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WHY ARBITRATION IS A FORM OF INTERNATIONAL JUSTICE (AND WHY IT IS DESIRABLE THAT OFF-SIDE CALLS ARE NOT REVIEWED BY ORDINARY JUDGES)

Posted on 20 Dicembre 2011 by Filippo Fontanelli

Vox Populi, vox dei?

In the Great Hall of Justice, a large painting hangs over the entrance through which Judges of the International Court of Justice make their way to the bench. Two jurisconsults, standing on a rock platform, are depicted in the midst of a debate before an arbiter, whereas a woman stands below the rock. Two knights in armor, presumably convened with some animus pugnandi, are showed parting ways, after the providential intervention of the woman, a personification of Peace itself.

This 1914 painting by Albert Besnard is commonly known under the title "Peace by justice" as, in fact, it shows how the resolution of a dispute through legal arguments prevented it from turning into a violent conflict, fought with swords.

Few know that the canvas originally bared a different title, as documented in a New York Times article of 3 October 1915, and in a preparatory sketch now kept at the archives of the Musée d'Orsay. It was called "peace by arbitrament", and the painter, presumably drawing from a legal dictionary shaped only by popular culture and reminiscences of King Solomon,

considered normal to define the administration of peace through legal reasoning an exercise of arbitration, rather than adjudication.

In homage to the venue, soon to be occupied by the Permanent Court of International Justice, the title was subsequently adjusted, changing the reference to the process (from arbitration to justice) and keeping the reference to the result (Peace).
Let us test the solidity of this suggestion: if arbitration and adjudication are interchangeable, at least when they bring about a comparable outcome, and if adjudication is a form of (administration of) justice, then arbitration is, likewise, a form of justice. Popular knowledge, however, can help only this much, as it also points to an opposite conclusion. Think of the word “arbitrariness”: common language attaches thereto a sense of undesirable unbound discretion, of caprice. It is regularly featured in the legal definition of unjustified discrimination, of breach of fair and equitable treatment and, generally, is deemed to represent the nemesis of justice.
To recap: arbiters can be wise persons who can evoke and administer justice, but language retains the traces of diffidence to their freedom in doing so, as arbitrators acted out of unregulated whim. The vox populi, ultimately, is generic and contradictory as to the interplay between arbitration and justice, and as such, this essay must venture into the realm of legal discourse.
Justice and international justice
An attempt to nail down some stipulative definitions is necessary, at the risk of causing disagreement: sheltering behind definitional difficulties will not help.
As said, arbitration refers to the process, not the result, it is a method of dispute resolution, an alternative to adjudication by courts. Its legitimacy lies in the parties’ freedom to dispose of, and shape their difference as they deem fit, but some have suggestively observed that the real incontrovertible fuel of arbitration is precisely the concept of difference: arbitration is capable of dealing with all sorts of differences (of nationalities, of applicable laws, of procedural devices, of legal mindsets, of interests) in a comparatively more effective way.

Turning to the concept of international justice, does it refer to a sub-section, a specification of justice, or to something different from it? A polar bear is certainly a bear, but a sea horse is, alas, not a horse. Mind the words: the question here is not whether international arbitration is a form of justice. The international qualification of justice must have an added value and, I argue, carries within it the kernel of the answer itself.

International justice might be defined a contrario, as an expression of justice that does not draw legitimacy from the nation-State, its laws, democratic foundation and monopoly of force. In international law, jurisdiction is based preeminently on consent (between States), just like it is in arbitration (between parties). A first fil-rouge linking arbitration and international (non national) administration of justice is drawn: consent is the stepping stone.

An ADR method without alternatives

Arbitration can either represent an alternative to judicial proceedings or a viable option when seisine of a permanent court is impossible or impracticable. Whereas in the first case (mostly in the domestic order) recourse to arbitration is mostly a matter of convenience, in other cases arbitration appears to be the only or the most appropriate way to promote a legal claim. Arbitration's added value does not always derive from its differences from adjudication (confidentiality, flexibility, expeditiousness…), but sometimes lies in the fact that it provides the natural (or the sole) forum available for the vindication of certain rights or interests.

This is particularly true in the international scenario, intended loosely as the area populated by all the claims and proceedings that cannot be safely confined within the closed limits of a given national legal order. Cases based on the application of transnational non-State regimes (such as sport rules), commercial disputes with transnational implications, disputes between foreign investors and host States, inter-State claims under UNCLOS, ECT and NAFTA, even WTO claims before the panels: there is a good share of transnational litigation that, simply, cannot do without arbitration, either because there exists no other juge naturel to hear the relative claims, or because existing national and international

