"Is arbitration a form of international justice?"

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Arbitration can easily be defined as a form of dispute settlement. That would be a neutral and uncontroversial label. To define it as a form of international 'justice' might instead prove problematic. If anything, for justice itself is an ill-defined concept; arguably, an indefinable one. For our purposes, I can identify at least three different dimensions of 'justice': justice as an end (substantive justice); justice as a method or process (procedural justice); justice as (legitimate) power. But arbitration as a word is itself multi-faceted: it can refer to inter-State, mixed or rather commercial arbitration. As such, not only 'justice', but also 'arbitration' has multiple dimensions.

Before embarking on an analytical task the very premise of which is anything but univocal, it is probably worth asking ourselves why at all we should enquire into whether arbitration is a form of justice. Why such a question? What is at stake? I argue that what is at stake is the legitimacy of the arbitration system, as one which is (not just diverse but also) exogenous to the established systems which have traditionally claimed the administration and the pursuing of justice. Yet, as I will explain further, the issue of legitimacy takes on a different intensity with regard to inter-State and mixed arbitration on one side and international commercial arbitration on the other.

Finally, I will claim that the apparent tension between arbitration and justice cannot be resolved by considering the former from a purely procedural stance: substantive law issues need to enter the equation. Indeed, arbitration as a phenomenon is by far more complex than a mere procedural mechanism: not only does it stem from a contract and

pursue adjudication on the basis of a contract, but it potentially can dispense with the application of any 'law' by referring exclusively to 'rules of law' which, again, are contractual in nature. It is such a circle of consensual law-making and private adjudication which might jeopardize the legitimacy of arbitration as a form of 'justice'. Here the underlying issue gets even more challenging: arbitration not just as a form of inter-national justice, but as a form of 'meta-national' or 'transnational' one.

Justice as a word is as much evocative as it is 'fuzzy'. It is not an entirely legal concept: it falls squarely into the twilight zone between law and morals; moral as well as political considerations are not exogenous to it. Yet, whilst such a description can accommodate the concept of national justice, it might prove over-explanatory when referred to international justice. The latter has, quite paradoxically, a narrower meaning. No supra-national authority claims the power to administrate justice *iure proprio*. International justice is inherently consensual in nature. Even the International Court of Justice, despite being a standing tribunal, depends on the consent of all the disputing parties for the establishment of its jurisdiction. As it is clear, international justice is not a matter of meta-physics: its very existence hinges on the will of the parties which would be subjected to it. In a word, it is not exogenous.

Having defined international justice in such terms, the issue surrounding the legitimacy of arbitration might look a bit shaded: the consensual nature of arbitration would not be an exception, but rather consistent with the rule. Indeed, there is no particular issue of legitimacy with regard to inter-State arbitration: if anything, for the alternative to it would be the use of force between States. In this vein, inter-State

arbitration may mirror a higher degree of 'procedural justice': it is a principled system, essentially judicial in nature, which does not depend on the 'power' of States and the outcome of which is binding on the parties.

Things might prove slightly different with regard to mixed (investment) arbitration. The latter is not entirely international in character; it is hybrid, inherently in tension between the international status of the State party to the investment on the one hand, and the contractual nature of the investment itself on the other. Yet, the alternative to investment arbitration would be the exhaustion of local remedies and the exercise of diplomatic protection by the State of nationality of the investor: the latter is a remedy which is completely discretionary both in its input and in its outcome, States exercising it in their own name and not in the name of the investors. As such, investment arbitration can be regarded as showing a higher degree of 'justice' than the alternatives to it. It replaces: discretion with procedure; political pressures with the rule of law. What is more, yet, is that the legitimacy of investment arbitration is not seriously open to question: it is true that the tension between State interest and private interest is inherent to investment arbitration, nonetheless such a tension is internalized in investment arbitration without affecting its validity: by definition, investment arbitration takes place when States consent to it.

The issue of legitimacy is by far more problematic with regard to international commercial arbitration. Whether the latter can be regarded as a self-contained system of justice is still open to question. I will look at the problem through the three different dimensions of justice outlined at the beginning.

The rise of strongly institutionalized arbitral institutions and of a core of commonly accepted principles governing the arbitral process may render the issue of 'procedural' justice superfluous. It is arguably not so if we consider 'justice' as the legitimate exercise of the power to adjudicate: commercial arbitration as an essentially contractual phenomenon might be deemed an autonomous form of justice only insofar as contracts might be regarded as an autonomous source of law. This is a contentious point, which I will develop later. Finally, issues of substantive justice may slip in: arbitrators may apply non-State law much easily than national judges who are bound by the conflict of law rules of their *lex fori*. The question then turns out to be whether an entirely private system of adjudication should be regarded as less 'just' than curial adjudication based on national law. I will focus on the last two points.

