"Is arbitration a form of international justice?"

*by **Karim El-Chazli**, Finalist of the Laureate of the Arbitration Academy Prize 2011*

"Is arbitration a form of international justice?"

"Is arbitration a form of international justice?" is not an easy question for two reasons. The first is that many of us can be tempted by an affirmative answer, mainly for emotional reasons. The word "International" in itself is flattering. It infers that something in arbitration is universal, that our knowledge of arbitration is valid beyond our legal and cultural frontiers. I understand fully the arbitrator who likes to associate the words "arbitration" and "international" for the prestige it can give him. However, feelings and hopes do not make law. That is why I think that, in order to have a scientific answer to our question, such emotions must be contained.

The second reason is that the words used in the question can have more than one meaning.

For these two reasons, I think that we must define every word in the question. In other terms, the answer lies in the definition of the words composing the question.

"Is arbitration a form of international justice?" will be referred to in the following essay as the "Question".

Is… ?

The verb used here is in the present tense. This indication is important. It means that the answer to the Question must take into consideration the present laws, practices and conceptions of arbitration. In other terms, our answer must be based more on static elements

than on dynamic elements. The arbitration phenomenon is an evolving one - one cannot compare arbitration of the beginning of the twentieth century to the arbitration of nowadays). Due to the present tense used in the Question, I will not take into consideration in my answer the evolution of arbitration.

… arbitration …?

Arbitration is not a homogeneous concept. It comprises many types. We do not have one "Arbitration" but many "Arbitrations". Since the arbitration has not by its nature an international connotation, confusing a local commodity arbitration with an investment arbitration does not help us at all in answering the Question. The Question is only relevant regarding Public International Law arbitration, Investment arbitration and international commercial arbitration. I do believe that local arbitration is not a form of international justice.

… a Form of International Justice?

International is an adjective describing Justice. In order to answer the Question, we should examine whether arbitration is a form of Justice. The term "form" shows us that, in order to be described as Justice, arbitration does not necessarily need to endorse the form of the state Justice. If the answer is in the affirmative, we will try to see if this form of Justice is international.

… Justice?

Is arbitration a form of Justice? Despite the frequent use by the jurists of the term "Justice", its meaning is not of an obvious clarity. Grosso modo, Justice can have two meanings. It can

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have the meaning of a value, of a higher objective for which something like a revolution can occur. The term "Justice" can also be used – probably in a less modest (and noble?) sense - to designate the judicial system (the courts and tribunals), which has the role of settling disputes. In this definition, by Justice, we do not mean the Justice about which Rawls has written his beautiful "Theory of Justice", but merely the institution, which has to be seized in order to put an end to disputes between individuals.

I do believe that, for the purposes of this essay, Justice must be understood in its second meaning for the simple reason that Jurists have left – wrongly? - the study of the first meaning of Justice to philosophers and preferred to study the second meaning, which is - by far - less complicated and more attainable than the first one. Thus, as a jurist, I will only focus on the definition, which is relevant for the current legal science.

So, how can we define Justice as a means of settling disputes? What are the criteria of Justice? I do believe – based on my observation of the different legal cultures – that in order to characterize a court or a tribunal, some basic and fundamental guarantees are required. These guarantees are designated under the name of "Due Process" or "Fair trial" (the requirement of "Due Process" shows us that we have links between the two meanings of Justice previously stated. The legal meaning of Justice does not completely ignore the philosophical meaning of Justice). Without having an independent adjudicator, without giving the right to the parties to be heard, and without treating parties equally, we cannot talk about having a judicial process. These requirements are not specific to a legal system; they are universal principles.

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I do believe that arbitration has considerably progressed in its way to adopt Due Process principles. What we call "Juridictionnalisation de l'arbitrage" - and which experienced arbitrators often criticize - has led to bringing arbitration closer to Due Process principles. Being a normal means of settling international disputes – and no more an exceptional one -, arbitration had to be more rigid, more predictable, but also had to endorse the procedural forms and guarantees of any respectable judicial system. We can, of course, regret the loss of the informal spirit of the arbitration, which was described as the "gentlemen's justice" but, in the same time, we cannot deny that the "juridictionnalisation" of arbitration is an enormous step that enables us to admit, without hesitation, that arbitration is a form of justice.

