No. 10257/2001 (City Statute).

Brazil first incorporated environmental protection into its legal framework with the Federal Constitution of 1946, which gave the federal government

1 It is essential to clarify that, in the Brazilian legal system, environmental protection is not restricted to the infra-constitutional laws mentioned throughout this text. In fact, there are several other sparse rules that also deal with this theme, which reveals the importance of the environmental issue in various legal contexts.

authority to regulate forests, water resources, hunting, and fishing. However, comprehensive environmental protection was established under the Federal Constitution of 1988, especially in Article 225 (Pinheiro, 2017). This article asserts that a balanced environment is a right for all and that both the public authorities and society share the duty to defend and preserve it (Brasil, 1988).

The Federal Constitution of 1988 also mandates that those who cause environmental damage are responsible for restoring it and face civil, criminal, and administrative penalties. This obligation is reinforced in paragraphs 2 and 3, which require those exploiting mineral resources to rehabilitate degraded areas. Such harmful actions result in criminal and administrative sanctions for the perpetrator, along with civil liability to repair the damage caused (Brasil, 1988).

In this context, defining the environment[2] is essential. Article 3, I, of Law No. 6,938/1981 (National Environmental Policy Act) describes the environment as "[…] the set of physical, chemical, and biological conditions, laws, influences, and interactions that permit, shelter, and govern life in all its forms"[3] (Brasil, 1981, free translation). This broad definition encompasses human, animal, and plant life. The environment includes everything surrounding humans: waters, seas, rivers, lakes, mountains, forests, urban centers, the atmosphere, and the subsoil. It covers elements of nature as well as objects encountered in daily life (Souza, 2013).

Article 225 of the Federal Constitution of 1988 settles the environment as a common-use asset essential to a healthy quality of life (Brasil, 1988). This designation emphasizes the environment as a protected legal "asset", affirming its effective and tangible legal safeguarding. As a common-use asset, it transcends typical property rights and classifications under public or private law, existing as an unavailable and diffuse asset (Coelho, 2020).

Thus, as the law protects the environment, no individual or specific group owns it, which gives it a transindividual character. An ecologically balanced environment is recognized as a third-generation fundamental right, transcending both

2 Studying the environment also involves understanding the origins of environmental law, which emerged during the second half of the 20th century. The Stockholm Conference in 1972 contributed to its affirmation and subsequent enrichment, both from an institutional and operational point of view. The Earth Summit in Rio de Janeiro in June 1992 marked its evolution by recognizing the principles inherent in its implementation, at which point it expanded. Environmental Law corresponds to the set of laws that regulate environmental systems, i.e., it concerns the system of norms, principles and legal practices that govern relations between social systems and natural systems (Pinheiro, 2017).

3 From the original: "[…] o conjunto de condições, leis, influências e interações de ordem física, química e biológica, que permite, abriga e rege a vida em todas as suas formas".

individual and collective interests. The environment is thus classified as diffuse and for common public use, with its management and preservation entrusted to federative entities—the Union, States, Federal District, and Municipalities—on behalf of society as a whole. It is neither public nor private but rather diffuse, collective, unavailable, and transindividual (Leite; Belchior, 2019).

Thus, an individual cannot claim ownership of the environment, as all, as established in the Federal Constitution of 1988 intend it for use. This concept highlights diffuse interests, meaning that environmental protection is not the responsibility of any one individual but is shared collectively by all members of society (Milaré, 2018).

Summarizing the discussion so far, Milaré (2018, free translation) defines that:

> The environment, as a common asset for all, encompassing ecological balance, environmental integrity, and natural resources, is a vital public asset, considered *communes omnium*. It represents a general, diffuse, and collective asset, inseparable from the quality of its elements, rendering it indivisible, unavailable, and protected from seizure. This essential asset requires ongoing stewardship by both the public authorities and society, who must work together to safeguard it continually[4].

The Federal Constitution of 1988 in Brazil entrusts both the public power and society with the duty to protect and preserve the environment for present and future generations. However, certain actions taken by individuals are often harmful to it. Such actions result in environmental damage[5], which may affect both individual and collective domains, subjecting offenders to criminal, administrative, and civil sanctions.

