



**Delocalized Arbitration myth or reality?
Analyzing the interplay of the delocalization
theory in different legal systems.**

التحكيم اللامركزي أسطورة أم واقع؟ تحليل تفاعل نظرية اللامركزية
في أنظمة قانونية مختلفة.

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ABSTRACT

This dissertation seeks to examine the stigma attached to the idea of a delocalized or floating or transnational arbitration. Whilst the debate on this subject has ensued for decades, this paper seeks to analyze whether the reasons for its slow development in the sphere of international commercial arbitration is due to its characteristics or if its acceptability and development is attached to the kind of legal system that operates in a given State. The analysis herein is limited to the jurisdictions of England, USA and France with an overview of the UAE. Data has been gathered mostly from journals on the subject and interviews of well-known multi-jurisdictional practitioners. Interestingly it has been found that delocalization or trans-nationalization is not tied to a particular legal system but is related to the extent to which a state is arbitration friendly. Furthermore, although delocalized arbitration has not been adopted in entirety soft delocalization (with certain aspects of it being adopted) is in play. The implications of this are that as international commercial arbitration continues to expand there may well be a development in the future in the form of an international instrument bridging the ideas of the seat theorists and those of the delocalized protagonists.

تسعى هذه الأطروحة الى فحص السمة المرفقة بفكرة التحكيم اللامركزي، العائم، او عبر الوطني؛ بالرغم من ان مناقشة هذا الموضوع قد نشأت لمدة عقود، فإن هذا المستند يسعى الى تحليل ما إذا كان السبب في تطوره البطيء في مجال التحكيم الدولي التجاري يرجع الى سماته او ما إذا كان قبوله و تطوره مرتبط بنوع نظام قانوني يعمل في حالة معطاة. التحليل هنا مقتصر على اختصاصات انجلترا، الولايات المتحدة الأمريكية، و فرنسا، مع نظرة عامة على الإمارات العربية المتحدة. تم جمع المعلومات في الأغلب من الجرائد التي كتبت عن هذا الموضوع و من خلال مقابلات مع ممارسين مشهورين ذوو اختصاصات متعددة. و مما يثير الاهتمام أنه وجد ان اللامركزية أو عبر الوطنية ليست مربوطة بنظام قانوني خاص و لكنها تتعلق بمدى تألف التحكيم مع اى حالة. علاوة على ذلك، بالرغم من ان التحكيم اللامركزي لم يتم إتباعه بالكامل ، فإن اللامركزية البسيطة (مع إتباع بعض النواحي منها) في تنافس. و مقتضيات ذلك هي بينما يستمر التحكيم التجاري الدولي في التوسع قد يكون هناك تطور في المستقبل في شكل وثيقة دولية تربط أفكار واضعوا نظرية المكان و أفكار أبطال اللامركزية.

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IBA Rules of Taking Evidence

International Chamber of Commerce Rules

London Court of International Arbitration Rules

Table of Abbreviations and Definitions

<i>Act</i>	Arbitration Act 1996 (England)
<i>Arbitral Situs</i>	Seat of arbitration
<i>CIETAC rules</i>	Commercial Arbitration of 1961 China International Economic Trade Arbitration Commission of Beijing
<i>Convention</i>	Convention on the recognition and enforcement of foreign arbitral awards 1958:
<i>DIAC Rules</i>	Dubai International Arbitration Rules 2007
<i>ICC Rules</i>	International Chamber of Commerce Rules
<i>ICSID</i>	International Centre for Settlement of Investment Disputes
<i>LCIA Rules</i>	London Court of International Arbitration Rules
<i>Lex Loci Arbitri/ Lex Arbitri/ Lex fori</i>	law of the place of arbitration
<i>NCCP</i>	French New Code of Civil Procedure 1981
<i>UAE Civil Procedural Law</i>	Federal Law No 12 of 1992??
<i>UNCITRAL</i>	United Nations Commission on International Trade Law
<i>UNCITRAL Model Law</i>	UNCITRAL Model Law on International Commercial Arbitration

CHAPTER I: INTRODUCTION

It is professed and largely accepted by the international community that international commercial arbitrations by their very nature are governed by the national laws of the seat of arbitration and the laws of the State in which enforcement is sought. Characteristically, arbitrations can only be commenced on the agreement of the parties; who opt for arbitration as an alternative dispute mechanism to the conventional courts. The perceived constraints imposed by national laws on international commercial arbitration gave cause for the delocalization uprising¹. Furthermore, the parties' objectives of having a less court structured approach for their dispute are fast dashed if either party involves the courts at the seat during or after the arbitration often hindering the arbitration from smoothly progressing².

Thus delocalization of arbitration permeates around the idea of having an arbitration that is independent of the restrictions imposed by the laws of the seat of arbitration³; albeit the argument being perhaps not entirely. This concept reduces or disapplies the involvement of the national courts; resulting in an award that floats in a transnational arena⁴ with only the laws of the enforcing State governing it. Having said this, delocalized arbitration has been misunderstood to mean an attempted escape from the national laws of the seat, whereas in true essence the term conjures the idea of not having to necessarily apply the restrictions from the seat of arbitration to the arbitration and thus liberating it from the constraints of the *lex loci arbitri*⁵.

The paradigm of delocalized arbitration rests in the fact that it gives greater leverage to party autonomy-the founding principle of arbitration and the overriding concept in arbitration. Parties in arbitration can choose the number of arbitrators, their powers and opt for the substantive laws they wish for their dispute to be governed by. The aim of delocalization or the idea of an independent arbitral legal order is that of applying a transnational rule method as opposed to the choice of law method wherein in the former case a particular law is adopted by virtue of it having a dominant trend⁶.

Although 'localization' was popular in the 1940s and 1950s⁷, fragments of the idea of having an arbitration award detached from the seat of arbitration; 'delocalization theory' were seen to emerge at the time of drafting the Convention⁸ in the 1950's. Frederic Eisemann⁹, holding office of the Secretary General of the ICC International Court of Arbitration at the time, particularly emphasized the transnational and autonomous nature of arbitration which he advocated to be included in the Convention. A subsequent examination of the Convention in this dissertation¹⁰ will

¹ J Li, 'The application of the delocalization theory in current international commercial arbitration' (2011) 22 (12) ICCLR 383-391

² R David, 'Harmonization and Delocalization of international commercial arbitration' (2011) 28 (5) J.Intl.Arb. 454

³ R David, 'Harmonization and Delocalization of international commercial arbitration' (2011) 28 (5) J.Intl.Arb. 456

⁴ J Wiener, 'The "Transnational" political economy- A framework for analysis (1996) <http://www.jus.uio.no/sisu> accessed November 17, 2012

⁵ J Li, 'The application of the delocalization theory in current international commercial arbitration' (2011) 22 (12) ICCLR 383-391

⁶ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 51

⁷ D Janicijevic, 'Delocalization in International Commercial Arbitration' (2005) 3 (1) Law and Politics 63

⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

⁹ J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Number 2

¹⁰ Chapter III pg 23

demonstrate the open approach that the Convention aspired for as compared to its previous counterpart; the Geneva Convention¹¹.

Fast forward to the 21st century-delocalized arbitration is still being debated. Fragments of the delocalization theory are being practiced by selected States demonstrating a clear forbearance to its acceptance in the arena of international arbitration. There is a continued tug of war between delocalization and orthodox propagators of the seat theory with scholars of the later, condemning delocalization as 'illusionary' and 'wholly unrealistic'¹² on the primary reason promulgated by Mann¹³,

'Every arbitration is necessarily subject to the law of a given state. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called *lex fori*....'

The main argument from supporters of delocalized arbitration is that parties opt for a place of arbitration due to the convenience attached to it and not to be tied or otherwise governed by the local laws of the place¹⁴. Others have commented that strict adherence to the seat theory is nothing but an outdated and archaic approach towards international commercial arbitration that needs to be deviated from for the true essence of international commercial arbitration to prosper¹⁵. In contrast opponents state that since arbitration takes place within a country, it ought to be subject to the laws of the particular State. Another criticism presented is that without the *lex arbitri* voids would arise in the arbitration such as a potential requirement for freezing orders where the *lex arbitri* would interplay¹⁶. In addition, problems arising at the outset in constituting the arbitral tribunal, would be difficult to deal with in the absence of a *lex arbitri*. These are just some of the arguments that form part of the ping pong game of delocalized arbitration.

The evolution of delocalized arbitration amongst States has taken an interesting pattern. This notional doctrine was initially applied by the Court of Arbitration in Paris in the *Gotaverken*¹⁷ and *General National Maritime Transport Co. v. Société Gotaverken Arendal A.B.*¹⁸ cases. Thereafter, France continued on a steady road of somewhat evolving delocalized arbitration into its legal system. In contrast, England, from the outset adopted an orthodox approach by repeatedly emphasizing the importance of the juridical seat¹⁹. This remains the position to date. So distinctive from the English is France's attitude towards the idea of an autonomous arbitration that whilst enforcing an award set aside by the English High Court the French Cour de Cassation held that:

¹¹ The Geneva Convention 1949

¹² A Tweeddale and K. Tweeddale, 'Arbitration of Commercial Disputes, International and English Law and Practice' (2007) Oxford: OUP

¹³ Mann, *Lex Facit Arbitrum* in P Sanders (ed). *International Arbitration: Liber Amicorum for Martin Domke* (the Hague: Martinus Nijhoff, 1957) p. 157

¹⁴ R David, 'Harmonization and Delocalization of international commercial arbitration' (2011) 28 (5) *J.Intl.Arb.* 445-466

¹⁵ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 13

¹⁶ R David, 'Harmonization and Delocalization of international commercial arbitration' (2011) 28 (5) *J.Intl.Arb.* 445-466

¹⁷ *Gotaverken (Sweden) v. Libyan General National Maritime Transport Yearbook VI* (1981) pp. 221-224 (France no. 3)

¹⁸ *General National Maritime Transport Co. v Société Gotaverken Arendal A.B.*, Paris Court of Appeal, February 21, 1980, 20 *I.L.M.* 884 (1981)

¹⁹ Lord Brougham's judgment in *Don v Lippmann* (1837) 5 *Cl & Fin* 1

'an international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought²⁰.'

The different attitudes between England and France on this element of delocalization could be attributed to their different legal systems. England is a common law jurisdiction, where the English judiciary plays a prominent and definitive role in analyzing, interpreting and enacting the law whereas France is a civil law jurisdiction, placing a greater emphasis on the constitutional development of law as opposed to the judiciary.

This dissertation, thus seeks to examine the accuracy of the criticisms raised against delocalized arbitration and investigate if these criticisms hold weight or if they are but an illusion created to blanket the real reason of the slow acceptance of delocalization despite the significant increase of the use of arbitration in international disputes. At the outset, to understand the concept of delocalization, the origins of delocalization will be considered. An examination of the two pertinent doctrines; party autonomy and the seat theory will be undertaken with an analysis on the criticism raised. The scope of delocalization under the all important Convention will be analyzed. Particular reference will also be made to the UNICTRAL Model Law. For the scope of this dissertation the approach towards delocalized arbitration taken in the two main jurisdictions civil and common law will then be examined by considering States such as England and France. A potential 'delocalized arbitration clause' will further be analyzed and the scope for delocalized arbitration, if any, in the UAE examined.

²⁰ Societe PT Putrabali Adyamulia v Societe Rena Holding et Societe Mnutotia Est Espices (2007) Revue de l'Arbitrage 507

CHAPTER II: UNLOCKING THE VEIL OF DELOCALIZED ARBITRATION

2.1 Theories of International Arbitration

Broadly speaking there are two opposing schools of thought. First, there are those that place predominant focus on party autonomy tying in the idea that an international arbitration cannot be restricted to the sole application of the procedural laws of the seat and thus rests in a transnational firmament²¹. Opponents of this theory place emphasis on international arbitration being subjected entirely to the juridical seat of arbitration, thus dismissing all the grandeur of delocalized arbitration.

A web of debate has evolved over 30 years due to the emergence and advocacy of the delocalization doctrine with scholars of opposing dispositions adamantly supporting each side. This chapter, by analyzing this debate, seeks to assess the hypothesis of whether the perceived disadvantages of delocalization are mere notions or hold weight.

2.2 The Traditionalist Perspective- Territoriality

The origins of the seat theory sprung from the traditional view that the *lex loci arbitri* governs the validity of arbitration²². Therefore, the legality of the award arises solely from the seat. Arbitration started out on this footing and this idea continues to exist today. Parties submitting to a particular place of arbitration, although such arbitration emerges from an arbitration agreement accept that the national laws of the particular place and its procedures govern the arbitration²³.

This school of thought has two main justifications. Firstly that profusely promulgated by Mann²⁴,

‘There is a pronounced similarity between the national judge and the arbitrator in that both of them are subject to the local sovereign. If, in contrast to the national judge, the arbitrator is in many respects, but by no means with uniformity, allowed and even ordered by municipal legislators to accept the commands of the parties, this is because, and to the extent that, the local sovereign so provides.’

Thus arbitrators by virtue of being assimilated to judges ought to be strictly subject to the laws of arbitral situs²⁵. The ideas propagated by Mann seriously dispute the parties right to a choice

²¹ B Cremades and D Cairns, ‘The Brave New World of Global Arbitration’ (2002) 3 (2) J.W.I 181

²² W Park, *Arbitration in International Business Disputes* (2nd edn OUP, Oxford 2012) 50

²³ H Yu, ‘A theoretical overview of the foundations of international commercial arbitration’ (2008) 1(2) CONTEMP. ASIA ARB. J. 255-286

²⁴ F Mann, *Lex Facit Arbitrum, International Arbitration, Liber Amicorum for Martin Domke* (P. Sanders ed, The Hague, Martinus Nijhoff 1967) 157

²⁵ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010)

of law and being compulsorily subject to the laws of the seat. He advocates that it is only the seat that can offer parties with an objective model within which the arbitration can succeed²⁶.