courts are not well-positioned to do so effectively.
In other words, sometimes arbitration is not a method of ADR, because it does not represent an alternative to begin with.
Arbitration is a method of dispute resolution. Dispute resolution may or may not aim exclusively at securing justice: other concerns could play a decisive role. Conflict prevention might prevail over the vindication of justice, and so could the protection of business interests or of diplomatic relationships, the rapidity of the proceedings etc. However, whereas there are some ADR methods that often sideline justice per se for the sake of resolution (think of mediation, composition amiable, conciliation, settlement), arbitration is not one of those. One oft-cited example of arbitration's extravagance is the possibility that arbitrators, if required to do so, issue a decision ex æquo et bono, in potential disrespect of codified laws.
In fact, if anything, this proves that arbitration is so concerned with justice that it foresees the possibility to attain a just (æquum) result notwithstanding the letter of the law (as in loi, not as in droit): only an incurable positivist and State-nostalgic would see this as an example of why arbitration is unfit to espouse the cause of justice.
Can arbitration run wild?
We all know the story about judicial activism, the infamous catch-all formula incoherently used to praise courageous judges and to blame reckless ones. What about arbitration? Could arbitral activism – unrestrained by the typical fences of systematic judicial review – be the reason why arbitration and justice cannot coexist?
First of all, arbitrators are not unfettered players. There is no need to list the counterweights that parties themselves, arbitral institutions and national laws have devised to avoid hallucinating awards. Rules of arbitrability prevent parties from putting at risk the existence of undisposables rights, and King Salomon would today have to decline to decide which party is the real mother of a child (not to mention the way he proposed to find that out, through baby-halving).
Secondly, annulment mechanisms, exceptions based on ordre public and other public policies, strict rules of professionalism and high reputational

stakes keep arbitrators from going awry, and few would disagree that the remarkable effectiveness of arbitration might suffer from some side-effects relating to its de-localized (or pluri-localized) nature, certainly not from an high occurrence of unjust decisions.

Thirdly, arbitration has emerged in the transnational scenario to satisfy a growing demand for justice and dispute resolution. The system itself must yield reasonable, predictable and quality results: if it did not deliver, parties would be reluctant to refer their matters to arbitration. As bad as it sounds, arbitral justice is to some extent a product, if arbitration did not meet customers' expectations, it would go out of business. Flexibility has taught arbitration to stay within the lines, and not to betray the cause of justice: how this could happen in such a de-centered and fractured system, quite apart from marketing similes, is not very relevant here; suffice it to recall the general phenomenon evoked by Raymond Radiguet, in the closing lines of Le diable au corps: "l'ordre, à la longue, se met de lui-même autour des choses".

Conclusions

It takes a lot of patience to debunk some of the commonplaces about arbitration, and to detach the idea of justice from the activity of national courts and legal order: pluralism is omnipresent in legal discourse but is seldom taken seriously, almost 100 years after Santi Romano's L'ordinamento giu
ridico.

Arbitration derives legitimacy from consent, but this is only a preliminary step, a superficial affinity with international justice. Often arbitration is the forum conveniens for transnational disputes: it does not only provide a business-friendly venue for the resolution of disputes, alternative to the domestic judiciary, it simply is the way to deal with delocalized claims in a delocalized fashion, something that national and international courts are often unable or incompetent to do.

In other words, arbitration relies to some extent on the State-order (when it comes to recognition and enforcement, and more commonly when the applicable law is a domestic one) and the international one (think of BIT/MIT and WTO litigation, and how principles of treaty interpretation

and State responsibility pervade it), but is not amenable to either in a definitive way. It refers to a diffused and apparently dis-ordered order, lying at the intersection of national and international systems.
Whether arbitration forms a discrete legal order (or, more generally, whether lex mercatoria, or the law of FDI protection are autonomous legal systems) is a value-judgment, and no response is needed here. Nonetheless, it should be clear that arbitration is not a parasite avatar of adjudication, but a reasonably consistent system of the administration of justice.
Make no mistake: the process and the product of arbitration are not justice à la carte, as many insinuate: arbitrators are mindful of public policies and values that might exceed the terms of reference of the single dispute. Arbitration is run according to rules (most often according to laws), it generally yields a reasoned outcome that is liable to logical and legal challenge and review: so much for the malicious link between arbitration and arbitrariness.

During a football game, the referee (arbitre) takes several decisions, for the most part final and non-appealable, pursuant to rules that are not inscribed in State-law. Whether they like these decisions or not, affected parties (players, managers, supporters) abide by them almost all the time, without questioning their legitimacy; on Mondays, referee's adjudicatory performance is painstakingly scrutinized in La Gazzetta dello Sport or L'Équipe, and discussed interminably by erudite amateurs. Errors are common, and they might detract from the credibility of the single referee, but not from the task of referees as a whole.
The referee is recognized as the administrator of football-justice (during the game), and a massive legal discourse surrounds his activity without undermining his role. His authority does neither depend solely on the consent of those involved in the game, or on the relative self-containedness of the football regime, but on the inherent legitimacy of his task (application of the rules and reasoned decision-making) and his qualification (he is clearly the most appropriate subject for this mandate, if only because he is on the field, running his lungs out). He might attract criticism for arbitrariness not because he acts as a sole arbitrator, but

whenever his decisions appear at odds with the rules and poorly reasoned.

Just as referees or wise men sitting on a rock, arbitrators administer non-State justice, and their mission is carefully designed so that those interests which courts lack the dexterity to handle are composed, in the interest of justice and reason, by someone who is used to running among the players, like a referee.