Environmental damage occurs when harmful changes to the environment negatively affect individuals' health or violate the fundamental right to an ecologically balanced environment. In essence, any undesirable alteration to the environment that results in harm constitutes environmental damage. This type of

4 From the original: "O meio ambiente, bem de uso comum do povo, consistente no equilíbrio ecológico e na higidez do meio e dos recursos naturais, é bem público essencial, considerado *communes omnium*. É bem comum, geral, difuso, indissociável da qualidade dos seus constitutivos e, por conseguinte, indivisível, indisponível e impenhorável. Esse bem é alvo necessário da solicitude do Poder Público e da coletividade, que devem, em conjunto, zelar continuamente por ele".

5 Environmental damage entails environmental degradation. It consists of adverse and unfavorable alteration of characteristics of the environment. It can be said that the main degradation of the quality of the environment is pollution, which directly or indirectly harms the health, safety and well-being of the population. In addition, it negatively affects biomes, having an unfavorable impact on social and economic activities, and alters the aesthetic and sanitary conditions of the environment. Thus, environmental damage represents harm to the environment caused by the conduct or activities of individuals or legal entities under public or private law (Pinheiro, 2017).

damage affects both the collective sphere—impacting environmental assets—and the individual sphere, where it harms a specific person's interests. In such cases, individual environmental harm is classified as private damage, obligating the responsible party to compensate the injured party for material or non-material losses (Leite; Ayala, 2020).

Environmental damage is complex because, in many cases, the party responsible may not be able to restore the degraded environment, given the difficulty or impossibility of returning it to its prior state. Studying the environment also involves understanding the distinction between micro-assets and macro-assets. The former relates to individual environmental damage and direct reparability; the latter characterizes the supra-individual and/or transindividual nature of the environment. In this case, the victim of the damage is society as a whole, which is why compensation should not focus on individual interests but rather on reparations for the environmental asset itself that was harmed (Spengler Neto; Konzen; Aguiar, 2023).

Thus, "[…] it can be said that the environment consists of both micro-assets and macro-assets, that is, environmental damages arising from the private sphere of individuals and environmental damages that are effectively unavailable, pertaining to the collective and the environment itself"[6] (Spengler Neto; Konzen; Aguiar, 2023, p. 122, free translation). Micro-assets refer to individual environmental damage, whereas macro-assets are linked to collective environmental damage, directly connected to the fundamental right to an ecologically balanced environment.

Individual judicial protection against environmental damage is grounded in civil liability. When environmental harm affects both an individual's personal interests and the environment, the injured party's primary aim is typically not environmental protection per se, but rather obtaining compensation for damage to their assets or other personal values and possessions (Leite & Ayala, 2020). Environmental damage, in this sense, is established when one or more individuals' health or private property is impacted. In such cases, victims may seek redress for environmental harm through an individual indemnification lawsuit (Milaré, 2018).

The collective dimension of environmental damage also warrants consideration, as it generally arises when harm is done to diffuse environmental assets

6 From the original: "[…] pode-se dizer que o meio ambiente é constituído tanto de microbens quanto de macrobens, ou seja, danos ambientais emergidos da esfera privada dos indivíduos e danos ambientais efetivamente indisponíveis, relativos à coletividade e ao meio ambiente em si".

owned by the collective (Leite & Ayala, 2020). Due to the collective nature of such harm, its protection can be pursued through public civil actions or other legal mechanisms, such as collective writs of mandamus. The Public Prosecutor's Office is responsible for filing these actions to ensure that collective environmental damage either is remedied or prevented (Milaré, 2018).

An ecologically balanced or healthy environment is an inalienable and diffuse right. Article 129, III, of the Federal Constitution of 1988, grants the Public Prosecutor's Office the authority to initiate public civil actions and civil inquiries to protect the environment as a collective and diffuse right. For example, in response to the environmental disaster resulting from the collapse of Vale's dam in Brumadinho/MG, the Public Prosecutor's Office recently filed a public civil action seeking compensation for collective moral damages (Coelho, 2020).

As Coelho (2020, p. 119, free translation) states, "[…] a healthy environment represents a means of ensuring a dignified existence in the world"[7], underscoring its diffuse, inalienable, and transindividual nature. Therefore, as a fundamental right, environmental protection concerns all individuals equally, and it cannot be waived in favor of situational interests without compromising the duty to safeguard it for present and future generations (Coelho, 2020).