International commercial arbitration is in permanent search of its legitimacy. The various theories which have differently conceptualized the arbitral phenomenon are nothing but an attempt to give it legitimacy. The debate over the nature and the source of commercial arbitration proves that there is a perceived problem concerning its foundation as a 'form of justice'. Since the jurisdiction of arbitral tribunals is purely based on consent – and, as such, has a contractual basis – the extent to which arbitration can be regarded as a self-contained system ultimately depends on the extent to which contracts are deemed to be autonomous from State law (i.e. whether *contrat sans loi* is conceivable or not). Here the doctrinal positions are well known: one may opt for a 'jurisdictional-territorialist' claim rather than for a 'de-localization' one. If we wanted to be even more sophisticated, we may speculate as to whether arbitration needs an *ex ante* legitimization by the State in which it takes place, or an *ex post* legitimization by the (many) States in

which the award might be enforced; or, rather, whether it needs no legitimization at all, being the product of an international – autonomous – legal order.

I will not examine such theories here, since it would not affect the answer to the original question: each theory undoubtedly considers international commercial arbitration as a 'form of justice'; the difference lies into whether it is to be regarded as a 'delegated' form of justice or rather an 'original' one. But even this particular issue is one which, in my view, does not prove crucial. Whichever its source of legitimacy, international arbitration does not exist in a vacuum: it may, at many stages of the arbitral proceedings, come into contact (or rather crash) with national legal systems. It is such a point of contact which really deserves attention. To be clear, my claim is not an entirely 'pragmatic' one: I do not pretend that theoretical conceptualizations of international arbitration ought to be disregarded in favour of purely practical considerations; rather, my claim is that practical considerations may help our understanding of how international arbitration should be conceptualized.

There is, in particular, one practical consideration which takes the scene. There is no such thing as the International Court for the Enforcement of Arbitral Awards and, even if it were to exist, the actual enforcement of arbitral awards would still hinge on national systems and on the use of force by national States. Such practical facet would not be affected by any conceptualization of international arbitration. Yet, it may itself affect the latter. Indeed, if considered from this practical stance, international arbitration may be regarded as a form of justice but not as an entirely autonomous and self contained one; at best as one which is autonomous 'up to a point'. International arbitration as a form of justice is an inherently incomplete one. It can define justice in the particular case but

cannot, by its own virtue, concretize it. Justice depends on power: not just the power to adjudicate but also the power to enforce decisions. Arbitration cannot seriously be said to lack the former; but as a matter of fact it lacks the latter.

We can now consider international arbitration in its last dimension: that of substantive justice. As said before, international commercial arbitration is not just a procedural phenomenon but one which may have implications for the developing of substantive law. Arbitrators have no forum and as such are not directly bound to apply the law of the State in which they sit, whether it be its substantive law or its conflict of law rules. Arbitrators sometimes apply rules of law which, independently of their being labelled as 'lex mercatoria' or not, share a crucial feature: they are non-State law. As it can be seen, the tension between international arbitration and national States takes place on multiple grounds, both procedural and substantive. When arbitrators apply non-State law, international arbitration posits itself as an entirely comprehensive system which spans from the constitution of the tribunal to the creation of the law applicable to the dispute. In such cases, the 'rule of contract' apparently supersedes the 'rule of law'. Apparently.

I am sceptical about the idea of a transnational or meta-national justice, of which international arbitration would be the prime motor. The reasons for such scepticism do not lie in the juxtaposition between State and non-State law. Indeed, the underlying assumption would be that only States should have the monopoly of law making and of the administration of justice: nevertheless, a similar proposition has no self-evident underpinning. Rather, the real tension is one of *private* interests created by contract vs. *public* policy. I would not question international arbitration as a comprehensive form of transnational justice because it prescinds from State-law; but I would question the

legitimacy of rules which only reflect the interests of contractual parties to the detriment of those of third parties and of the public in general. In this vein, State-law would not have a value per se, but rather insofar as it internalizes the public policy balancing act, something which 'lex mercatoria' or the alike, being essentially contractual in nature, cannot do.

Consequentially, the idea of international arbitration as a purely 'transnational' form of (substantive) justice, which would develop outside the boundaries of State-law without ever falling within its scope, might in my view go a bit too far. At least, until international arbitration will not develop a notion of 'transnational public policy' which may complement the otherwise inherently private nature of non-State rules of commercial law. That is far from being utopian.