The second justification is a more subjective view. This reasoning states that the parties submission to an arbitral situs by choice, or through the institutional rules that they adopt is their express acceptance to be subjected to the control of the particular State's laws. This idea was also supported by Nizar Fadhlou²⁷ who further stated that the insertion of a place in the institutional rules shows the continuing importance of the curial law²⁸. This view has been strongly supported by Goode whose ideas are later examined in this chapter.

2.3 The sprouts of Party Autonomy

Ardent scholars of the seat theory, Mann²⁹, Weill³⁰ and Goode³¹, have emphasized that the principle of party autonomy cannot float in space and that it has to be integrated in a legal framework which gives it legal form and effect. Goode further argues that, a contract in itself is not law. Notably if this was the case, every contract formed between parties would be a law of some sort defeating the legal system in which they operate. Similarly, therefore, the *locus standi* of an arbitration agreement is the law of the place where it is formed. A counter supposition to this argument can be that it is universally accepted that all contracts are to be primarily upheld between the parties, therefore as remarked by Lew why not uphold an arbitration agreement and treat it similarly- limiting court interference to highly exceptional circumstances such as instances whereby the parties agree to something contrary to public policy³².

The law according to Lew ought not to be used to validate the parties' agreement or second guess their agreement and obligations. Moreover, exceptions to the parties' agreement should only arise in exceptional cases of public policy and operation of mandatory provisions. Therefore, awards should be enforced and recognized except in extreme cases.

Moreover, Kellor³³ asserts that the deep rooted voluntary nature of arbitration is embodied in the fact that parties by opting for arbitration willingly forego courts. Therefore, it is argued that there would be little sense in subjecting the parties to the courts when they expressly chose to

²⁶ F Mann, *Lex Facit Arbitrum, International Arbitration, Liber Amicorum for Martin Domke* (P. Sanders ed, The Hague, Martinus Nijhoff 1967) 157

²⁷ Appendix 1: Sr No.5

²⁸ Registrar at the DIFC-LCIA Arbitration Centre: interview at DIFC on 4 April 2013

²⁹ F Mann, *Lex Facit Arbitrum, International Arbitration, Liber Amicorum for Martin Domke* (P. Sanders ed, The Hague, Martinus Nijhoff 1967) 157

³⁰ F Mann, *Lex Facit Arbitrum, International Arbitration, Liber Amicorum for Martin Domke* (P. Sanders ed, The Hague, Martinus Nijhoff 1967) 190

³¹ R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 (1) Arb. Intl.10-39

³² R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 (1) Arb. Intl.18

³³F Kellor, 'Arbitration in Action: A Code for Civil Commercial and Industrial Arbitration' (1941) quoted by H Yu , 'A theoretical overview of the foundations of international commercial arbitration' (2008) 1(2) CONTEMP. ASIA ARB. J.266 '[A]rbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration. Accordingly, with the exceptions of arbitrability and public policy which are reserved for the lex fori, the lex fori has very little influence over the procedures and outcome of the arbitration. Moreover, it has been concluded that "national arbitration laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of an arbitration.'

exclude it. To counter this supporters of the seat theory base their argument on State sovereignty and public policy.

Goode retorts that the traditional approach of the seat theory is premised on the significant point of international law of each State being sovereign such that its laws and courts have the sole right to determine the legal issues arising within their borders³⁴. From this it can be discerned that party autonomy exists but within the enclosure of the national law of the State which in a merry-go-round fashion is where the parties' free will arises from. Such interpretation would mean party autonomy would be yet be another State concept.

2.4 The Delocalization Spring

The focal of delocalization thus rests on the importance of party autonomy³⁵. The primary focus of the arbitration is the arbitration agreement and the parties' freedom to choose who adjudicates over their dispute, which rules to follow and which laws to apply³⁶. The prime importance of the will of the parties is best portrayed by the Geneva Protocol of 1923 at Article 2 which states that, 'the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties.'³⁷ This principle of arbitration stemming from the parties agreement is firmly recognized even by anti- delocalization enthusiasts³⁸.

Advocates of the seat theory asserted that arbitration bore a jurisdictional character. In contrast others suggest arbitration to be of a purely contractual nature springing from party autonomy. It was later suggested that arbitration consisted of a hybrid form being subject to the local laws and to the party agreement³⁹. Lew, a profound advocate of autonomous arbitration felt that even the hybrid theory did not reflect the true nature of arbitration and did not take into consideration aspects such as the arbitrator. This gave rise to a fourth theory that views arbitration as autonomous and a stand-alone mechanism. Gaillard, in his comments supported Lew and stated that the supposed hybrid or concluded *sui generis* nature of arbitration promulgated had become meaningless and obsolete⁴⁰ and thus served little for international arbitration. Therefore, in his opinion the debate and issue of a transnational arbitral order went much further than this⁴¹.

The nature of international arbitration involves different jurisdictions in terms of parties' residence, the arbitrator and even a different place of the contract and its performance⁴². The increased entrenchment of national laws to the extent of prejudicing the parties' interests

³⁴ R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 (1) Arb. Intl.24

³⁵ A Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn OUP, Oxford 2004) 315.

'Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition...'

³⁶ W Park, *Arbitration in International Business Disputes* (2nd edn OUP, Oxford 2012) 60 and M Pryles available at http://www.arbitrationicca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf accessed 22 March 2013

³⁷ Geneva Protocol 1923 <http://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=543&lang=en> accessed 22 November 2012

³⁸ R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 (1) Arb. Intl. 21

³⁹ H Yu, 'A theoretical overview of the foundations of international commercial arbitration' (2008) 1(2) CONTEMP. ASIA ARB. J.277

⁴⁰ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 14

⁴¹ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 15

⁴² J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 (2) Arb. Intl. 179-204

formed a launching pad for the emergence of delocalization⁴³. Particularly, as it was argued that at the time of selecting the seat of arbitration the parties gave predominant consideration to convenience and not to the laws of the respective country⁴⁴.

A lesser evil than having a transnational arbitration is that of having an arbitration being subject only to the procedural laws of the enforcing state. Goode observes that in this manner inadvertently, advocates of delocalization accept that arbitration cannot be fully autonomous and therefore, eventually whether at the country of origin or the enforcement country the award would be subject to the courts of a State. However, he avoids the crux of the delocalization debate. What Paulsson and Lew want is not for arbitration to operate in total independence, but what they desire and advocate is a strictly limited interference of the national courts in the proceedings and to ease enforcement of the award to reduce or even remove the effect of prior annulment of the award.

However, Goode further argues that by the award only being subject to the laws of the enforcing State, the award would be the product of the parties' agreement and until the point that the award is ready for enforcement the arbitration process would operate in a legal void. This correlates back to the argument that the parties' mere agreement does not have legal force until accepted as a binding contract under the particular national laws- being the laws of the place of arbitration.

Gaillard comments that the above approach is still not satisfactory to international arbitration and advocates for a transnational arbitration. That is arbitrators applying laws and principles common to the wider international arbitration community rather than simply restricting themselves to the laws of the seat. To this Goode would predictably argue that even if the parties were to opt for an alternate jurisdictions curial law to apply, such a law would apply to the extent allowed by the *lex loci arbitri* and would be subservient to any mandatory laws of the seat⁴⁵.

2.4.1 Delocalization of substantive law

The foregoing analysis has examined the delocalization of procedural law that an arbitration is subject to. A second aspect that supporters of delocalization are stretching to is the possibility of applying a concoction of general principles of trade- 'a *lex mercatoria*' (customary commercial law), or general principles of public international law to arbitration instead of the substantive law of the seat of arbitration. Commentators have gone thus far to argue that during the origins of arbitration, decisions were based on the law of the merchants being general principles of business therefore, the same could in all possibility be applied today. Along the same lines, it could also be possible for parties to designate the applicable law in a contract as the Vienna Convention on Contracts for the International Sale of Goods 1980⁴⁶ and thus in this manner opt out of the application of the substantive laws.

⁴³ D Jancijevic, 'Delocalization in International Commercial Arbitration' (2005) Law and Politics 65

⁴⁴ J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 (2) Arb. Intl. 192

⁴⁵ R Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 1 Arb. Intl.,29

⁴⁶ R Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 1 Arb. Intl.,24

2.5 Towards a Transnational Arbitral Order

Steyn J in the English case of *Paul Smith Ltd v H&S International Holdings Inc*⁴⁷ observed the national laws of the seat to be external laws that the parties are subject to outside the purview of the arbitration agreement. The limit of such control is to the extent of the mandatory provisions⁴⁸. The non- mandatory provisions are therefore, free to be agreed to between the parties. The significance of the *lex loci arbitri* rests in the extent of its interventionist function such as the imposition of interim measures, examining the validity of arbitration agreements, arbitrability of subject matters, and composition and constitution of the arbitral tribunal (often agreed to by the parties in the agreement or through institutional rules), equality between the parties, the tribunal's powers that may be exercised and the legality of the arbitration award⁴⁹. Notably, these laws outline the national court's supervisory powers in ensuring that the arbitration is smooth⁵⁰. Therefore, wherever the arbitration agreement provides a procedural glitch, the national laws of the seat apply.

The issue arises when national laws of certain States are so intrusive in nature that their existence only serves to crucify party autonomy for example imposing restrictive conditions on the considerations to be placed in selecting an arbitrator⁵¹. In contrast, however, States that are more favourable and open to arbitration as a method of dispute resolution, place greater importance on party autonomy and therefore, have a less interventionist approach⁵² and thus involvement of national courts of such States is restricted. Such courts also have clear interim powers and injunctive relief that can aid the overall arbitration process particularly when dealing with an obstinate party⁵³.

The argument posed by delocalization theorists is that it is not necessary for solely national laws to apply. If a party to the arbitration raises an issue on the application of the law, the arbitrator does have the discretion to apply an alternative more suitable law to the particular situation. This was particularly the view of one interviewee Emmanuel Gaillard⁵⁴ who provided the following example:

'It is relevant only in case of conflict between a local rule and a generally accepted principle. For instance, the seat would say that there is no valid arbitration agreement because it is a national company and if this is against the transnational norm then it may or may not be followed by the arbitrator.'

Moreover, he further opined that, 'in a similar way you can say that well you know how are you going to examine the witness, do you apply the laws of the seat or the transnational norms. In most cases arbitrators would go with the latter. But it does not mean that they have to disregard the laws of the seat. It simply means that the arbitrators have an option and their option is broader than just the law of the seat. The question is what is their model? Is the

⁴⁷ [1991] 2 Lloyd's Rep. 127 QBD (Comm)

⁴⁸ Available at <http://www.dundee.ac.uk/cepmlp/gateway/?news=31246> accessed 14 October 2012

⁴⁹ Blackaby, N., et al Redfern and Hunter on International Arbitration (5th ed) (New York ,USA: Oxford University Press, 2009) p.175

⁵⁰M Ahmed, ' The influence of delocalization and seat theories upon judicial attitudes towards international commercial arbitration' 77 (4) Arbitration 406-422

⁵¹ Available at <http://arbitration.practicallaw.com/7-205-5092> accessed 24 January 2013

⁵² W Park, 'Procedural Evolution in Business Arbitration' (2006) Arbitration of International Business Disputes 66

⁵³ Available at <http://arbitration.practicallaw.com/7-205-5092> accessed 24 January 2013

⁵⁴ Appendix 1: Sr No.4

model the local judge or is the model an international type of justice. To me that is also the answer to the question. More and more often whether they accept it or not or express it or not, arbitrators tend to think they are international judges and at least behave like international judges.'

The foregoing view is further supported by Lew⁵⁵ who observes a shift to a *sui juris* autonomous arbitration that operates on well-developed international commercial arbitration practices and is governed by non-national rules. The reasons for such a shift can be attributed to the increased homogenization of international commercial arbitration⁵⁶ assisted by institutional rules such as the LCIA and the ICC. Furthermore, tribunals fix the procedure for the case⁵⁷ and can grant interim measures⁵⁸. As most situations are in this manner covered the importance of the arbitral situs diminishes but is not eliminated and the institutional rules and tribunal procedures do not replace the national laws.

Over the years arbitration has developed in a more autonomous fashion gradually distancing itself from the involvement of the national courts particularly at the procedural level. It seems that Jan Paulsson's prediction⁵⁹ of the *lex arbitri* playing a mere administrative role seems to be descending with the passage of time. Nevertheless, the importance of the national courts remains significant especially in the less developed nations where the arbitration law often forms part of the civil procedure code.

2.6 Anti- Suit Injunctions

The use of anti- suit injunctions are the primary example given by delocalized theorists in support of their ideas and to showcase the archaic nature of courts. Traditionally, anti-suit injunctions were a common law tool implemented by judges who believed that they had jurisdiction over a matter or aimed to protect another State's jurisdiction or arbitral tribunal by forestalling parties from pursuing proceedings abroad⁶⁰. These injunctions are presently used today to disrupt arbitration whether in the common law courts of India and Pakistan or the civil law courts of Brazil, Venezuela or Indonesia⁶¹.

Notably, the use of anti-suit injunctions is particularly common in inter-State disputes⁶². A State involved in a dispute often breaches the arbitration agreement by reverting to its courts to prevent the other party from initiating or pursuing arbitration. Such injunctions have also been used to oppose enforcement of awards⁶³.