Even though the environment is a diffuse and inalienable right, damage to it can affect both the collective sphere and the individual sphere of a particular person or group, as it involves both micro-assets and macro-assets. When environmental harm occurs, affected parties often turn to appropriate legal mechanisms to seek compensation for the damage caused, although non-state conflict resolution methods may also be employed.

This article aims to examine the feasibility of using arbitration as a means to resolve both individual and collective claims related to environmental damage. Before exploring the application of arbitral jurisdiction to these conflicts, however, it is essential to understand arbitration itself as a heterocompositive method of conflict resolution and to determine the appropriate circumstances for its use.

2 Arbitration as a heterocompositive method for resolving proprietary and available conflicts

Before delving into arbitration, it is essential to understand this heterocompositive method for conflict resolution as a public policy tool designed to promote

7 From the original: "[…] o (meio) ambiente saudável representa um instrumento de garantia de uma existência digna no mundo".

access to justice. Public policies are, by definition, governmental initiatives aimed at addressing social needs related to collective or public issues. When a political issue affects a community, it is the State's responsibility to implement measures to respond to these needs, typically by creating relevant public policies (Schmidt, 2018).

In creating public policies, it is crucial to ensure equal access to justice for all. Examining access to justice also requires understanding the traditional barriers that often prevent individuals from accessing judicial protection. These barriers lead to frustration among those seeking judicial recourse and ultimately deny many individuals their constitutional right to judicial access. Overcoming these traditional limitations is essential to establish a fair legal system, made possible through the constitutional guarantee of inalienable judicial protection (Spengler, 2019).

Once the traditional limitations on access to justice have been overcome, complementary instruments[8] to the Judiciary should be considered, as they enable citizens to have their conflicts resolved in a fair, effective, and swift manner. To address the delays and inefficiencies of judicial services, mechanisms have been developed to tackle the challenges within the judicial system. From this objective, self-compositive and heterocompositive methods arise as complementary means to state jurisdiction.

Heterocomposition includes both arbitration and judicial jurisdiction. In heterocomposition, a third party imposes a binding decision, resulting in a win-lose outcome where there are clear winners and losers in the conflict. In contrast, mediation and conciliation are self-compositive methods, where no win-lose scenario occurs. Instead, the parties engage in dialogue, are heard, and work toward a mutually agreeable solution, creating a win-win outcome (Spengler; Spengler Neto, 2015). This research specifically examines arbitration as a heterocompositive method of conflict resolution

Carmona (2009, p. 31, free translation) defines arbitration as:

> […] an alternative method of dispute resolution through the intervention of one or more persons who derive their authority from a private agreement, deciding based on this agreement without state intervention. The decision carries the same effectiveness as a judicial sentence and is available to anyone to resolve conflicts related to proprietary rights over which the litigants have control[9].

8 The term "complementary instruments" is used because they correspond to forms of conflict resolution that go beyond judicial protection. These are mechanisms that complement the Judiciary, with the figure of an impartial third party (different from the Magistrate) having the power to facilitate dialogue between the parties involved in the conflict (mediation and conciliation) or even impose a decision (arbitration).

9 From the original: "[…] meio alternativo de solução de controvérsias através da intervenção de uma

Arbitration can be seen as a response to the challenges faced by the Judiciary, designed to make the administration of justice more efficient and timely by providing specialized judgments that aid in resolving conflicts. In modern states, arbitration is further justified as a complementary tool to state jurisdiction, addressing the increasing volume of litigation in contemporary society (Nery, 2016).

In general terms, arbitration is an extrajudicial method of conflict resolution in which the parties select an impartial third party to resolve the dispute. This third party, known as the arbitrator, is tasked with deciding the case and will issue an award that serves as a judicially enforceable title. The decision is binding and must therefore be adhered to by the parties. The arbitrator is limited to adjudicating cases involving available economic assets.

In terms of arbitration regulation under Brazilian law, the Federal Constitution of 1988 does not explicitly address arbitration. However, Article 5, item XXXV, guarantees the right to legal action, stating that the law shall not exclude judicial review of any threat or harm to a right. Opting for arbitration does not infringe upon this constitutional guarantee, as arbitration is limited to available rights. By mutually agreeing to arbitration, the parties choose to forgo state jurisdiction in favor of having an arbitrator resolve their dispute, thereby maintaining their right to judicial recourse (Nery, 2016).