Some can say that, in order to have Justice, we should have a settled case law, which must be observed by courts of a given judicial system. I do not share completely this view, which I find highly influenced by the model of centralized justice system (mostly systems belonging to a state). I do not see the necessity to limit our definition of Justice to this model. Unlike Due process requirements, the requirement of a settled case law is not universally shared. At least, it is not understood in the same way everywhere. Nothing, from a logical point view – I am not talking from the appropriateness of having a case law –, can prevent us from accepting a judicial system where the adjudicator is, at the same time, creating the norm and applying it.

In all events, the arbitrators are not completely unbound by external norms. In some fields – like Investment arbitration –, it is sustained that arbitrators should observe the "case law".

… International Justice?

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"International" implies that there is something universal in arbitration, shared everywhere. It implies that arbitrators have the same duties and rights; it implies the same regime for arbitration awards. It implies that arbitration is not bound by the national laws and is beyond the influence of the domestic courts (We could have chosen to define "international Justice" as the Justice to which merchants have recourse for settling their international disputes. The problem of this definition is that the answer to the Question becomes too easy. Of course, merchants have recourse to arbitration so arbitration is a form of international Justice! Another reason to refuse this large definition is that we do not have any reliable statistics enabling us to assess how frequently merchants have recourse to arbitration. Many scholars and practitioners say that arbitration is the normal means of solving international disputes but nobody has proved, scientifically, his assertions).

Under this understanding of the term "international", is arbitration a form of international justice?

I think we should distinguish between ICSID arbitration and international commercial arbitration. The answer is to be affirmative for the first type because of its selfcontained (and, consequently, unique and uniform) regime.

For the second type, there is, unfortunately, no clear-cut answer. The absence of an answer needs to be explained. In fact, Law is not a hard science. The answers are often uncertain and they depend on the point of view from which they are given (especially when it comes to conflict of laws or, more broadly, international legal relations). I believe that the answer to the Question is not the same considering the point of view I adopt. I think we have two major

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points of view: the point of view of the States and the point of view of the arbitration community.

If we answer the Question from the point of view of the States, the answer will be most probably negative. Each country has its own arbitration law. Of course, some provisions are common between the national laws (due, principally, to the existence of international conventions and model laws) but we cannot deny the existence of not only different provisions but also different conceptions of what arbitration is. Even if the French legal system considered - in its decision Putrabali - that an award is a decision of international justice, it remains that it is the point of view of the French legal system only. Moreover, the different legal systems have different provisions whether the award is national or foreign. Using the terminology of "foreign award" is not compatible with considering arbitration an international Justice.

On another note, members of the arbitration community (i. e., arbitration lawyers and arbitral institutions) may have the feeling that they form a homogenous corpus, that they talk the same language, that they should act in the same way without regard to the seat of arbitration, and that they fulfil an international task, which is contributing to the settlement of international disputes. But it is not only a matter of feelings. Today, one witnesses many disputes settled by a hybrid judicial system borrowing ideas, techniques and norms from different legal systems. Today, there is, undoubtedly, an international market of international arbitration. Is it enough to conclude that arbitration is a form of international Justice?

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After describing the two points of view, I still do not want to adopt one of them. There are two reasons for such an approach. First, I do not think that there is a correct or false answer to the question because there is no correct or false answer to the question of knowing whether arbitration is or not a form of international justice (unless one "believes" in a theory but, in this case, we are talking about emotions and feelings. Without adopting a kelsenian view of the legal science, I do not see the usefulness of explaining irrational theories in a rational way). Secondly, I believe I am writing this essay as an author aiming to pertain to the scientific community. I do not see any scientific reason, which obliges me to adopt one of the two aforementioned points of view.

Conclusion

As it has been said in the beginning of this essay, the Question is not an easy one. But if one adopts a dynamic view of what is happening in the arbitration world, one can perceive a move towards a greater internationalization of arbitration. To be convinced of that, a look at the diversity of the origins of participants to the Arbitration Academy is most probably sufficient.