Issues arise when courts exercise anti-suit injunctions determining themselves to be more apt to examine the validity of the arbitration agreement overriding *Kompetenz- Kompetenz* and

⁵⁵ J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 (2) Arb. Intl. 179-204

⁵⁶ Available at <http://arbitration.practicallaw.com/7-205-5092> accessed 24 January 2013

⁵⁷ These are commonly the IBA Rules of Taking Evidence

⁵⁸ LCIA Rules: Article 25 and ICC rules Article 28

⁵⁹ J Paulsson, 'Arbitration Unbound: Award detached from the law of its country of origin' (1981) 30 The International and Comparative Law Quarterly 366

⁶⁰ E Gaillard, 'Anti-suit Injunctions in International Arbitration' (2005) Institute of International Arbitration (IAI)

⁶¹ E Gaillard, 'Anti-suit Injunctions in International Arbitration' (2005) Institute of International Arbitration (IAI)

⁶² L Barrington, 'Arbitral and Judicial Decision: Hubco v WAPDA: Pakistan Top Court Rejects Modern Arbitration' (2000) 11 Am. Rev. Int'l Arb 385 COPEL and National Grid cases

⁶³ *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT,PLN (Persero)*, Award of December 18, 2000, International Arbitration Report, March 2001, p C-2

doctrines of separability. It seems incredulous for a State to impose its understanding of what constitutes a valid arbitration agreement by virtue of it being the seat when arbitrators are empowered to make such decisions.

Gaillard takes the example of the participation of a State owned entity⁶⁴. He further analyses that an arbitrator in such instance would likely determine the fate of such an entity in a manner similar to the national courts and would apply the national law on the issue. Regardless of the negative attitude of the State owned entity the arbitrator would not be able to opine on such matter due to the choice of law issue. It would be a significant task for the arbitrator 'who has determined the law of a given State to be applicable to entirely ignore, at the same time, a decision issued by the courts of that State on the same subject and based on the same facts.' Thus an anti suit injunction would produce the maximum effect⁶⁵. If comparative State laws were applied the result would be opposite. It is a widely recognized principle in arbitral jurisprudence that a State owned entity that has accepted arbitration cannot hide behind its own domestic law to evade arbitration.

2.7 The indispensability of the national courts astride the unruly horse of public policy⁶⁶

Although the applicability and suitability of the seat has procedurally diminished, the same does not necessarily hold true on recognition of awards. The courts have the discretion to refuse recognition and enforcement of an award for reason of it being contrary to international public policy⁶⁷. There is no universal definition of public policy. Lew in 1978 commented, 'the uncertainty and ambiguity as to its actual content is one of the essential characteristics of public policy⁶⁸'. International public policy is even more difficult to explain, 'as it is confined to violation of really fundamental conceptions of legal order in the country concerned⁶⁹.'

The Convention refrained from identifying grounds for annulment of awards and in this manner left this window open to national courts to fit into it whatever public policy arguments they desired. Perhaps a transnational public policy consisting of common items infringing morality of states would best serve the interests of international commercial arbitration. Moreover, it is worth examining if parties can amongst themselves set out items in an arbitration that they deem to be against public policy of the place of arbitration. Although, they have this freedom, parties cannot dictate fairness or evade principles of justice found in national and international laws⁷⁰ and therefore, public policy restrains party autonomy. This unruly horse 'public policy⁷¹' continues to predominantly dictate international commercial arbitration both at the challenge and enforcement stage; that is, if an award conflicts public policy principles of the lex fori it can potentially be set aside⁷².

⁶⁴ E Gaillard, 'Anti-suit Injunctions in International Arbitration' (2005) Institute of International Arbitration (IAI)

⁶⁵ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 77

⁶⁶ Public policy was described by a judge two centuries ago as an 'unruly horse' and warned 'once you get astride it you never know where it will carry you' Richardson v. Mellish, 2 Bing. 229, 252 (1824)

⁶⁷ Convention: Article V (2) (b)

⁶⁸ M Hunter and others, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4 (3) J.W.I 3

⁶⁹ M Hunter and others, 'Transnational Public Policy and its Application in Investment Arbitrations' (2003) 4 (3) J.W.I 3

⁷⁰ B Bastida, 'The independence and impartiality of arbitrators in international commercial arbitration' 6 (1) Mercatoria 2007

⁷¹ Available at http://www.rodyk.com/usermedia/documents/RodykReporter_Jun12.pdf accessed on 28 March 2013

⁷² G Moss, 'International Commercial Arbitration, Party Autonomy and Mandatory Rules' (Oslo, Norway: TanoAschehoug) 1999,

Considering that the most obscure elements can sometimes be found to flounder under the umbrella of public policy, the UNCITRAL Model Law ('Model Law') that was formed with the idea of providing countries with a framework of essential elements to consider for international commercial arbitration goes to the extent of attempting to limit court intervention. In this manner it places party autonomy on a higher pedestal than the seat theory⁷³.

It is common knowledge that a losing party in arbitration immediately seeks the invalidation of the award by claiming a public policy issue under Article V (2) of the Convention. This renowned public policy exception is derived from the common law maxim, "*ex turpi causa non oritur actio*" an action does not arise from a disgraceful cause⁷⁴. However, the issue with the public policy notion is that '*once you get astride it you never know where it will carry you*⁷⁵'. Cases worldwide have seen the losing party oppose an award on grounds of public policy⁷⁶.

Public policy concerns serve to exclude foreign law or overriding mandatory rules whether those of the seat of arbitration or that of another jurisdiction enabling the national courts to carry out such functions. For arbitrators the position is quite different. In the presence of the parties explicit choice of rule of law to what extent if any can the arbitrator, 'nothing more than a private judge⁷⁷' deviate from the law chosen by the parties; where would such rules be found that would prevail over the curial laws applicable; in what cases can the arbitrator, if at all, enforce laws and rules of another State when based on the traditional choice of laws another States laws would have been applicable.

Taking the traditional jurisdictional or monolocal approach⁷⁸, the arbitrator would strictly apply the laws of the seat in the same manner as local judges. Moreover, in the event that the laws of the seat conflict with mandatory rules of another State by virtue of the latter being foreign to the State it would not be applied to the arbitration. In contrast if a multi- local approach is taken where an arbitration is subject to different States that are entitled to put forth their views on the arbitral process whether on the process or the merits of dispute, then this would mean that the State or States of enforcement would have an equal standing with that of the seat of arbitration. At the point of enforcement of the award each State would ensure that the award does not violate its overriding mandatory rules. Problems however, would arise when the arbitrator is confronted with conflicting rules presented by the parties from different States. A number of scholars have emphasized on the importance of the award being in line with the mandatory laws of the States of enforcement and that of the seat so as to prevent the award from being set aside in the latter⁷⁹. Imperative rules ought also to be complied with to prevent

⁷³ R David, 'Harmonization and Delocalization of ICA' (2011) 28 (5) Journal of International Arbitration 445- 466

⁷⁴ Richardson v. Mellish, 2 Bing. 229, 252 (1824)

⁷⁵ Richardson v. Mellish, 2 Bing. 229, 252 (1824)

⁷⁶ Dubai Court of First Instance (see Case No. 489/2012, ruling of the Dubai Court of First Instance of 18 December 2012) Australian case of Uganda Telecom Ltd v Hi –Tech Telecom Pty Ltd [2011] FCA 131; Shandong Hongri Acron Chemical JSC Ltd v PetroChina International (HK) Corp Ltd [2011] 2 HKLRD 124, Hong Long;

⁷⁷ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 30

⁷⁸ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 24

⁷⁹ A. Court de Fontmichel, 'L'arbitre, le juge et les pratiques illicites du commerce international' 'Arbitrators must comply with the mandatory rules (lois de police) of the State of the seat as well as the mandatory rules (lois de police) of the State of enforcement that claim to apply to the situation. Otherwise, their award could be set aside and/ or become unenforceable.'

arguments from being raised on their non-compliance being against the international public policy of the State of enforcement and of the seat⁸⁰.

Transnational arbitration as perceived by Gaillard⁸¹ determines to what extent the adaptation of international public policy limits party autonomy. The idea promulgated is that just as the national courts can disregard the law chosen by the parties in view of international public policy so to can arbitrators. Thus arbitrators have the discretion to give weight to values of the international community. Other scholars such as Federic Eisemann⁸² Lambert Matray, Pierre Lalive, Philippe Khan, Eric Loquin, and recently Lotfi Chedley and Jean Baptiste Racine extend their support for this view. The Institute of International Law adopted a Resolution in the same vein stating that:

'In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community⁸³.'

The argument of public policy has been successful in setting aside awards. Chapter IV will examine how States have proceeded to either enforce dead awards or confirm their bereavement.

2.8 Conclusion

International arbitration is a unique form of dispute resolution. What the traditionalists have failed to recognize is that delocalizationists do not condemn and set aside the national laws of the seat in totality. Instead what they advocate is a wider discretion to exist within the arbitrators powers of applying international values and norms acceptable in the community of international arbitration and not necessarily tied to the seat to be applied to a particular arbitration. In such manner the arbitration is thus detached from the seat and could perhaps be said to be attached to the international community of norms and principles thus in this manner floating in a transnational firmament. Alternatively, delocalized arbitration can be achieved through political support such as ICSID.

Arbitration under ICSID is not attached to national arbitration laws of a particular State and is wholly subject to the ICSID convention. The acute difference between ICSID arbitrations and arbitrations outside this convention is the scrutiny and enforcement of such an award as all such are partaken on the convention provisions. There is no scope for ICSID awards to be challenged before a national court and instead an internal delocalized procedure for recognition and enforcement exists⁸⁴. The duress on parties to comply with an ICSID award is the damaging publicity and threat of reduced World Bank funding that they would face for non-compliance.

⁸⁰ 'This is because both the State of the seat and the State of the place of enforcement may well consider an award that does not comply with this imperative rule contrary to their international public policy, even if it is not formally part of their legal order.'

⁸¹ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 44

⁸² F Eisemann, 'La lex fori de l'arbitrage commercial international' travaux du comite francais de droit international prive' (1977) Paris Dalloz

⁸³ Available at http://www.idi-iil.org/idiE/resolutionsE/1989_comp_01_en.PDF accessed 10 February 2013

⁸⁴ J Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law Arbitration, 2003)

What the ICSID example demonstrates is that delocalization can be achieved with significant political backing and by the creation of a 'supra-national infrastructure' to sustain the process⁸⁵. Gaillard and Fouchard would possibly argue that delocalized arbitration can be achieved irrespective of such political support.

CHAPTER III: KEY INTERNATIONAL INSTRUMENTS AND DELOCALIZATION

3.1 The Delocalization uprising - the Convention perspective

Post World War II, empires over Europe decolonized, and as countries moved to recovery, increasing investment was made in commerce and business. Examining the birth of delocalized arbitration under the umbrella of the Convention against the back drop of the 1950's era reveals that around 1958 numerous key developments occurred in the wider commercial spectrum which necessitated ease in dispute resolution. It was during this time that cross country fund transferability was made easier, trade treaties were signed⁸⁶ and the European Union formed⁸⁷.

With commerce naturally come disputes, and thus it is with little wonder that the Convention and its radical thinking of cross border enforcement of awards came to the fore in 1958⁸⁸. With this, not only could enforcement of awards amongst signatories to the Convention be easily undertaken, but also greater recognition was afforded to party autonomy. Thus, the Convention, in its wording, potentially conceived the possibility of delocalized arbitration.

3.2 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

The coming into effect of the Convention was the start of the true internationalization of arbitration⁸⁹. It essentially altered the shoreline of recognition and enforcement of awards⁹⁰. The main motive of the Convention was to eradicate the double exequatur of awards that had prevailed under the Geneva Conventions⁹¹ and thus placed judicial control in the country of enforcement. Under the Geneva Convention, parties seeking enforcement of an award had to present a court statement from the seat reflecting the award as enforceable in the particular country prior to proceeding with enforcement⁹². Furthermore, the Convention as highlighted by Professor Pieter Sanders one of the drafters of the Convention aimed, '.....to restrict the grounds for refusal of recognition and enforcement as much as possible and to switch the burden of proof of the existence of one or more of these grounds to the party

⁸⁵ Available at <http://arbitration.practicallaw.com/7-205-5092> accessed 24 January 2013

⁸⁶ General Agreements and Tariffs and Trade 1947

⁸⁷ Formation of the European Union in 1957

⁸⁸ Convention : Art. VII (2)

⁸⁹ J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 (2) Arb. Intl. 200

⁹⁰ Available at http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf accessed 22 March 2013

⁹¹ Available at http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf accessed 22 March 2013

⁹² Available at

http://www.arbitrationicca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf accessed 25 February 2013

against whom the enforcement was sought. This again stands to reason⁹³. Indeed the Convention was a 'very bold innovation'⁹⁴

Pursuant to the Convention, the party seeking to enforce the award only requires the award⁹⁵ and the arbitration agreement⁹⁶. The onus is then on the opposing party to prove that a reason under Article V exists rendering the award unenforceable. Subsequent to the Convention the European Convention of 1961 was enacted. This instrument addressed areas that had not previously been covered by the Convention⁹⁷. Moreover, the European Convention at Article IX⁹⁸ particularly restricted the reasons for which an award could be successfully challenged at the seat. In the aftermath of the Convention there was a fear in the international community that pursuant to Article V (1) (e) of the Convention, awards would be regularly challenged and set aside by the national courts at the seat on their application of public policy which may be accepted as international public policy⁹⁹.