Finally, in 1996, Law No. 9,307, which governs arbitration, was enacted. The introductory provision of the Arbitration Law states that "persons capable of contracting may use arbitration to resolve disputes involving available economic rights"[10] (Brasil, 1996, free translation). According to Verçosa (2013, p. 16, free translation), available economic rights are "[…] those relating to assets that form part of one's estate and that can also be subject to disposition, meaning transfer, sale, use as collateral, donation, etc."[11].

When arbitration law mandates that arbitration is limited to available proprietary rights, it refers to objective arbitrability. It is necessary to distinguish between the patrimonial nature of a right and its availability. The former refers to whether a right can be assigned a monetary value, that is, any right with economic

ou mais pessoas que recebem seus poderes de uma convenção privada, decidindo com base nela, sem intervenção estatal, sendo a decisão destinada a assumir a mesma eficácia da sentença judicial – é colocada à disposição de quem quer que seja, para solução de conflitos relativos a direitos patrimoniais acerca dos quais os litigantes possam dispor".

10 From the original: "as pessoas capazes de contratar poderão valer-se da arbitragem para dirimir litígios relativos a direitos patrimoniais disponíveis".

11 From the original: "[…] aqueles relativos a bens integrantes do patrimônio e que, além disso, ainda possam ser objeto de disposição, o que significa alienação, venda, entrega como garantia, doação etc.".

consequences. The latter pertains to whether a right is transferable, alienable, waivable, and negotiable, meaning the holder of the right can dispose of it, by either transferring or waiving it. Not all patrimonial rights are available rights, as not everything with economic or monetary value is necessarily available (Nery, 2016).

Property rights are found in legal relationships under the law of obligation, arising from contracts, unlawful acts, and unilateral declarations of will. For litigants to be able to use arbitration as a means of resolving conflicts, disputes must be limited to property rights, especially available rights. The latter are linked to the possibility of alienation and transaction. On the other hand, it should be made clear that, in certain cases, the infringement of unavailable rights is compensable, and in these situations, it is possible to use the arbitration procedure (Scavone Júnior, 2023).

For example, an individual cannot negotiate their right to honor, as it is a personal right and therefore not transferable. However, if someone insults another's honor, they may be required to pay compensation for moral damages. In the case of an affront to this personality right, which leads to patrimonial compensation, there is nothing preventing the use of arbitration to determine the amount of compensation in accordance with the Arbitration Law. In such a case, the arbitrator does not decide whether the offended party has the right to honor, as this right is non-negotiable. However, the arbitrator can determine the facts that led to the violation of the right to honor and establish the monetary compensation for this offense (Scavone Júnior, 2023).

Arbitration proceedings cannot proceed without an arbitration agreement, which may take the form of an arbitration clause or a commitment to arbitrate. Article 3 of the Arbitration Law provides that "the interested parties may submit their disputes to arbitration by means of an arbitration agreement, defined as an arbitration clause or commitment"[12] (Brasil, 1996, free translation).

The arbitration clause can be inserted into contracts at the will of the parties, whereby the contracting parties agree and undertake to submit any future disputes arising from the contractual relationship to arbitration (Figueira Júnior, 2019). This is precisely what Article 4 of the Arbitration Law states, i.e., "the arbitration clause is the agreement by which the parties to a contract undertake to submit to

12 From the original: "as partes interessadas podem submeter a solução de seus litígios ao juízo arbitral mediante convenção de arbitragem, assim entendida a cláusula compromissória e o compromisso arbitral".

arbitration any disputes that may arise in relation to that contract"[13] (Brasil, 1996, free translation).

According to Article 9 of the Arbitration Law, "the arbitration agreement is the agreement by which the parties submit a dispute to arbitration by one or more persons, and may be judicial or extrajudicial"[14] (Brasil, 1996, free translation). The arbitration agreement sets out the effective conditions for the establishment of arbitration, based on what is agreed by the parties (Bacellar, 2016). Therefore, "[…] if there is an arbitration clause or arbitration agreement. Thus, any of the contracting parties who brings an action before the State-judge will have the case terminated without resolution of the merits due to lack of extrinsic procedural prerequisites for validity"[15] (Figueira Júnior, 2019, p. 171, free translation).

Studying arbitration also presupposes understanding the duties of arbitrators. The main section of Article 13 of the Arbitration Law states that any capable individual who is trusted by the parties may be an arbitrator (Brasil, 1996). Being an arbitrator also presupposes acting seriously, maintaining impartiality, independence, and secrecy about what happened in the arbitration proceedings, unless the parties (Morais; Spengler, 2019) waive confidentiality.

