"Is arbitration a form of international justice?"

*by **Christopher Chinn**, Finalist of the Laureate of the Arbitration Academy Prize 2011*

Arbitration: International Justice in an Era of Globalization

Arbitration is a fonn of international justice. It is the binding resolution of disputes by impartial tribunals which are neither state courts nor entities of a particular state, aided and enforced through the imperium of state courts. Arbitration in its modem incarnation was born of early twentieth century statesmen's efforts as "merchants of peace" to create an international legal order where disputes among or involving states could be settled through judicial means rather than anned conflict. Arbitration has, however, evolved over the past century to become a common fonn of dispute resolution in private commercial matters not involving states as parties. One may therefore question whether arbitration, international in origin, has morphed into a private fonn of justice that is merely enforced internationally.

Arbitration remains a fonn of international justice because it is a fonn of justice, or mechanism for resolving disputes according to rules of law, which is invariably limited neither to the laws and courts of a particular state nor to the ad hoc rules set out by the parties. Arbitration is an amalgam of legal systems and practices.

Most would agree that arbitration can be a fonn of international justice in a particular case. Parties are free to choose the substantive and procedural laws of different states, to mix and match those laws, and to choose rules of law connected to no particular state, such as the usages and customs accepted and worked out by international merchants (lex mercatoria) or alternatively, religious law. States continue to submit disputes among themselves to private ad hoc arbitral tribunals, as was the case with over a half dozen boundary dispute arbitrations administered by the Pennanent Court of Arbitration in the last decade. States may also

provide for international arbitral claims tribunals, such as the Iran-United States Claims Tribunal, in which claims of nationals of one state against the other state are heard by neutral tribunals applying internationally agreed upon rules of law.

Investment treaties such as the 1965 Washington Convention establishing International Centre for the Settlement of Investment Disputes (ICSID) arbitration have furthermore spawned the field of investment arbitration in which states' rights of diplomatic protection on behalf of their nationals have been transferred by the states to the nationals themselves. Rules of international law act in conjunction with the laws of the investment host state to determine the substantive rules to be applied should the parties fail to choose an applicable law. Even when the parties have specified an applicable law, the laws of other states govern with respect to jurisdictional questions like nationality, given the international nature of investment disputes that involve state parties and foreign investors.

Arbitration is invariably a form of international justice even when international law is not chosen by the parties and when there are no state parties. The fact that a commercial arbitral award may be enforced in multiple states means that the minimum standards of justice in each of the states in which the award may be enforced are inherently part of the mechanism of arbitration. The widely subscribed 1958 New York Convention now provides for enforcement of foreign commercial arbitral awards in each signatory state, thereby promoting the international currency of awards, but national law still plays a key role in practice. Article V of the Convention provides that the law of each state where enforcement is sought governs whether enforcement of an arbitral award may be refused on grounds of subject matter arbitrability or public policy.

Each enforcing state may furthermore define which disputes are treated as outside the scope of the Convention and regarded as so-called domestic arbitrations, usually because of the absence of any international element in the parties, subject matter of the dispute, procedural rules or damages sought. Although the line between foreign and domestic arbitration may be sometimes blurred, domestic arbitration is in few respects international and may be the one exception to the rule discussed in this essay.

With respect to non-domestic arbitration, states such as France have made it clear that they treat arbitral awards as delocalized, such that approval or disapproval by one state alone will not control other states' treatment of the award. Paradoxically, this lack of consistency in the applicable national legal systems in enforcement proceedings supports arbitration as an international form of justice because no one legal system can be dispositive. Arbitration does not necessarily transcend national law in all respects as a non-national form of justice, but may still lay claim as a form of international justice because it invariably draws on multiple national systems.

Arbitrators and institutions are sometimes mandated under institutional rules chosen by the parties, such as those of the International Chamber of Commerce (ICC), to ensure the general enforceability of their awards. Arbitrators may thus engage in a balancing act between the law nominally applicable to the arbitration and the law of the place or places where the award may be enforced.

National courts may also participate in the arbitration process at earlier points in the proceedings, either to confirm the validity of arbitration clauses when so-called gateway

issues arise at the beginning, or to grant provisional relief such as attachment of assets or securing of evidence. The applicable law in such proceedings is often the law of the deciding court. Multiple national laws thus come into play to supplement the chosen law of the dispute throughout the arbitration process.