For the purposes of this dissertation, a closer consideration to the wording of the Convention needs to be examined. Article V (1) demonstrates that the courts of enforcement have a discretionary power and it is at their determination to accept or reject the grounds brought forth by the opposing party¹⁰⁰. The controversial Article V (1) (e) of the Convention allows awards to not be enforced or recognized if the award has been set aside at the seat. It has been argued that this is by no means a prerequisite to enforcement of an award and States are not mandated to refuse enforcement of an award if it has been discarded in the country of origin¹⁰¹. During interviews conducted with practitioners¹⁰² it was found that such understanding of this Article was consistent despite most of them being against the notion of delocalization¹⁰³. Nevertheless, opponents of the delocalization theory have interpreted the use of the word may in Article V (1) to mean that the enforcement country 'may not enforce' or 'refuse to enforce' annulled awards but nevertheless overall give credence to the decision of the place of arbitration¹⁰⁴.

Furthermore, if enforcement proceedings in a different State commence prior to such challenge being brought forth, due to the enforcement proceedings having been commenced the challenge could be rendered valid. Another school of thought advocated by Philip

⁹³ Available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf accessed 31 January 2013

⁹⁴ Professor Matteucci, Italian delegate to the Conference Available at http://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf accessed 25 February 2013

⁹⁵ Convention: Article IV (1) (a)

⁹⁶ Convention: Article IV (1) (b)

⁹⁷ P Fouchard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 998

⁹⁸ European Convention 1961 Article IX Available at <http://www.jus.uio.no/im/europe.international.commercial.arbitration.convention.geneva.1961/portrait.pdf> accessed 20 March 2013

⁹⁹ P Fouchard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 999

¹⁰⁰ G Hartwell, 'Arbitration and Sovereign power' (2000) 17 (2) *Journal of International Arbitration* 15

¹⁰¹ P Read, 'Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 *Am. Rev. Int'l Arb.* 177, 190.

¹⁰² Appendix 1

¹⁰³ Appendix 1

¹⁰⁴ J Li, 'The application of the delocalization theory in current international commercial arbitration' (2011) 22 (12) *ICCLR* 385

Pinsole¹⁰⁵ further adds that if an action to set aside the award commenced in the country of origin it is not mandatory to pause enforcement proceedings.

A juxtaposed reading of Article V and VII of the Convention reveals that if a party succeeds in setting aside the award the other party has the option to seek enforcement in a different country which is usually the country that the losing party has its assets in; provided of course that such country is a party to the Convention¹⁰⁶. Article VII has been analysed by scholars¹⁰⁷ to contain a sort of reservation right for parties who wish to enforce an annulled award in another State¹⁰⁸. This Article clearly states that the Convention is not intended to affect other multilateral or bilateral agreements on recognition and enforcement of arbitral awards¹⁰⁹. In the author's view the interpretation of this Article is clear- enforcement of annulled arbitral awards can potentially be sought in another State.

Prominent scholars such as Goode¹¹⁰ also admit to an existing scope in Article VII for the *lex loci arbitri* to be circumvented but on the same note maintain that the Convention does not permit issuance of stateless awards and emphasizes the Convention does give potency to the *lex loci arbitri*¹¹¹. Articles of the Convention that are deemed by seat theorists to give prominence to *lex arbitri* are Article II(1) which states 'differences . . . in respect of a defined legal relationship . . . concerning a subject matter capable of settlement by arbitration', which is deemed an implicit reference to the *lex arbitri*. Moreover, Article II (3) requires a court to refer a dispute to arbitration under the arbitration agreement 'unless it finds that the said agreement is null and void, inoperative or incapable of being performed' which again infers matters to be determined under the *lex arbitri*. On a similar note, Article V (1) (a) Article V(1)(d), Article V (1) (e) and Article VI all give some sort of power to the courts of the place of the arbitration.

Article V (1) (d) is further viewed to contain a speck of delocalization. It provides that enforcement could be refused if the tribunal was constituted in a manner contrary to the parties agreement and failing this that it was not composed as per the law of the seat. In harmony with the features and rationale for the development of the Convention importance is placed primarily on party autonomy with national laws operating as a fallback position.

Another predominant idea arising from the Convention is the suggestion that the award should possess a nationality which is that of its seat. This idea of an international arbitration award bearing a nationality is not a notion that was appreciated by Emmanuel Gaillard¹¹²

¹⁰⁵ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) *Arb. Intl.* 290

¹⁰⁶ R Brazil- David, 'Harmonization and Delocalization of ICA' (2011) 28 (5) *Journal of International Arbitration* 456

¹⁰⁷ J Li, 'The application of the delocalization theory in current international commercial arbitration' (2011) 22 (12) *ICCLR* 384

¹⁰⁸ New York Convention Article VII, 'The provision of present Convention shall not.....deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

¹⁰⁹ P Fouchard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999)997

¹¹⁰ R Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 1 *Arb. Intl.*,27

¹¹¹ A Berg, *The New York Convention of 1958* (Deventer, Kluwer Law and Taxation Publishers 1981)37. The Convention applies to the enforcement of an award made in another State. Those who advocate the concept of the 'a-national' award, on the other hand, deny that such award is made in a particular country ('sentence flottante', 'sentence apatriée'). How could such award then fit into the Convention's scope?

¹¹² International commercial arbitrator and Partner at Shearman and Sterling LLP- Paris offices: Interview conducted on 22 March 2013 vide telephone

prominent practitioner and author on the subject¹¹³. Support for this can be found in Article I (1) which states, 'This Convention shall apply.....arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'. Thus on this reading in contrast to the first part of this Article it is clear that the award is not required to derive nationality from recognition at the country of origin when the enforcement country classifies it as international¹¹⁴. This idea of an award bearing a nationality is particularly frowned on with respect to investment disputes not falling under the International Centre for Settlement of Investment Disputes Convention (hereinafter 'ICSID Convention') .It is argued that arbitration awards arising from investment disputes subject of bilateral or multilateral treaties ought to be treated as international judicial decisions just like an ICSID award since they are based on treaties and the parties to the dispute are foreign investors and host states ¹¹⁵.

Jie Li further suggests that had the Convention set out a uniform annulment standard for the countries of the seat of arbitration and the enforcement, there would not be two places overseeing the arbitration process (double *exequatur*)¹¹⁶. This point correlates to Phillipe Pinsolle who suggests that awards from international commercial arbitrations are akin to international judicial decisions that stand detached from the local national laws ¹¹⁷ . Enforcement of the award could then centrally be controlled by the enforcement courts increasing efficiency as the assets of the losing party are usually in the residence country of the losing party.

Examining case law under the Convention France has notably keenly explored the delocalization theory. The French Cour de cassation, in *Ticaret Sirketi v. Norsolor*¹¹⁸ based the enforcement of an award in France which had been set aside in Austria on Article VII. Henceforth, France continually expanded on such precedence of enforcing annulled awards. Discussion on its approach will be further undertaken in Chapter IV of this dissertation. The US Courts took a similar approach in the case *Chromalloy Aeroservices v. Arab Republic of Egypt*¹¹⁹ where the Egyptian courts on an appeal by the defendants nullified the arbitration award, despite the contract clearly stating an arbitration award to be final. The US courts based their reasoning on Article V (1) (e) and VII and stated that the Convention justified the enforcement of such an award despite it being set aside in the country of origin¹²⁰.

Supporters of the Chromalloy decision highlighted that such enforcement is in accordance with the Convention which in fact allows enforcement of awards despite their nullification¹²¹. Opponents viewed such an approach as heightening uncertainty, making arbitration

¹¹³ During interview with Emmanuel Gaillard, he refrained from attaching an award to a nationality for reason that the by-product of an international arbitration is an arbitral legal order that is transnational in nature.

¹¹⁴ J Li, 'The application of the delocalization theory in current international commercial arbitration' (2011) 22 (12) ICCLR 383

¹¹⁵ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl. 285, 290

¹¹⁶ J Li, 'The application of the delocalization theory in current international commercial arbitration' (2011) 22 (12) ICCLR 384

¹¹⁷ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl. 291

¹¹⁸ Cass. 1e civ., October 9, 1984, 1985 Rev. Arb 431

¹¹⁹ 939 F. Supp. 907 (D.D.C. 1996)

¹²⁰ R David, 'Harmonization and Delocalization of ICA' (2011) 28 (5) Journal of International Arbitration 455

¹²¹ P Lastenouse, 'In harmonization and delocalization, Why Setting Aside an Award is not Enough to Remove it from the International Scene?' (1999) 16 (2) Journal of International Arbitration 25, 26

unpredictable and leaving the courts of the seat with little judicial control for the parties to rely on¹²². Two decisions post this case, *Baker Marine (Nig.) Ltd. v. Chevron Ltd*¹²³, and in *Spier v. Calzaturificio Tecnica S.p.A.*¹²⁴, disallowed enforcement of the awards nullified in Nigeria and Italy respectively, on the grounds that the parties had not agreed to US law to govern the arbitration; distinguishing the Chromalloy case. The US courts unlike the French courts took Chromalloy as the exception rather than the rule to enforcement of annulled awards¹²⁵.

In contrast to the aforementioned, England adopted a more restrictive approach placing greater emphasis on the seat of arbitration and expressed clear reluctance in enforcing annulled awards. This will be further examined in Chapter IV of this dissertation.

Nevertheless, and notwithstanding the different approaches adopted by the different countries, scholars have suggested that, 'a core objective of the New York Convention to free the international arbitration process from the domination of the law of the place of arbitration¹²⁶.' This in itself clearly encapsulates the intended conception of delocalized arbitration.

In contrast scholars such as Mangan (2008) state that the Convention does little to recognize and appreciate its globalization attempts further arguing that it might be time for the Convention to be repealed¹²⁷. Such criticism of the Convention is deeply rooted in the fact that interpretation of the articles of the Convention is greatly left to the courts of the signatory State. As is often the case, with social and political influences, two courts from different States may not interpret a particular provision the same way¹²⁸. This undoubtedly defeats some of the initial advantages of arbitration, such as it being quicker than courts¹²⁹ and proceedings being confidential. The Convention has created a state of disparity leaving arbitration awards, to neither, 'sit on the global plane, nor float in the "transnational firmament'¹³⁰. However, the author agrees with the practitioners interviewed for this dissertation who opined that the wording of the Convention was clear, not warranting the need for further clarification. Nevertheless, Bjorn Gehle¹³¹ commented that even if the Convention was in any manner amended or supplemented considering the day and age it would be a magnanimous task to convince member States to accept such amendments.

3.3 The UNCITRAL Model Law

¹²² P Wahl, 'In Harmonization and delocalization, Enforcement of Foreign Arbitral Awards Set Aside in their Country of Origin: The Chromalloy Case Revisited' (1999) 16 (4) Journal of International Arbitration 131, 140

¹²³ 191 F.2d 194 (2d Cir. 1999)

¹²⁴ 71 F. Supp. 2d 279 (S.D.N.Y. 1999)

¹²⁵ P Lastenouse, 'Why Setting Aside An Arbitral Award Is Not Enough to Remove It From The International Scene' (1999) 16(2) Journal of International Arbitration 25, 34.

¹²⁶ J Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)' (1998) 18 (1) Bull 9

¹²⁷ M Mangan, 'With the Globalization of arbitral disputes, is it time for a new Convention?' (2008) 11 (4) Int. A.L. R 136

¹²⁸ M Mangan, 'With the Globalization of arbitral disputes, is it time for a new Convention?' (2008) 11 (4) Int. A.L. R 138

¹²⁹ As enforcement of the award has to be sought by the courts

¹³⁰ Lord Mustill once wrote that the New York Convention could perhaps 'lay claim to be the most effective instance of international legislation in the entire history of commercial law'. L Mustill, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 49.

¹³¹ Partner at Pinsent Masons: Interviewed on 05 March 2013 at Burj Khalifa

Although different countries proceeded to accept or reject the delocalized approach in their own manner, one development does give cause to consider that there was an increasing concern regarding the suitability of national laws being applied to international arbitrations. In 1985, the UNCITRAL created the UNCITRAL Model Law, later amended in 2006 to keep in track with international trade and technology developments¹³². The UNCITRAL Model Law unsurprisingly is a composition of the UNCITRAL Arbitration Rules and the Convention.

The main aim of the UNCITRAL Model law was to create harmony by providing a prototype law for States to adopt into their domestic legislation and therefore reduce the national law peculiarities that sometimes surface to disturb international commercial arbitration¹³³. The UNCITRAL Model law remarkably limits court intervention¹³⁴ and heightens party autonomy¹³⁵. By the adaptation of the UNCITRAL Model law by States, a harmony was achieved¹³⁶. Nevertheless, for reason of countries adopting the UNCITRAL Model law having the option to alter it the degree of harmonization has been hindered.

The Convention and the UNCITRAL Model Law perceive a reduced power of the courts at the arbitral situs and overall portray a pro-arbitration attitude.¹³⁷ The next chapter examines the manner in which different countries applied the Convention when it came to enforcing annulled awards. It is noted that extreme delocalization is albeit a dream, but States have bit into morsel by morsel possibly heading into a future where stateless awards could be enforced.

3.4 Conclusion

The Convention successfully removed the double *exequatur* of awards but opened the possibility of delocalized arbitration. The importance of the nationality of an award for enforcement is debatable, but one aspect is clear the seat has the power to annul an award for reason of contravening public policy. However, it is also clear from Article VII that an award annulled for any reason by the seat even if it was annulled for reason of being against the public policy of the seat may be enforced at the enforcing State. The importance of the seat is then questionable.