Article 19, caput, of the Arbitration Law states that the procedure will be instituted if the appointment of the arbitrator(s) is accepted, at which point arbitral jurisdiction begins (Brasil, 1996). Finally, the arbitrator makes the award, which is a written instrument through which the arbitrator(s) decide(s) the dispute submitted to them (Morais; Spengler, 2019). The award must be rendered within the period stipulated by the parties or, if nothing has been agreed, the deadline for its presentation is six months, according to art. 23, caput, of the Arbitration Law (Brasil, 1996).

According to art. 31 of the Arbitration Law, the arbitral award has the same effects as the award handed down by the Judiciary, i.e., it is equivalent to a court judgment. Even if it is condemnatory, the arbitral award constitutes a judicial enforcement order (Brasil, 1996). Thus, the arbitration award does not depend on homologation by the courts to produce its effects, which are binding on the

13 From the original: "a cláusula compromissória é a convenção através da qual as partes em um contrato comprometem-se a submeter à arbitragem os litígios que possam vir a surgir, relativamente a tal contrato".

14 From the original: "o compromisso arbitral é a convenção através da qual as partes submetem um litígio à arbitragem de uma ou mais pessoas, podendo ser judicial ou extrajudicial".

15 From the original: "[…] havendo cláusula compromissória ou compromisso arbitral, qualquer das partes contratantes que vier a postular perante o Estado-juiz terá o processo extinto, sem resolução do mérito, por falta de pressuposto processual extrínseco de validade".

parties involved in the dispute.

Once arbitration has been explained, it is clear that this process applies to disputes involving proprietary rights available for disposal. In cases concerning non-disposable and non-monetary rights without compensation, arbitration is not applicable. With the phenomenon of arbitration defined, the applicability of this method in resolving individual and collective conflicts arising from environmental damage will be examined, considering *objective arbitrability*—the disposability and proprietary nature of rights.

3 The (in)applicability of arbitration in individual and collective conflicts arising from environmental damage

As established in the initial section of this research, environmental damage can be complex, affecting both individuals directly (micro assets) and the environment as a collective entity (macro assets). Environmental harm can impact individual, private spheres as well as the community at large and the environment itself.

When an ecologically balanced environment is harmed, the resulting rights are diffuse and therefore non-disposable, precluding the use of arbitration to resolve the dispute (Lehfeld; Rodrigues; Marcolino, 2023). As previously discussed, arbitration can only be used if the conflict involves a disposable and proprietary right. However, if the injury gives rise to a right to compensation, the amount of this reparation may be subject to arbitration.

For example, on November 5, 2015, the collapse of the Fundão dam owned by the Samarco mining company in the municipality of Mariana, state of Minas Gerais, released mining waste into the Doce River, resulting in extensive environmental, social, and economic consequences. This disaster led to the death of local flora and fauna, impacting water quality and availability, affecting both the local community and the ecosystem—a matter of diffuse interest. Additionally, the destruction of homes and loss of lives created a collective interest in the strict sense, as the harmed group comprised a specific population in the affected area. Victims, representing personal rights (Lehfeld; Rodrigues; Marcolino, 2023), also filed individual compensation claims.

Damage to the ecologically balanced environment can give rise to diffuse, collective, and individual rights. In cases of property disputes arising from damage to the environment, arbitration can be used. On the other hand, if the damage is to the environment itself—the ecosystem as a whole—there is a diffuse and

unavailable interest, which is why it is not feasible to use arbitration. In the case of the Mariana/MG dam collapse, when it comes to direct reparations to the victims in the region, there is no obstacle to the use of arbitration. However, when it comes to the damage caused to the ecosystem as a whole, because of this environmental catastrophe, the use of arbitration becomes unfeasible.

Given the non-disposable nature of the environment, initially, arbitration may seem inapplicable for environmental damage disputes. Environmental rights belong to third-generation rights, involving indeterminate beneficiaries (Nobre; Pauseiro; Pereira, 2019). Article 225 of the Federal Constitution of 1988 recognizes this nature, stating that all individuals have the right to an ecologically balanced environment (a diffuse right), with a duty placed on the State and society to preserve it (Brasil, 1988).