Arbitration transcends national legal systems in some respects. Tribunals often rely on the published decisions of other arbitrators to decide procedural questions such as the awarding of costs and the admitting of evidence. While not stare decisis in the sense of common law precedent, prior awards have also helped subsequent tribunals address gaps in national law. Arbitral institutions release selected awards and procedural orders in commercial cases that, whether representative or not, are cited by tribunals in orders and awards. Arbitrators also cite works of international expert groups such as the International Bar Association's (lBA's) "Rules on the Taking of Evidence in International Commercial Arbitration." Scholars have thus spoken of a transnational legal order or orders composed of general principles of law found in these sources.

One such general principle, often called a pillar of the arbitration system, is competence competence, whereby an arbitrator has the power to rule on whether he has jurisdiction over the arbitration. This is an example of a principle that arose through decisions of arbitral tribunals and only later made its way into national legislation. Although differences arise in state courts' application of this and other general principles, the most common denominator still prevails and consensus might gradually be reached.

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States have ceded their diplomatic protection power to individuals in the field of investment arbitration while relinquishing a large portion of their national courts' adjudicative power to private tribunals in commercial arbitration. This transfer of states' rights has left the interpretation of state laws to non-state actors who consciously or unconsciously import their own conceptions of international justice. Arbitral tribunals are independent not only from the parties, which is true of judges in most forms of national justice, but are independent from any state. This independence allows arbitrators to rule with less constraint. While the parties are often said to be masters of their own arbitration, in reality they must compromise with the tribunal acting as an international authority in application of the chosen laws and rules as well as any mandatory law that may govern.

Parties might choose the law of a particular state as the applicable law for both substance and procedure, but even in this case it is not exactly the law of that state which governs because the state courts do not apply the law. Rather, the law is applied through the prism of independent arbitrators who, as a matter of practice, are free to apply the law differently from how that state's own courts would have applied the law. This was illustrated in the recent Dallah case, where an arbitral tribunal applied French law to extend the arbitration clause to a nonsignatory party. The English courts in enforcement proceedings, also applying French law, however refused to do so. The English courts made references to transnational general principles and usages reflecting the concept of good faith in business in their interpretation of French law. French courts subsequently refused annulment proceedings of the award in France, in contradiction with the English courts, because the arbitration clause

could indeed be extended to the nonsignatory party under the French courts' conception of French law.

Dallah illustrates the simple reality that the identity of the entity applying the law makes a difference. An arbitral tribunal or a court will necessarily import its own brand of justice, perhaps influenced by its own conception of international law, into the analysis.

More subtle characteristics contribute to the international nature of commercial arbitration. Arbitral rules which the parties may choose, for instance, have been elaborated through the compromise and debate of experts from multiple legal systems. Institutions that decide on procedural matters such as arbitrator challenges may be furthermore comprised of international personnel who apply the rules from their own perspective and according to multiple national practices or customs not derived from any national legal system. Even the use of private seminar rooms as neutral hearing locations symbolically reinforces arbitration's detachment from any national court system.

Language in arbitral proceedings is another example of arbitration's international character. English, French, and Spanish -the official languages in ICSID arbitration and the three main languages in ICC arbitration- are becoming the predominant languages in almost all arbitrations, even when they are not the first language of any of the parties. This harmonization of language may have the subtle effect of harmonizing the framing of legal arguments and evidences uniformity in business culture that contrasts with the legal cultures of particular national legal systems.

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Commercial arbitration's reliance on the laws and customs of multiple nations, institutions and expert organizations like the IBA reflects the increasingly interconnected nature of global commerce. Commerce may not be confined to national borders and therefore resolution of a single dispute cannot necessarily be confined to a single legal system, although it can be dealt with in a single arbitration. Arbitration is often called a private means of dispute resolution. In reality it is a form of international justice because it depends on international cooperation and compromise to work.

Symbolic of the international character of arbitration is the increasingly diverse body of legal professionals who practice in the field. Arbitration is carried out by people who are international in outlook and background. The diverse composition of the Arbitration Academy for which this essay is written is representative; jurists from sixtynine different nations came together at the Arbitration Academy to exchange ideas about a single legal discipline.

It is true that globalization has also led to the introduction of international law into domestic court proceedings in a variety of fields. The European Union is a prime example, where mandatory E.U. law applies in the courts of each member state. Domestic court proceedings themselves are thus becoming increasingly international in nature as state borders become less significant. To some extent all forms of justice are becoming increasingly international.

Arbitration however remains distinctive as a form of international justice par excellence. Arbitration is a truly hybrid system driven by international practitioners, where

private tribunals interact with multiple state courts and where the laws and practices of several different legal systems must be considered in one multifaceted proceeding.