"Is arbitration a form of international justice?"

*by **Kamalia Mehtiyeva**, Finalist of the Laureate of the Arbitration Academy Prize 2011*

IS ARBITRATION A FORM OF INTERNATIONAL JUSTICE ?

Introduction

A famous American author, Mark Twain, once said that it was difference of opinion that made horse races. When it comes to legal matters however, one could question whether difference of opinion and diversity, manifested namely by opposing legal cultures of parties, do not undermine this saying. It is not subject to doubt that arbitration is an impeccable tool to embrace diversity and uniqueness of legal systems which collide in international disputes.

Developments that follow will demonstrate that not only international arbitration (hereafter "arbitration") is a form of international justice (I), but it is also a form of international justice par excellence (II).

I. ARBITRATION, A FORM OF INTERNATIONAL JUSTICE

To address the issue of whether arbitration is a form of international justice is to respond, before all, to a definitional question of what is international justice (A). For the purposes of the present study, such intellectual exercise is an

indispensable passage, which will allow crystallizing reasons why arbitration is a form of international justice (B).

A. The concept of international justice

The concept of international justice, if such were to exist, does not have a uniform definition. A negative approach would lead to conclusion that international justice is any justice that is not domestic. However, to know what a concept is not does not equate with knowledge of what the concept is, as this negative approach would only lead to a conclusion that everything that is a-national or transnational is international.

The difference between international and national justice is a matter of layer of judicial universe, just like the difference between layers of atmosphere such as stratosphere and troposphere. In order to project light to the quest of whether arbitration is a form of international justice, the main question to address is the content of the stratosphere of international justice. Is international justice a unified system of law which components create a coherent constellation or could it be assimilated to a legal system which is rather a juxtaposition of independent legal regimes?

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International justice is a concept broader that the one of system of law. The concept of international justice could be apprehended through the notion of legal system, which could be defined via a normative approach. According to this approach, legal system is constituted by norms governing subjects of the system, on one hand, and acceptance of the rule of recognition, empowering representatives of the system to observe whether norms were violated and to apply relevant sanctions, on the other hand. Therefore, a legal system, in order to exist, needs norms but can exist and survive without institutions. International justice could be assimilated to legal system in its broad, normative sense.

International justice would be then a layer of judicial atmosphere encompassing arbitral awards, decisions emanating from international courts and tribunals as well as decisions of domestic courts rendered in international matters. More precisely, international justice could be defined as a legal system of a decentralized character which is constituted of judicial fora, extra-judicial bodies and many other prevalent legal institutions that have ad hoc nature. International justice is thus composed of different legal orders, one of which is arbitral order.

B. Arbitral legal order, a component of international justice

Arbitration, irrespective of whether reference is made to commercial or investment arbitration, is a form of international justice. One might think that if the question of whether arbitration is a form of international justice arises, it is because some arbitral awards may not be qualified of decisions of international justice. The following analysis will illustrate that such argument does not have any legal foundation.

The complex regime of international arbitration could be roughly divided into two categories. The first category will include arbitral awards based on a treaty, such as ICSID awards. These awards, along with awards rendered in inter-state disputes, are by definition decisions of international justice. The second category comprises awards with a legal regime depending both on a treaty and national laws. Commercial arbitral awards rendered between private parties in international matters fall into the second category. Awards belonging to this category are also forms of international justice which, in conformity with the New York Convention,

produce effects internationally and independently of their exequatur in the country of the seat of arbitration. The author of the present study explicitly avoids the term of the "country of origin", considering that such usage would be inaccurate and incompatible with emancipation of arbitration which is set forth by the author in the present study. Moreover, the independence and international effect of commercial arbitral awards are confirmed by the fact that an award, even if it is set aside in the country of the seat of arbitration, may still be enforced under the New York Convention.

Arbitration, which has its own arbitral order, is one of the components of international justice. Current trends in international arbitration leading to recognition of arbitral legal order with all consequences that such affirmations imply only recognize a situation that had existed prior to its recognition. In fact, the existence of arbitral order is undeniable. Its recognition or non-recognition by national systems of law does not affect its existence.

Some national legal orders have already recognized the existence of arbitral legal order by stating that arbitral legal order is not anchored in any legal order and is a decision of

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international justice, as it was recognized French Cour de cassation on June 29, 2007 in the Putrabali case. The French Supreme Court thus explicitly recognized the existence of an arbitral legal order and an award as decision of international justice. The recognition of an arbitral legal order only consolidates a situation which pre-existed to it.

An analysis of features of arbitral order will allow to set forth reasons why arbitration a form of international justice. One of the main features of arbitral order is its autonomy. It is autonomous not only in relation to national legal orders, but also in relation to international legal order.

Firstly, arbitration is autonomous in relation to national legal orders. The explicit usage of plural form for the "order" means that arbitration is not only autonomous in relation to legal order of seat of arbitration, but also in any national legal order.