¹³² R David, 'Harmonization and Delocalization of ICA' (2011) 28 (5) *Journal of International Arbitration* 454

¹³³ S Perloff, 'The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration' (1992) 13 *U. Pa. J. Int'l Bus. L.* 323, 337; M Hoellering, 'The UNCITRAL Model Law on International Commercial Arbitration' (1986) 20 *Int'l L.* 327; S Jarvin, 'Choosing the Place of Arbitration: Where Do We Stand?' (1988) 16 *Int'l Bus. L.* 417

¹³⁴ Arts. 8 and 9 deal with the relationship between the arbitration agreement and the national courts and, similarly to art. II(3) of the Convention, the UNCITRAL Model Law places any court under an obligation to refer the parties to arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed.

¹³⁵ UNCITRAL Model Law, art. 19(1).

¹³⁶ J Li, 'The application of the delocalization theory in current international commercial arbitration' (2011) 22 (12) *ICCLR* 387

¹³⁷ This term has the same meaning of a delocalized arbitration but is the more apt terminology preferred to be used by scholars such as Emmanuel Gaillard in his book *Legal Theory of International Arbitration* and interview.

CHAPTER IV: CROSS COUNTRY APPROACHES TO DELOCALIZED ARBITRATION THROUGH THE LENS OF ENFORCEMENT OF ARBITRAL AWARDS

4.1 Civil and Common Law Systems

Historical differences are just one area where these legal systems differ. In brief and by way of simplistic introduction for the basis of this dissertation, the common law legal system is an uncodified compilation of laws and is largely precedent based e.g England and USA. Due to this precedent system, judges play a significant role in shaping the law. In contrast, the civil legal system is codified and countries operating with such a legal system have codified laws that are continually updated. The judge does not, compared to its common law counterpart, play a role in shaping the law instead seeks to apply the codes to the particular facts of the case¹³⁸. In chapter II it was noted that critics of the delocalization theory often use threats to State sovereignty and purported depowering of the judges as an argument to suggest that delocalization is merely a myth and an unachievable dream. In this chapter, the effect of the type of legal system on delocalization and the approach of different jurisdictions to enforcement of awards annulled at the country of origin is examined

4.2 Common Law Jurisdiction- England and USA

4.2.1 England

Overall England is largely perceived as pro-arbitration¹³⁹. The Arbitration Act of 1996 (the "Act") governs arbitrations in England. Its introduction was aimed at repealing parts of the Arbitration Act of 1979 to enhance England as an arbitration friendly destination. The older Act had granted courts with a predominant interventionist role that had increased England's popularity as an arbitration adverse country.

Pursuant to the Act, the court nevertheless retained extensive supervisory powers¹⁴⁰ The Act contains a significant amount of mandatory provisions¹⁴¹ to be observed in arbitration proceedings. There are numerous opportunities within the Act for parties to challenge awards¹⁴². Moreover and despite the existence of an arbitration agreement showing the parties consensus to submit to the arbitration forum, the courts retain the discretion to rehear issues when being faced with a challenge¹⁴³ and in such manner therefore, have the discretion to review the decision of the arbitrators.

Such reluctant emancipation of arbitration from the clutches of the judiciary is reflective of England's conservative approach towards delocalization. Rationality for such behavior could be attributed to the fact that England is one of the founding nations to advocate a common law legal system wherein judges actively participate in the enactment and interpretation of legislation and further operate in the ambits of doctrines such as that of *stare decisis*.

¹³⁸ Available at http://www.consulegis.com/fileadmin/downloads/thomas_marx_08/DLengeling_paper.pdf accessed 10 January 2013

¹³⁹ Appendix1: Sr No. 3 and 4

¹⁴⁰ Arbitration Act 1996, ss. 45 and 69 which allow the courts to determine preliminary points of law when English law is applicable.

¹⁴¹ Arbitration Act 1996, Sch. 1.

¹⁴² Arbitration Act 1996, s. 68.

¹⁴³ *Gulf Azov v. Baltic Shipping* [1999] 1 Lloyd's Rep. 68

When questioned on the judiciary heavy powers that the Act imposes, Richard Harding¹⁴⁴ during his interview¹⁴⁵ commented that the powers enlisted in the Act enable judges to keep the arbitration on track. The perceived misuse of power bestowed upon the judges often arises due to inexperienced judges exercising their discretions which due to their limited experience has a counterproductive reaction.

Furthermore, consequent to sections 67-69 of the Act the courts can revise arbitration awards on challenges posed with respect to the tribunal's jurisdiction, the occurrence of an irregularity in the arbitration, and challenges raised on points of law. English courts can confirm, vary or set aside the award, and in some circumstances revert the award back to the Tribunal for re-examination. By awarding such wide powers to courts over arbitration awards it is evident that the Act aimed to achieve equilibrium with autonomous arbitration under the umbrella of the overriding power of the courts. The courts have not hesitated in exercising their powers under the Act and have taken the opportunity to review awards whenever the same arose. It is true that under the umbrella of a sophisticated judiciary arbitration can prosper which can be seen in the case of England. However, at the same time, the judiciary seems to have purposefully adopted a negative attitude to enforcement of annulled awards which although perhaps a more politically correct approach dewater international commercial arbitration and justice to the parties.

The stringent view of the judges on the importance of the lex fori has proceeded to the extent of judges believing that the mandatory provisions and public policy issues in English law ought not only to automatically apply by virtue of the arbitration taking place in England but to also override any express choice of law that the parties may have made¹⁴⁶. This view was initially adopted by Lord Broughman in *Don v Lippmann*¹⁴⁷. In this case, he stated that arbitral procedures cannot 'exist without an internal procedural law'¹⁴⁸. This orthodox approach was upheld in a number of subsequent cases such as *Whitworth Street Estates (Manchester) Ltd v James Miller*¹⁴⁹ and *International Tank and Pipe S.A. K. v Kuwait Aviation Fuelling Co. K. S.C*¹⁵⁰

In the case of *Minmetals Germany GmbH v Ferco Steel Ltd*¹⁵¹ arbitration was conducted pursuant to the China International Economic Trade Arbitration Commission of Beijing (CIETAC rules). There were two awards that resulted from the arbitration. In the initial award Mr. Justice Colman was convinced that the arbitrators in the issuance of the award had defied principles of fairness and reasonableness pursuant to Article 53 of the CIETAC Rules. The second award was issued after the arbitration resumed. An issue arose as to whether a party victim of a procedural injustice ought to revert the same to the seat of arbitration and would its failure to do so be deemed a waiver of such right¹⁵². Mr. Justice Colman, expressed,

¹⁴⁴ Appendix 1: Sr. No 3

¹⁴⁵ Appendix 1: Sr. No 3

¹⁴⁶ H Yun, 'Defective awards must be challenged in the courts of the seat of arbitration- a step further than localization' (1999) 65 (3) Arbitration 196

¹⁴⁷ (1837) 5 Cl & F 1

¹⁴⁸ Mustill, 'Transnational Arbitration in English law' (1984) 37 (133) Curr. L. Pr. 142

¹⁴⁹ [1970] AC583 (HL)

¹⁵⁰ [1975] 1 QB 291

¹⁵¹ [1999] 1 All E.R. (Comm) 315 (QBD (Comm Ct))

¹⁵² H Yun, 'Defective awards must be challenged in the courts of the seat of arbitration- a step further than localization' (1999) 65 (3) Arbitration 198

‘By agreeing the place of foreign arbitration, a party not only agreed to submit all contractual disputes to arbitration but also agreed that the conduct of the arbitration should be subject to the supervisory jurisdiction of the courts of that place.’

In this case Mr. Justice Colman adjudged that the party affected by the procedural unfairness ought to challenge it in the Chinese courts (being the seat) and thus emphasized the supervisory role of the courts at the seat¹⁵³. In this case since Ferco Steel Ltd had failed to challenge the award in the Chinese courts it had waived its right to such challenge causing the award to be final and enforceable under Chinese law. Mr. Justice Colman conclusively stated in this case that the parties submitting to have their arbitration in a particular jurisdiction in doing so were bound by the procedural law of the place and the supervisory jurisdiction of its courts¹⁵⁴. This seems to be a conservative stance the result of which is a grave injustice. Mr. Justice Colman had the discretion to apply the English law to reach an alternative result but instead adopted a strict approach emphasizing the curial law.

In *Lesotho Highlands Development Authority v. Impreglio SpA*¹⁵⁵ the seat of the arbitration was London, and the applicable law was Lesotho law. In the arbitration award, the arbitrators awarded amounts in the European currency instead of Lesotho currency. On this basis the losing party challenged the award under section 68 of the Act asserting that by awarding in the European currency, the arbitrators had acted *ultra vires* and erred in law. This decision was upheld by the High Court and Court of Appeal and overturned by the House of Lords. It adjudged that the arbitrators had exercised their powers correctly. Alternatively even if they had erred in law, such was not a ground to review the award as this was within the arbitrator’s powers.

Had the House of Lords decided otherwise, this would have been a free hand to judges to intervene and would have severely prejudiced the arbitration process reducing the popularity of England as an arbitration destination¹⁵⁶. Lord Steyn in this case recalled the famous words of Lord Wilberforce which highlighted the willingness of certain English judges to depart from England’s traditional orthodox view on delocalized arbitration. He said,

‘I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and courts. I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law- yes its substantive law. I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts. Other countries adopt a different attitude

¹⁵³ H Yun, ‘Defective awards must be challenged in the courts of the seat of arbitration- a step further than localization’ (1999) 65 (3) Arbitration 199

¹⁵⁴ H Yun, ‘Defective awards must be challenged in the courts of the seat of arbitration- a step further than localization’ (1999) 65 (3) Arbitration 199

¹⁵⁵ [2005] UKHL 43

and so does the UNCITRAL model law. The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here....'

However, interestingly in the more recent case of *Yukos Capital SARL v OJSC Rosneft Oil Company*¹⁵⁷, the English Court of Appeal did not exercise the same sternness. Briefly in this case, Yukos obtained four ICC arbitration awards against Rosneft. Rosneft sought to annul the awards in the Russian courts and notwithstanding such actions, Yukos continued to seek enforcement of the same in Amsterdam. The Amsterdam courts opined the annulment of the awards by the Russian courts to be the product of a 'partial and dependant process' and therefore, enforced the awards despite their annulment¹⁵⁸. Consequently, Rosneft paid Yukos under the enforced awards. However, Rosneft failed to pay the post award accrued interest. Yukos in turn sought enforcement of the same through the Commercial Courts of England. The English courts faced two preliminary significant issues. First, the existence of issue estoppel preventing the courts from hearing the issue as it had previously been heard and decided on by the Amsterdam courts, and secondly that of the act of state doctrine¹⁵⁹.

The Court of Appeal ruled that since foreign court decisions are not considered as acts of state for purposes of the acts of state doctrine, English courts could examine the substantive element of foreign court judgments for purposes of enforcement or recognition of such decisions. Furthermore, the Court commented that as public policy differs from country to country the English courts can have their own view on public policy which may vary from that of a previous court and therefore the defendant would not be issue estopped¹⁶⁰. Therefore, Rosneft was not issue estopped for reason of public policy in Amsterdam being different to that of England..

This decision is significant in that it confirms the discretion available to English courts giving them the power to scrutinize decisions when the matter falls within their jurisdiction¹⁶¹. It also demonstrates the English courts ability to interpret matters in a manner that justifies their intervention in decisions by using the realm of England's public policy being subject to a prejudicial risk.

In *Occidental Exploration Production Co. v. Republic of Ecuador*¹⁶² the issue was whether an English court could decide on a challenge posed to the substantive jurisdiction of the tribunal pursuant to section 67 of the Act and whether the tribunal had exceeded its authority under section 68. The Court held that the tribunal had jurisdiction to decide on Ecuador's breach under the USA- Ecuador BIT. The court further rejected the issue under section 68 and decided that the tribunal had the authority to decide on international law breaches¹⁶³; thus

¹⁵⁷ Available at http://www.dlapiper.com/uk/publications/detail.aspx?pub=7367#_ftn1 accessed 25 March 2013

¹⁵⁸ A Berg, 'Enforcement of Arbitral Awards Annulled in Russia- case comment on Court of Appeal of Amsterdam April 28, 2009' (2010) 27 (2) *Journal of International Arbitration* 181

¹⁵⁹ M Alcalde, 'English courts entitled to adjudicate on enforcement of awards annulled at seat' (2012) *International Arbitration Newsletter*

¹⁶⁰ Issue estoppel means, 'that parties are unable to argue an issue in the courts of one country if this issue has already been decided in court proceedings in another country' M Alcalde, 'English courts entitled to adjudicate on enforcement of awards annulled at seat' (2012) *International Arbitration Newsletter*

¹⁶¹ M Alcalde, 'English courts entitled to adjudicate on enforcement of awards annulled at seat' (2012) *International Arbitration Newsletter*

¹⁶² [2005] EWCA Civ 1116.

¹⁶³ Appropriateness of the review by English courts under Sections 67 and 68 of the Arbitration Act 1996 remains

expanding arbitrability. A more thought-provoking issue in this case was the extent to which the award could be reviewed by the English courts. By selecting arbitration the parties' evidently wanted to preclude the matter from the courts. The only basis on which the English court could review the award in this case was by applying English law due to England being the seat. The Court of Appeal chose to ignore that the present case concerned an international award between non- English parties and that court supervision was uncalled for. Commentators have opined that in the absence of an express agreement the national court cannot simply assume at whim that the parties intended to be subject to English law. The approach adopted by the court in this case reverts back to England's 1970's attitude and continuance of a restraint towards delocalization.