A priori, waivers and settlements concerning the environment are not allowed, in other words, only state jurisdiction is possible to settle conflicts in environmental matters. A limitation on arbitration in environmental damage can be considered due to the provisions of Article 1 of the Arbitration Law. In other words, arbitration can be used by individuals with the capacity to contract and provided that the conflict relates to an available property right. On the other hand, it is necessary to think in terms of micro and macro assets, as the availability of that environmental matter will depend on the nature of the system affected. Despite the unavailability of the environmental asset and its diffuse nature, arbitration can be used in certain circumstances (Nobre; Pauseiro; Pereira, 2019).

It cannot be forgotten, therefore, that the ecologically balanced environment is a diffuse and unavailable interest. Part of the doctrine believes that the environmental asset cannot be the subject of a transaction and, therefore, cannot be arbitrated. On the other hand, there are certain circumstances relating to the environmental asset that are available and can be negotiated, especially if there are repercussions in terms of property and how to compensate for damage to the environment. There is no impediment to using arbitral jurisdiction when it comes to how to fulfill obligations arising from damage to the environment. In the latter cases, there is the possibility of disposition (Bezerra; Gouvea, 2019).

Aligning with this perspective, Spengler Neto, Konzen, and Aguiar (2023, p. 123, free translation) affirm:

> […] the issues concerning the applicability of arbitration for resolving environmental disputes, particularly those damages affecting the collective, are controversial and debatable, and therefore should be analyzed on a case-by-case basis. In principle, when it concerns collective and diffuse rights, arbitration cannot be applied due

> to the inalienable nature of such rights. On the other hand, regarding individual rights, it is generally possible to use this heterocompositive method of conflict resolution, especially when there is civil liability for environmental damage[16].

It is possible to consider a type of damage that harms environmental quality for the collective (macro asset), directly impacting the essential characteristics of ecosystems, as well as individual environmental damage (micro asset), where harm results from environmental degradation, affecting the interests of the injured party. This individual may seek compensation not directly related to environmental protection but to patrimonial or extra-patrimonial damage. As for the arbitrability of environmental damage, it is noted that individual interests concerning the environment—being patrimonial, individual, and available—can be subject to arbitration (Bezerra; Gouvea, 2019).

Here is a practical example of the possibility of using arbitration as a means to resolve environmental disputes affecting individuals' private sphere:

> Another example, which we believe is perfectly arbitrable, is a case in which the owner of land with environmental contamination hires a remediation company to recover the area, but the contract is breached as the company fails to rehabilitate the area. In this case, the conflict involves only private parties and patrimonial interests, leaving no doubt as to the necessity of environmental restoration. The integrity of the environmental asset is not in question—only the recovery method and contractual noncompliance[17] (Bezerra; Gouvea, 2019, p. 185, free translation).

A similar example of an extrajudicial mechanism for resolving environmental disputes, like arbitration, is the Conduct Adjustment Agreement (TAC – *Termo de Ajustamento de Conduta*). The use of TAC does not imply disposability of the right to the environment, as it remains inalienable. These agreements outline alternatives—ways, methods, and deadlines—for protecting collective rights. For example, a TAC might address the deadline or method of environmental

16 From the original: "[…] as questões relativas à aplicabilidade da arbitragem para resolução de conflitos ambientais, especialmente aqueles danos oriundos da coletividade, são controvertidas e discutíveis, razão pela qual devem ser analisadas de acordo com o caso concreto. Assim sendo, em tese, quando se refere a direitos coletivos e difusos, não há que se falar em aplicação da via arbitral, diante da indisponibilidade de tais direitos. De outro lado, em relação aos direitos individuais, em regra é possível a utilização de tal método heterocompositivo de resolução de conflitos, mormente quando há responsabilização civil para os danos ambientais".

17 From the original: "Outro exemplo que, a nosso ver, pode perfeitamente ser arbitrado, é o caso no qual o proprietário de um terreno com contaminação ambiental contrata uma empresa de remediação com o objetivo de recuperar a área, mas o contrato é descumprido, uma vez que a empresa de remediação não obtém êxito em reabilitar a área. Nesse caso, o conflito envolve exclusivamente particulares e interesses patrimoniais, não havendo dúvidas a respeito da necessidade de recuperação do meio ambiente, de modo que não se discute a disponibilidade da integridade do bem ambiental, somente a forma de recuperação e o inadimplemento contratual".

restoration, without waiving the protection of diffuse environmental rights. Just as TACs are accepted in environmental matters, arbitration should also be permitted since both define how environmental rights should be restored (Coelho; Rezende, 2016).