Secondly, arbitral legal order is autonomous in relation to international legal order, which along with arbitral order form international justice. However, arbitral order differs from international order in that arbitral tribunals are empowered by private will of the parties. Moreover, arbitral order can not be

assimilated to international order as its transnational character allows to apply not only international norms, but also domestic rules, as well as other rules chosen by the parties.

An outstanding example of the fact that arbitration is a form of international justice is competition of jurisdictions of international courts and arbitral tribunals. Potential jurisdictional competition or any other type of interaction between arbitral tribunals and International Court of Justice are outside of the scope of the present study but constitute an undoubted manifestation of the fact that arbitration is a form of international justice.

II. ARBITRATION – A FORM OF INTERNATIONAL JUSTICE *PAR EXCELLENCE*

Arbitration is a form of international justice par excellence. As contrary to national legal order or international legal order, its main feature is a total absence of any boundary. Arbitration is not linked with, nor is it integrated in any legal system, what is characterized as delocalization of arbitration. Delocalization in itself however is not sufficient to make arbitration a form of international justice par excellence.

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Arbitration is also characterized by multilocalization of different components which pushes strengthens international character of arbitration (A). This phenomenon leads to positive consequences for the future of international arbitration (B).

A. Neutrality, a guarantee of a truly international justice

Arbitrator, just like any judge, has a mission to resolve disputes. The only difference between arbitrator and judge is the origin of its power to do so. An arbitral tribunal is empowered by parties and not by the State to resolve disputes. Contrary to a judge, arbitrators do not have a proper forum. More exactly, arbitrators do not have a national forum with a geographical localization. The origin of arbitral power does not change however the qualification of arbitration which is a form of justice, as arbitrators, just like judges, are empowered by the Law to reject or grant claims brought by parties to the dispute. Arbitral award is therefore without any doubt equated with a judicial decision and is not a private act. Arbitral awards have therefore all the virtues of judicial decisions, such as binding character, res judicata effect, enforceability, etc.

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Existence of arbitral legal order and its independence from national legal orders guarantees one of the main virtues of arbitration – its neutrality. By choosing arbitral proceedings, parties seek to achieve neutrality, which is indeed achieved in arbitration via avoidance, to the extent of possible, of the intervention of the parties' national courts on one hand and of procedural and material legislation of their respective countries, on the other hand. The arbitral justice is therefore not simply international but is truly international.

Private character of the origin of arbitral power deprives arbitrator from sovereignty of the State. One could argue that this private source and the absence of geographical forum are precisely the weaknesses of international arbitration when it comes to enforcement of arbitral awards. According to this logic to which the author of the present study does not subscribe, arbitration would be an amputated form of international justice. Its dependence on national courts after award is rendered would be then a weakness of international arbitration and will in any way make arbitration leave the layer of stratosphere of international legal system in order to integrate the troposphere of national legal system. However, as noted above, arbitration belongs to an arbitral order, which

is one of the components of international justice. There is no vacuum juris, but an independent arbitral order with its arsenal of procedural and substantive rules and which is a manifestation of international justice.

B. Recognition of arbitral awards independently from national legal systems

It is exactly the lack of sovereignty that constitutes the strength of the arbitration and makes it a form of international justice par excellence. Arbitral procedure is governed by the will of the parties who have full autonomy to determine procedural rules and principles to apply in the arbitration. As arbitrators do not have any forum, or at least not a geographical one, and therefore do not have lex fori, they apply rules without referring to methods of private international law such as rules of conflict of laws and have recourse to general principles of law, rules of law, including lex mercatoria. The application of this corpus of rules is another demonstration of arbitration affiliation par excellence to international justice.

Finally, the fact that arbitration is a form of international justice gives to arbitral awards a character of international

judicial decision. As a consequence, arbitral awards can be recognized and enforced without approval of a national legal system. This emancipation is fundamental as it will lead to an emergence of coherent body of arbitral jurisprudence and of common features in the practice of arbitral tribunals.

Conclusion

It is delocalization, which is a negative approach, consisting to escape application of State rules, and multilocalization of a dispute that give legitimacy to affirm that arbitration is a form of international justice. These features strengthen international character of arbitration, namely by accentuating some of its features, such as neutrality. This renders international arbitration truly international and legitimizes universal applicability of arbitral jurisprudence.

Therefore, the term "transnational" arbitral order is absolutely appropriate as it accurately implies the fact that arbitration lies within the stratosphere of international justice just like permanent international courts established by international community. It is a form par excellence of international justice as it is truly international. The fact that arbitration is a form of international justice promises a bright

future which lies ahead of arbitration making it potentially universally applicable.

Even though international justice is not a system with structural relations and complete normative coherence, the existence of stratosphere of international justice is undeniable. Its actors, namely community of international courts and arbitral tribunals, have similar functions in settling disputes and ensuring the proper administration of international justice. Recognition of transnational arbitral legal order and guarantees of its enforcement under certain requirements constitute a solid foundation for the further development of a harmonious system of international dispute settlement and the better administration of international justice.