From the foregoing it is evident that England has a silent push and pull approach towards delocalization. It is appreciated that the English judiciary comprises of state of the art minds well experienced in law and its application. This is what lends England favour as an international arbitration hotspot. On the other hand, the judges are reluctant to give in too much to this idea of a relaxed approach on arbitration as seen above. This could be due to insecurity as to their position and continued importance or even due to the firmly ingrained belief of the seat theory. Ideally and if seen in the right perspective the English approach does not contravene the Convention but what it does is perhaps hamper the purported free spirit that arbitration has. Dr G Welter in 1968 compared English and Swedish arbitration and stated,

'London is the locale of the greatest number of international arbitrations in the world, yet the vast majority of these are viewed by the arbitrators, counsel and the parties as wholly domestic in character in the sense that proceedings are indistinguishable from those which take place between two English parties.'¹⁶⁴

Gaillard¹⁶⁵ when addressed with the question of England's approach commented that England would someday have to accept this idea of a transnational arbitral legal order, US in his opinion may get there first but eventually England would arrive at such point.

4.2.2 USA

In comparison to its UK counterpart the USA started off with an optimistic attitude to arbitration that to a certain extent favored delocalization. As early as the 60's when arbitration was picking up after the introduction of the Convention, the US Supreme Court in the case of *Prima Paint*¹⁶⁶ reinstated the principle of Kompetenz- Kompetenz extending the ambit of arbitrability to include fraud. In contrast, the UAE which has only recently experienced a growth in arbitration, fraud is outside the arbitrators jurisdiction. In case of a claim of fraud being raised during the arbitration, proceedings would cease and the matter would be referred to court. The arbitration would resume after the resolution of the fraud¹⁶⁷.

Whilst on the one hand it is noted that the US expanded the question of arbitrability of disputes by upholding an arbitration agreement in a dispute involving allegations of fraud

¹⁶⁴ F Welter, 'Choice of law in International Arbitration Proceedings in Sweden' (1986) 2 Arbitration Int. 298

¹⁶⁵ Appendix 1: Sr No. 4

¹⁶⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (388 U.S. 395 (1967))

¹⁶⁷ Interview with Tom Wilson

and security claims¹⁶⁸, on the other hand when it came to enforcement of annulled awards it retracted its steps. Interestingly, the reasoning of the courts in the former case was that,

‘.....invalidation of the arbitration clause in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts¹⁶⁹.’

The last statement made by the judge is intriguing. There exists in his words an underlying perception of the reality that international transactions by their very nature require flexibility in their dispute resolution and thus cannot be compulsorily subjected to the laws of a single country in this case to the US.

Furthermore, on the foregoing lines, the US Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*¹⁷⁰ went further to extend arbitrability by allowing anti-trust violations to be an issue determinable by arbitrators. Progressively and rather over optimistically the Court stated that,

‘We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution¹⁷¹.’

Such progressive radical rationalization of the US courts in the field of arbitration quickly dissipated with regards to enforcement of annulled awards. The US began optimistically with *Chromalloy Aeroservices v. Arab Republic of Egypt*¹⁷² where the US District Court for Columbia granted the enforcement of an arbitral award in the USA when it had been set aside by the Egyptian courts. The courts reached this decision by focusing on the wording in the arbitration agreement which stated that the arbitrator’s decision could not ‘be made subject to any appeal or other recourse. It is noted that such wording is usually inserted in most arbitration agreements, and simply highlights the finality element of awards.

Interestingly, this did not remain the approach of the US courts¹⁷³. In contrast, France adopted this approach and the Paris Court of Appeal in *General National Maritime Transport Co. v. Gotaverken*¹⁷⁴ highlighted that in international arbitration proceedings, just as the parties have the freedom to choose the legal order that they wish to attach the arbitration to, likewise they have the choice to exclude the application of a national law.

¹⁶⁸ Case of Scherk 1974

¹⁶⁹ Case of Scherk 1974

¹⁷⁰ 473 U.S. 614 (1985)

¹⁷¹ R David, ‘Harmonization and Delocalization of ICA’ (2011) 28 (5) Journal of International Arbitration 457

¹⁷² 939 F.Supp. 907

¹⁷³ Baker Marine (Nig.) Ltd. v. Chevron Ltd. 191 F.2d 194 (2d Cir. 1999) and in Spier v. Calzaturificio Tecnica S.p.A. 71 F. Supp. 2d 279 (S.D.N.Y. 1999)

¹⁷⁴ Arendal A.B., 107 J.D.I. 660 (1980)

4.3 Civil Law Jurisdiction- France

Historically, France pioneered in adapting key concepts in arbitration such as being amongst the first states to adopt the doctrine of separability in 1963 compared to England which followed 25 years later¹⁷⁵. France was also one of the first States to become a signatory to the Convention in 1959¹⁷⁶. It is a country that seems to be setting the bar and tone for international commercial arbitration with its radical thinking and approach to arbitration¹⁷⁷. Even before the development of the NCCP¹⁷⁸ France had advertised its laissez faire approach in international commercial arbitration in three famous cases: the *SEEE arbitration*¹⁷⁹, *General National Maritime Transport Company v Gotaverken Arenal A. B*¹⁸⁰ and the *Norsolar Case*¹⁸¹.

The French New Code of Civil Procedure ('NCCP') adopted in 1981¹⁸² has played a fundamental role in arbitration proceedings in France. In the true sense of party autonomy, it provides parties with significant amount of freedom in deciding their arbitration procedure without requiring them to revert to national law procedure. In the event that the parties have not decided on the procedures the arbitrators have default powers under the NCCP to decide accordingly. The NCCP does not provide any grounds to appeal against an award but does permit for international awards made in France to be set aside if the award exceeds the arbitration agreement, or if there has been a procedural irregularity in contravention to public policy¹⁸³.

Despite France being a signatory to the Convention it applies the Convention differently when enforcing awards annulled in the country of origin by instead choosing to apply its domestic law in line with the Convention¹⁸⁴.

Article 1502 of the (NCCP), states that,

'the order enforcing a foreign award may be appealed only in the following cases:

- i) if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;

¹⁷⁵ England in 1992 with the case 15 Harbour Assurance Co. (UK) Ltd v. Kansa General International Insurance Co. Ltd [1992] 1 Lloyd's Rep. 1.

¹⁷⁶ Available at <http://www.newyorkconvention1958.org/> accessed 24 March 2013

¹⁷⁷ Prof Emmanuel Gaillard on the existence of a separate arbitral legal order- adopted reasoning by the French Court of Cassation in *Putrabali*

¹⁷⁸ French New Code of Civil Procedure 1981

¹⁷⁹ *Société Europeane d'Etudes et d'Enterprise (S.E.E.E.) v. Yugoslavia* (1959) J.D.I. 1074

¹⁸⁰ Decision of Feb. 21, 1980, Court of Appeal, Paris, 107 (1980) J.D.I. 660, [1980] Rev. Arb. 524, reprinted in 20 I.L.M. 883 (1981).

¹⁸¹ *AKSA v. Norsolor*, Judgment of 9 December 1980, Cour d'Appeal, Paris (1980) published in [1981] Rev. Arb. 306. An English translation is published in (1981) 20 I.L.M. 883, at p. 888. Report of the Supreme Court of Vienna, Nov. 18, 1982 was reprinted in [1984] IX Y.B.C.A. 159.

¹⁸² The Decree of 12 May 1981 was incorporated into the New Code of Civil Procedure 1981 with the idea of making France the most attractive venues for international commercial arbitration- C Carbonneau, 'The elaboration of a French court of International Commercial Arbitration: A study in liberal judicial creativity' (1981) 55 (1) Tul. Rev. 15,16

¹⁸³ NCCP Articles 1502 and 1504.

¹⁸⁴ Article VII of the Convention states, 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

- ii) if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
- iii) if the arbitrator has not rendered his decision in accordance with the mission conferred upon him;
- iv) if due process has not been respected;
- v) if recognition or enforcement is contrary to international public policy.’

Notably, annulment of an award at the country of origin is not one of the reasons for the refusal of the enforcement of a foreign award in France. In this manner the French courts have established a docket of cases wherein based on the foregoing, annulled awards have been enforced keeping in line with the greater spirit of internationalization and transnationalization of arbitration.

4.3.1 From Norsolor to Putrabali

The case of *Norsolor*¹⁸⁵ was one of the first cases before the NCCP where the French courts applied this radical approach. The Turkish Pabalk Ticaret Ltd claimed damages from the French company Norsolor for wrongful termination under an agency contract. The arbitrator in this case applied *lex mercatoria* laws instead of the municipal laws of either party¹⁸⁶. Furthermore, the arbitrators found it difficult to compute the claim and thus allocated a lump sum amount based on calculations in equity. The Vienna Court of Appeal partially set aside the award as it found that the arbitrator had acted *ultra vires* by applying *lex mercatoria* instead of the national law¹⁸⁷ and by awarding damages in equity, thus assuming the role of amiable compositeur when it had not been so appointed by the parties.

When the case finally came to the French Court of Cassation, it set aside the decision of the lower court on the basis that the Court of Appeal did not examine the enforceability of the award under Article VII and only considered Article V (1) (e) violating the former article of the Convention.

From 1984 onwards the French Courts adopted a pragmatic approach by applying Article 1502 of the NCCP in the enforcement of arbitration awards annulled at the seat. This was undertaken under the auspices of Article VII of the Convention in the following manner.

In the case of *Polish Ocean Line ('POL')*¹⁸⁸, a French company obtained an award against POL. POL obtained a stay of enforcement pending the annulment proceedings from the courts in Poland. The French company therefore sought enforcement of the award in France. Such enforcement was granted by the Paris Court of Appeal. POL appealed on the basis of the stay order to which the Cour de Cassation stated on the basis of Article VII of the Convention that the article¹⁸⁹, ‘....does not deprive any interested party of any right it may

¹⁸⁵ AKSA v. Norsolor, Judgment of 9 December 1980, Cour d'Appeal, Paris (1980) published in [1981] Rev. Arb. 306. An English translation is published in (1981) 20 *I.L.M.* 883, at p. 888. Report of the Supreme Court of Vienna, Nov. 18, 1982 was reprinted in [1984] IX *Y.B.C.A.* 159.

¹⁸⁶ C Koch, 'The Enforcement of Awards Annulled in their Place of Origin- The French and US experience' (2009) 26 (2) *J. Int. Arb.*

¹⁸⁷ This was important as the arbitration was governed by the ICC Rules of Arbitration which under Article 13 required the national law to be applied.

¹⁸⁸ Cass.le civ., March 10, 1993 *Polish Ocean Line v Jolasry*, 1993 REV ARB 255, 2d decision

¹⁸⁹ C Koch, 'The Enforcement of Awards Annulled in their Place of Origin- The French and US experience' (2009) 26 (2) *J. Int. Arb.*

have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon¹⁹⁰.'

The French in this manner used the NCCP which constitutes '...the law of the country where such award is sought to be relied upon' as a mechanism for enforcing annulled awards. In *Norsolor* it is noted that the French Supreme Court¹⁹¹ held that Article V (1) (e) by itself was not enough for the refusal of enforcement in POL and thus decided that it was under Article VII that Article 1502 of the NCCP could be followed.

The most famous case on this subject has been the *Hilmarton*¹⁹² case. This was a dispute between a French company OTV and an English company Hilmarton where the latter claimed outstanding commissions from the former arising pursuant to a public works contract secured in Algeria for OTV. The place of arbitration was Geneva. The arbitrator found that for reason of such a contract being contrary to Algerian law the contract was invalid. The Geneva Court of Appeal set aside the award finding the arbitrator's decision arbitrary and the Swiss Federal Tribunal confirmed this decision. OTV sought recognition of the award in France and obtained the exequatur award from the Paris Court of First Instance. Hilmarton appealed the decision and the Paris Court of Appeal applied Article VII and Article 1502 NCCP and affirmed the previously adopted approach. The French Supreme Court confirmed the decision stating, 'Lastly the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy'. This opinion resonates statements made by prominent French scholars Berthold Goldman and Philippe Fouchard in 1960¹⁹³.

Therefore, the French Court of Cassation took an increasingly internationalist stand by stating that the award rendered in Switzerland was an international award not integrated into its domestic legal order. By stating so France was potentially overstepping its territory as it didn't have the discretion to determine what constituted Swiss legal order¹⁹⁴. France's idea behind enforcing such annulled awards seemed clear. According to them an award issued pursuant to an international commercial arbitration is detached from any legal order particularly the place and is thus delocalized¹⁹⁵. In the court's view point therefore, the fact the parties had opted for Geneva as the place of arbitration had no bearing¹⁹⁶. This point of view and ideology was confirmed in 2007 in the *Putrabali*¹⁹⁷ Case by the Cour de Cassation.

¹⁹⁰ Article VII of the Convention

¹⁹¹ The French Supreme Court for Private Matters

¹⁹² Cass. Le civ., March 23, 1994 *Hilmarton v OTV*, 1994 Bull. Civ.1, No. 104, 1994 REV ARB, 327

¹⁹³ W Park, 'Procedural Evolution in Business Arbitration' (2006) *Arbitration of International Business Disputes* 64

¹⁹⁴ E Schwatz, 'A Comment on *Chromalloy Hilmarton*, à l'américaine' (1997) 14 *J. Int'l Arb.* 125, 130, commented on that passage as follows: 'Although consistent with a conception of international arbitration that has a noble and prestigious heritage in France, [reference omitted] this pronouncement, I might timidly venture to ask, is nevertheless just a little bit presumptuous, is it not? For on what authority can a French court decide what does or does not form part of the Swiss legal order? I would have thought that this is a matter for Swiss legislators and courts, and not the French Court of Cassation to decide.'