Brazil has signed international treaties and conventions that allow the use of arbitration for environmental dispute resolution. Notable among these are the Vienna Convention for the Protection of the Ozone Layer, the Climate Change Convention, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and the Convention on Biological Diversity (Assis; Araújo, 2011). The Brazilian legal system, particularly the Federal Constitution of 1988 and the Arbitration Law, did not explicitly establish the possibility of using arbitration for environmental disputes. However, the incorporation of these international treaties and conventions into the national framework reinforces the arbitrability of environmental matters, that is, the possibility of arbitration in issues related to the environment.

Finally, Article 225, Paragraph 3 of Brazilian Federal Constitution of 1988 states that environmentally harmful acts "[…] shall subject offenders, whether individuals or legal entities, to criminal and administrative sanctions, independently of the obligation to repair the damages caused"[18] (Brasil, 1988, free translation). In this context, it is noted that environmental damage may lead to administrative, criminal, and civil liability. The first two, related to public law, are tied to collective environmental protection and are not disposable. The latter, civil liability has both collective and individual dimensions, with the latter being arbitrable as it pertains to the private and patrimonial spheres of individuals (Salim; Silva, 2014).

In conclusion, from the perspective of protecting an ecologically balanced environment—a diffuse, collective, and inalienable interest—environmental damages harmful to the ecosystem as a whole are not arbitrable. However, in cases of environmental damage affecting individuals' private sphere, there is no doubt that arbitration is possible, especially if such damages are directly reparable and affect the patrimonial sphere. In the latter case, disputing parties may resort to arbitration, which is a swift, effective, informal, streamlined, flexible, confidential process that delivers socially just and desirable outcomes.

18 From the original: "[…] sujeitarão os infratores, pessoas físicas ou jurídicas, a sanções penais e administrativas, independentemente da obrigação de reparar os danos causados".

Conclusion

The research initially examined the environment in terms of both individual and collective environmental damages, noting that environmental protection is embedded in Brazilian law, especially in Article 225 of the Federal Constitution of 1988. The environment is understood as the sum of interactions governing all life forms, beyond just natural elements.

The study emphasized that the right to an ecologically balanced environment is diffuse, transindividual, and inalienable—a third-generation fundamental right. Various actions or omissions by individuals or entities can result in environmental damage, causing undesirable changes to the environment, affecting both individual and collective interests. Those responsible for environmental damage are obligated to remedy them, facing possible administrative, criminal, or civil sanctions.

Given these individual and collective dimensions of environmental damage, this research explored the role of arbitration in resolving such disputes. It addressed arbitration jurisdiction as a complementary mechanism to state jurisdiction, in which an impartial third party (the arbitrator) has the authority to settle disputes between the involved parties. Arbitration was formally introduced into Brazilian law by Law No. 9307/1996, which defines arbitration's scope, when it can be employed, and how its procedures should unfold.

The study found that arbitration applies only to rights that are patrimonial and available, meaning that disputes must involve issues that can be sold, transferred, waived, or negotiated with quantifiable monetary value. This concept is known as objective arbitrability. Therefore, arbitration is permissible if the conflict pertains to patrimonial matters within the parties' control (patrimoniality and availability of rights).

Next, the research addressed the (in)applicability of arbitration in individual and collective disputes arising from environmental damages, effectively answering the proposed research question: Can arbitration resolve individual and collective damages resulting from environmental harm? The conclusion was affirmative, provided that objective arbitrability is upheld, i.e., the patrimoniality and availability of rights in environmental matters.

It was initially noted that when harm occurs to an ecologically balanced environment, impacting diffuse and inalienable rights, arbitration cannot resolve the environmental conflict, as arbitration only applies to patrimonial and available disputes. While environmental assets are generally viewed as inalienable and transindividual, arbitration may be possible if the environmental harm involves patrimonial and available dimensions.

The study found that when environmental damage impacts collective environmental protection (macro asset), the inalienability of rights prevents arbitration. However, when environmental damage affects the private sphere (micro asset), individuals may seek monetary compensation, thus creating a patrimonial and available conflict suitable for arbitration.

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