¹⁹⁵ C Koch, 'The Enforcement of Awards Annulled in their Place of Origin- The French and US experience' (2009) 26 (2) *J. Int. Arb.* 273

¹⁹⁶ Available at <http://conflictoflaws.net/2007/the-french-like-it-delocalized-lex-non-facit-arbitrum/> accessed on 20 March 2013

¹⁹⁷ *Putrabali v Rena* Civ 29 June 2007 Bull. Civ. 1. No 250, 251, REV ARB 2007, 507

Whilst the French are flexible in their approach on enforcing annulled awards their public policy is also sacred to them. In 1992 when a second award was issued in favour of Hilmarton, the French Court of Cassation dismissed the approach of executing the award adopted by Versailles Court. The reasoning for this was executing the award violated the *res judicata* rule of Article 1351 of the French Civil Code¹⁹⁸.

In the famous case of *Bechtel* an award was granted in favour of Bechtel against the Department of Civil Aviation of Dubai ('DAC'). In 2003 enforcement of the award was granted by the Paris Court of First Instance. The UAE Court of Cassation annulled the award in 2004 on the basis of the arbitrator having violated mandatory procedural rules of the UAE by not swearing in a witness. Thus, DAC appealed the enforcement to the Paris Court of Appeal on the basis that the award was premature for enforcement as it was still being reviewed by the UAE judiciary in 2003¹⁹⁹

This view was rejected by the Paris Court of Appeal which stated that under the bilateral treaty the award was not a judicial decision and therefore, enforcement could be sought before completing all local procedures at the UAE. Following its radical thinking initiated in the Hilmarton case, the Paris Court of Appeal held that the Dubai judgment could not be internationally recognized: '....judgments delivered pursuant to annulment proceeding, like execution orders, do not have international effects because they apply only to a defined territorial sovereignty, and no consideration can be given to these judgments by a foreign judge pursuant to indirect proceeding.'²⁰⁰

In the very next year the Cour d'appel de Paris in the case of *Thales v. Euromissiles*²⁰¹ held that the French court could not review the award on its merits in the absence clear violation of French public policy. This case concerned EU competition law and the party against whom the award was made attempted to annul the award on the premise of the contract being anticompetitive²⁰².

The Cour de Cassation in 2007 in *Putrabali*²⁰³ affirmed France's position on the enforcement of annulled awards. Arbitration was initiated by Putrabali under the International General Produce Association ('IGPA'), which has its seat in England for payment for goods lost at sea. An award was granted against the claimant. Typically, the award was appealed by the Claimant²⁰⁴. The English High Court set aside the award, partially granted the appeal and

¹⁹⁸ C Koch, 'The Enforcement of Awards Annulled in their Place of Origin- The French and US experience' (2009) 26 (2) J. Int. Arb 274: Cour de Cassation stated, 'the existence of a final French decision bearing on the same subject between the same parties creates an obstacle to any recognition in France of court decisions or arbitral awards rendered abroad which are incompatible with it.'

¹⁹⁹ At the time the UAE was not a party to the convention therefore, the DAC based their submissions on the bilateral judicial enforcement treaty between the UAE and France signed in 1991.

²⁰⁰ Available at <www.whitecase.com/files/Publication/9519e3f5-1c7b-4531-8a62-a6ac59dc87de/Presentation/PublicationAttachment/153d6bd2-17f4-48a0-94b2-af4265abf8fc/article_Annulled_awards_v3.pdf> accessed 21 March 2013

²⁰¹ 18 November 2004, (2005) 8(2) *Int'l ALR* 55; (2005) *Juris Classeur* 357, note Alexis Mourre

²⁰² R David, 'Harmonization and Delocalization of international commercial arbitration' (2011) 28 (5) *J.Intl.Arb.* 460

²⁰³ *Putrabali v. Rena*, Cass., 1ère civ., 29 June 2007

²⁰⁴ The Claimant appealed to the Board of Appeal and under s69 of the English Arbitration Act appealed to the High Court on a point of law Available at <http://www.ciarb.org/south-east/enforcement-of-arbitral-awards-in-france.php> accessed 15 March 2013

reverted the award to the arbitrators to be revised²⁰⁵. Subsequently, the IGPA Board issued a second award in the claimant's favour. The Respondent however, sought recognition of the first award, which had been granted in its favour in France. An enforcement order was granted by the Paris Court of First Instance three weeks after the second award in favour of Putrabali was issued. This was appealed and rejected on the basis of Article 1502 of the NCCP.

The Cour de Cassation famously remarked, 'an international arbitral award- which is not anchored to any national legal order- is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought²⁰⁶.' In this remarkable judgment that significantly altered the parameters of arbitration in France, the Cour de Cassation, emphasized the importance of the rules at the place of enforcement as opposed to the seat and the existence of an arbitral legal order independent of national orders. Moreover, this decision affirmed the arbitral award to be an international judicial decision²⁰⁷. Mourre, a prominent scholar, however, stated that the analysis of the French Cour de Cassation in reality does not delve further than that already found in the *Hilmarton* case²⁰⁸ whilst practitioners such as Alain Farhad attributed the Putrabali decision to the '*birth of the universal arbitral award*.²⁰⁹

The French Court of Cassation premised its foregoing decision on two major points:

i) "*Arbitral Award is not anchored in any national legal order*²¹⁰"

The French Court of Cassation, not only confirmed the French position on this subject by endorsing the idea of delocalized arbitration- the idea of an arbitration award not being tied to the legal order of the country of origin, but also went further to state that the arbitration award is not tied to any national legal order. Interestingly, this idea has lodged a plethora of debate between those that view the Court of Cassation as having in such manner stated arbitrations to be conducted in a vacuum²¹¹ and those that are of the view that what the court simply did was launch a new idea of an arbitral legal order²¹² separate from a national legal order, but a legal order nonetheless²¹³.

It is further suggested by Phillipe, a profound scholar on the subject,²¹⁴ that if the recognition of arbitral awards as a separate judicial decision is accepted, then by default the existence of a separate arbitral legal order would also be accepted. Against this backdrop, it is foreseeable that the radical notion of the existence of a separate arbitral legal order would be the brain child of the French community- the development of which is examined herein.

²⁰⁶ 2006 Rev. Arb. 665 (author's translation) and note E. Gaillard at 666–72.

²⁰⁷ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl. 278

²⁰⁸ A Mourre, 'A Propos des Articles V et VII de la Convention de New York et de la Reconnaissance des Sentences Annulées dans leurs pays d'origine: Où va-t-on après les arrêts Termo Rio et Putrabali?' (2008) Rev. Arb. 263,281

²⁰⁹ Available at <http://www.ciarb.org/south-east/enforcement-of-arbitral-awards-in-france.php> accessed 15 March 2013

²¹⁰ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl. 292

²¹¹ X Delpuch, 'Sentence arbitrale internationale, force exécutoire et conflit de juridictions' (2007)

²¹² This idea was first conceptualized by Prof. Emmanuel Gaillard in his seminal paper given at the end of the Sixth Brazilian Congress on Arbitration in November 2006.

²¹³ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl. 293

²¹⁴ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl. 294

ii) “*International Arbitral Award is an International Judicial Decision*”²¹⁵

Whilst this reasoning is easier to digest for many, the manner in which an international arbitral award may be revered as an international judicial decision is important. Primarily, it is notable that there is no universal definition of the term ‘judicial decision’ or ‘arbitral award’²¹⁶. The former was not even defined in the Hague convention²¹⁷. These terms are thus defined by virtue of the characteristics that they possess. That is, they are ‘binding in nature’²¹⁸; ‘intended finally to dispose of a dispute’²¹⁹; ‘have *res judicata* effect’²²⁰; ‘can be recognized and enforced’²²¹; ‘even if not enforced or recognized, can nevertheless constitute proof of certain facts or be taken into account as a fact in other proceedings’²²².’ Notably, arbitral awards and judicial decisions share the same characteristics. Similarly, international judicial decisions, also undefined may be broadly linked to judicial decisions stemming from the International Courts of Justice²²³. By their nature they too are not linked to a particular national order. Some international arbitration awards by reason of them being governed by particular treaties or conventions such as ICSID or the Iran- US treaty are undisputed as international judicial decisions²²⁴.

²¹⁵ Status of vacated awards in France

²¹⁶ M Hunter and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London, 2004), paras. 8-05 to 8-08; F Poudret and others, *Comparative Law of International Arbitration* (S. Berti and A. Ponti (trans.) 2007) para. 721.

²¹⁷ P Pinsolle, ‘The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali’ (2008) 24 (2) Arb. Intl. 291

²¹⁸ Art. III of the Convention: ‘Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles’; UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 35 (with amendments as adopted in 2006): ‘(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36’

²¹⁹ French New Code of Civil Procedure, art. 1496; *Braspetro Oil Services Co. v. Management and Implementation Authority of the Great Man-Made River Project*, Cour d’appel de Paris, 1 July 1999, at 14, (1999) 8 Mealey’s Int’l Arb. Rep. 24: ‘The qualification of [a decision as an] award does not depend on the terms used by the arbitrators or by the parties ... after a five-month deliberation, the arbitral tribunal rendered the “order” of 14 May 1998, by which, after a lengthy examination of the parties’ positions, it declared that the request could not be granted because Brasoil had not proven that there had been fraud as alleged. This reasoned decision – by which the arbitrators considered the contradictory theories of the parties and examined in detail whether they were founded, and solved, in a final manner, the dispute between the parties concerning the admissibility of Brasoil’s request for a review, by denying it and thereby ending the dispute submitted to them – appears to be an exercise of its jurisdictional power by the arbitral tribunal ... Notwithstanding its qualification as an “order”, the decision of 14 May 1998 ... is thus indeed an award’ (emphasis added).

²²⁰ P Pinsolle, ‘The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali’ (2008) 24 (2) Arb. Intl. 295 ‘To promote efficiency and finality of international commercial arbitration, arbitral awards should have conclusive and preclusive effects in further arbitral proceedings’: ILA, Resolution 1/2006; French NCPC, Art. 1476: ‘The arbitral award, from the moment that it has been given, will become *res judicata* with respect to the dispute that it has determined’.

²²¹ Article III of the Convention

²²² P Pinsolle, ‘The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali’ (2008) 24 (2) Arb. Intl. 294

²²³ M Bedjaoui, ‘The Reception by National Courts of Decisions of International Tribunals’ (1995-1996) 28 NYUJ Int’l L and Pol. 45.

²²⁴ P Pinsolle, ‘The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali’ (2008) 24 (2) Arb. Intl. 290- the author in this journal remarks that such arbitral awards from inter- state arbitrations, arbitrations under treaties or conventions are a part of jurisprudence. As per Article 38 of the Statute of the ICJ ‘jurisprudence’ is one of the sources of international law and thus such awards constitute sources to international law.

It has been suggested that the French modernist approach to delocalized arbitration may stem from the fact that the French commercial law doctrine has accepted that there is an independent body of law created by the participants in commerce referred to as the 'lex mercatoria'. This consists of a composition of transnational rules and behavior in commerce. As arbitration is a common place dispute resolution mechanism in international commerce the underlying concept of the lex mercatoria can stretch to the idea that awards are thus not 'anchored' in the legal system where the award is produced²²⁵. Phillippe Pinsolle²²⁶ interestingly sets out the idea that just as the international arbitration community has now become more receptive to the idea of arbitrators having no forum so too can such discretion apply to the law as deemed fit including drawing reference to rules of law such as lex mercatoria²²⁷ or general legal principles^{228, 229}.

Similar thoughts have been advocated by Gaillard²³⁰ who mentioned during his interview that the idea of a transnational arbitral legal order is not one that is in any manner disrespectful to the laws of the seat of arbitration but it is that the arbitration is not entirely subjugated to the laws of the seat and thus the arbitrator has the possessory discretion to apply such international values, norms and principles as he deems fit for the particular case.

It is worth noting that the Cour de Cassation's idea of a transnational arbitral order stretches beyond the parameters of the 'local standard of enforcement' envisaged in Article VII of the Convention as it 'denies the courts of the place of arbitration any role in establishing the international validity of the arbitral award.'²³¹

Furthermore, the idea of classifying an international arbitral award as an international judicial decision to detach the award from the national court in terms of its recognition and enforcement may not be as farfetched as it may seem. In the opposite circumstance of a case when the award is not annulled or if a challenge raised is rejected, the international arbitration award easily transitions to being an international decision with no eyebrows raised. Applying the same reasoning there ought to be no difference in enforcement in the face of a successful challenge and annulment of the award. When faced with a decision of the court annulling an award, the primary question that the courts in the enforcement country have to address is do they give weight to the judgment of the courts from the annulling state or do they give importance to the arbitral award from that State. If they do give weight to the latter,

²²⁵ C Koch, 'The Enforcement of Awards Annulled in their Place of Origin- The French and US experience' (2009) 26 (2) J. Int. Arb. 272: While this is not the place to discuss the merits of whether or not a *lex mercatoria* exists and what its contents might be, the debate surrounding these questions has been a passionate one ever since the mid-1960s. Whereas Fouchard, Gaillard, and Goldman strongly affirm the existence of such a transnational legal order, Alan Redfern & Martin Hunter *in* The Law and Practice of International Commercial Arbitration 117 (2d ed. 2004) are more skeptical.

²²⁶ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl. 293

²²⁷ Channel Tunnel Group Ltd and others v. Balfour Beattie Construction and others [1993] AC 334.

²²⁸ Andersen Consulting Business Unit Member Firms (ACBU) v. Arthur Andersen Business Unit Member Firms (AABU) and Andersen Worldwide SC (AWSC). For the final award, see ICC Award No. 9797, 28 July 2000, 15 (2000) *Int'l Arb. Rep.* 8 Doc. A-1.

²²⁹ In this regard, the scholar Phillip further proposes an alteration to the UNCITRAL Rules to reflect this wide powers of the arbitrator – particularly Article 33(1) to the applicable 'law' should be modified to refer to the applicable 'rules of law' that arbitrators may apply

²³⁰ Appendix 1: Sr No. 4

²³¹ C Koch, 'The Enforcement of Awards Annulled in their Place of Origin- The French and US experience' (2009) 26 (2) J. Int. Arb. 274

clear grounds on which the same is given weight to need to be determined²³² and thus the courts of the enforcing country would accept such an award into their legal order. The reasoning behind this can be that the decision from a court in a particular country affects the legal order of that country only²³³.

The rationale in theory of the French decisions can be couched in the notion of an arbitral legal order existing separately from the national legal orders. This is because of the idea that the international arbitral award is not embedded in the national legal order of the place of arbitration but instead is hooked in the arbitral order. Therefore, the only aspect that the courts can determine on is that the arbitration award would be denied recognition in their legal order. Despite the criticisms raised against the French way of enforcement, their approach does not contravene the Convention²³⁴.

4.4. Other Arbitration-Friendly States

During the interviews Thomas Wilson²³⁵ and Bjorn Gehle²³⁶ leading arbitrators and lawyers suggested that instead of delving into theories and notions such as delocalization in the sense of complete detachment from the laws of the *lex loci arbitri* instead parties and particularly their lawyers need to exercise extreme caution in selecting a place of arbitration. Too often, parties and their counsel take for granted the selection of a place for arbitration. If enough consideration is given involvement of a national court belonging to an unfriendly arbitration State can be avoided. This section highlights some of the perceived arbitration friendly states and the elements in their law that increases their desirability rating.

Switzerland has been acclaimed to have the 'most liberal reformed arbitration law²³⁷'. Unsurprisingly Switzerland is a civil legal system. Its arbitration laws can be found under the Private International Law Act 1990 ('Swiss PILA') which carefully sets out areas within the arbitrators jurisdiction with judicial assistance being granted for taking of evidence and for interim measures²³⁸. Overall limited court intervention is allowed²³⁹. Similarly Sweden under the Arbitration Act of 1999 provides the courts with a supporting role²⁴⁰, limited grounds for challenges against the award and the arbitrator has broader powers of discretion²⁴¹. Nevertheless, and even prior to the enactment of this statute, the Swedish courts were arbitration friendly²⁴².

²³² P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl.290

²³³ P Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24 (2) Arb. Intl.292

²³⁴ New York Convention, Art. VII

²³⁵ Appendix 1: Sr No. 1

²³⁶ Appendix 1: Sr No. 2

²³⁷ J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 (2) Arb. Intl. 201

²³⁸ Arts 183–185

²³⁹ Arts 179–180.

²⁴⁰ SS. 4, 14–17 and 20 with respect to constituting the tribunal, and s. 26 with respect to summoning witnesses.

²⁴¹ ss. 21–25 subject in limited circumstances to party autonomy.

²⁴² P Fouchard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) para. 164, citing J Paulsson, 'Arbitrage international et voies de recours: La Cour supreme de Suede dans le sillage des solutions belge et helvetique' (1990) 117

Switzerland additionally allows non-Swiss parties to opt out of the Swiss judiciary's involvement in arbitration subject to a few restrictions²⁴³. Belgium, Sweden, Peru and Tunisia all provide parties with such waiver rights under their arbitration laws²⁴⁴. Notably once the parties have waived such right the award cannot be challenged in the country of origin and in this manner the award transcends into an international judicial decision. In such a case the award would need to be enforced under the Convention as a foreign award²⁴⁵. Subsequently, awards rendered in the foregoing countries can have the same effect under the Convention despite the party waiving the rights to challenge the award without being attached to any national legal order.

4.5 Conclusion

Arbitration friendly jurisdictions are clearly adopting soft delocalization. By this the author means that whilst the entire notion of eradicating the seat has not been adopted, nor has a transnational arbitration mechanism been followed, arbitration friendly countries are willing and happy to ignore the annulment at the seat for the greater good of enforcement. This is encouraging and parties seeking a progressive arbitration can assert their seat to be one of the aforementioned jurisdictions.

²⁴³ Art. 192.

²⁴⁴ Belgian Code of Civil Procedure, 10 October 1967 (CJB), art. 1717(4); Swedish Law on Arbitration, 4

²⁴⁵ PILS, art. 192(2): 'If the parties have waived fully the action for annulment against the awards and if the

CHAPTER V: DELOCALIZED ARBITRATION IN THE UAE AND ANALYSIS OF A 'DELOCALIZED ARBITRATION CLAUSE'

5.1 Delocalized arbitration in the UAE

The UAE is a fairly young country in arbitration but has expanded and grown considerably in the last few years. When interviewees²⁴⁶ were asked to comment on whether they thought that delocalized arbitration could possibly be achieved in the UAE, they commented that certain limbs of delocalized arbitration could be adopted by the UAE such as increasing arbitrability but felt that this would take a considerable length of time as UAE despite all its growth till today doesn't have a separate more detailed arbitration law then the present select provisions of the UAE Civil Procedural Rules.

The interviewees suggested that arbitrability could be extended in case of the existence of fraud in a particular case instead of suspending proceedings and reverting to the court perhaps the arbitrator would be empowered to decide on the matter itself.

The recent case of the Dubai Court of First Instance²⁴⁷ required the courts to enforce four ICC awards²⁴⁸. The ICC arbitration went in favour of the Claimant, la Compagnie Française' Entreprises S.A (CFE), who had claimed for outstanding payments for works performed in the construction of the Canal de Jongle in South Sudan. The Government of the Republic of Sudan refused to comply with the award which is why enforcement was sought through the UAE courts. Prior to this case the UAE had reflected a positive attitude of adhering to the Convention²⁴⁹. However, in this case the Court took a step back in the enforcement of foreign arbitral awards. The Court ruled that it did not have the jurisdiction as a matter of public policy to hear the present case for reason that the party was not domiciled in the UAE and nor had the contract taken place in the UAE²⁵⁰. The reasoning of the Court for several reasons is inaccurate and an indepth examination of the same is not within the purview of this dissertation. Whilst this case has but little relevance to the present topic, it does inadvertently portray the UAE's conservative approach. Thus if the notion of delocalized arbitration were raised amongst the judiciary it is expected that their reaction would not be favourable.

In another case that has caused uproar, the Dubai courts decided that registration of units in the interim register with Dubai Land Department was a matter of public policy and thus not arbitrable²⁵¹. The courts did not have a choice in this case due to the laws on the matter and perhaps the laws need to be revised to have more matter arbitrable.

²⁴⁶ Appendix 1

²⁴⁷ Dubai Court of First Instance (see Case No. 489/2012, ruling of the Dubai Court of First Instance of 18 December 2012) Available at <http://kluwerarbitrationblog.com/blog/2013/03/12/recent-ruling-of-dubai-court-of-first-instance-on-enforcement-of-foreign-arbitral-awards-back-to-square-one/> accessed 25 March 2013

²⁴⁸ ICC Case No. 5277/RP/BGD . Enforcement of a preliminary award, final award and an award on costs

²⁴⁹ The UAE acceded to the Convention by the implementation of UAE Federal Decree No. 43 of 2006

²⁵⁰ Available at <http://www.habibalmulla.com/Mediaresource/8fe32aa0-4146-4303-b435-9b56242c5aef.pdf> accessed 13 April 2013

²⁵¹ Available at <http://gulfnews.com/business/opinion/real-estate-arbitration-at-risk-in-dubai-1.1080415> accessed 28 March 2013

From the foregoing and the views presented by the interviewees the UAE may not be open to enforcing a floating award or for that matter enforcing an award annulled at its seat. In the case of the later, it can be argued that the UAE by virtue of acceding to the Convention can explore this notion under Article VII. However, if this would be caught in the web of public policy remains yet to be examined.

5.2 Analysis of a 'delocalized arbitration' clause by interviewees

Since the premise of delocalized arbitration is based on the notion of the detachment of arbitration from the procedural and sometimes the substantive laws of the place of arbitration²⁵² the interviewees²⁵³ were given the following hypothetical clause²⁵⁴ to opine on:

'Any dispute arising out of the formation, performance, interpretation, nullification, termination or invalidation of this contract or arising there from or related thereto in any manner whatsoever, shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules ("the Rules"), by one or more arbitrators appointed in compliance with the Rules. For purposes of this arbitration the Parties agree that the procedural and substantive laws of the UAE shall not apply and request for lex mercatoria to instead be followed.'

Most of the interviewees had problems in interpreting the foregoing clause. The interviewees found that by all means such a clause would not be accepted by the UAE courts. The clause raised uncertainty on whether even a more liberal jurisdiction would accept it. The reasons for this were twofold. Some interviewees found that they were not aware of there being any procedural rules governing arbitration or dispute resolution within the lex mercatoria which would create a problem of the arbitration being left without any governing procedural law. However, this wouldn't matter if one would have established/ selected a set of arbitral rules that are sufficiently comprehensive to answer whatever questions that may be raised during the arbitration.

Thomas Wilson²⁵⁵ opined that an award arising from such a clause would be a stateless arbitral award. This leads to the question of whether such a stateless award would be enforced by the courts²⁵⁶. The interviewee proceeded to address whether Article V (1) (e) would apply to a stateless award. It would as the award would have to have been made somewhere even though it wasn't subject to the laws of the particular country. Hypothetically, if an award was issued against a party in Dubai, they could seek to challenge the award in the Dubai courts²⁵⁷ even though it has been agreed that the UAE law would not be applied the party would be requesting that action be taken and if it belongs to the country in which the award is made then it could potentially be set aside and therefore, would be covered by Article V (1) (e) of the Convention.

²⁵² Chapter II and IV of this Dissertation pg 14 and 29

²⁵³ Appendix 1 Sr No. 1-3 only

²⁵⁴ The standard DIAC clause was used as the foundation for this clause which was drafted by the author for purposes of assessing its interpretation, applicability and enforceability amongst arbitrators. The DIAC clause can be found at <http://www.diac.ae/idias/forms/DIAC%20Model%20Arbitration%20Agreement1/> accessed 2 February 2013

²⁵⁵ Appendix 1: Sr No. 1

²⁵⁶ E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 51

²⁵⁷ In this case the arbitrator would then have to ensure compliance with the procedural issues such as swearing of witnesses under the UAE Civil Procedural law. The Courts authority will arise from Article 215 of the UAE Civil Procedure Code

He further commented that the fundamental question addressed is that if a stateless award, intended by contract to be stateless, could be enforceable. Article II of the Convention states that the Convention applies to awards made in a territory of a State. Therefore, the award has to be anchored to a State that is signatory to the treaty. Although the Convention states that in order for the treaty to apply the award has to be made in a State, this is not believed to be entirely the case as this may be up to the enforcing State.

Bjorn Gehle²⁵⁸ raised the concern that since there was a broad reference to *lex mercatoria* there was no real uniform view that comprised these principles unless reference had been made to the UNIDROIT principles²⁵⁹. Offering a generic view point it was highlighted that in reality having a reference to just *lex mercatoria* would not be acceptable to clients. Taking the example of the shipping industry a lot of different traditions have developed which have been codified into *incoterms* of the ICC. He further stated that whilst it would be a great idea to have *lex mercatoria* it would be difficult to achieve. There are other conventions such as the Convention of International Sale of Goods law of merchants which is a codified form of international trade principles would be better suited for the parties.

Examining the interpretation and performance of this Clause, the interviewee pointed out that there was an inherent problem in the drafting of the clause²⁶⁰. This was because although the UAE laws were excluded from application 'for purposes of this arbitration', what of the performance of the contract before the dispute arose. From the clause it was unclear as to what the obligations of the parties would then be and whether the *lex mercatoria* was to be discerned as the law of the contract or the law of the arbitration.

From the clause it is noted that parties won't apply the laws of Dubai, UAE instead choose *lex mercatoria* to apply it looks as though the *lex mercatoria* is both procedural and substantive. If it is taken as substantive and only applying for the purposes of the arbitration then the parties have basically agreed that no substantive law applies during the performance of the contract or does the law apply to the contract during execution then one would have a different law that would apply during execution of the contract and during the arbitration. The arbitration would use the *lex mercatoria* to review the conduct of the parties at a substantive level which would be different than the substantive law that would apply to the contract. From the foregoing it is noted that there were significant difficulties that arose from the interpretation of the clause. Some interviewees felt that it was a pathological clause whilst others opined that although it may not be a pathological clause it would create significant difficulty in interpretation.

Bjorn Gehle²⁶¹ further advised that to apply this clause the arbitrator would ask the parties for their submission on what they believed *lex mercatoria* to be as a matter of evidence. An arbitrator has the discretion to ask the parties to submit on points of law that are contentious. Alternatively the parties could be asked to amend the clause but practically speaking since at

²⁵⁸ Appendix 1: Sr No.2

²⁵⁹ Although the application of *lex mercatoria* for the purposes of this dissertation is limited in so far as it concerns delocalized arbitration, the following comments made by the interviewee are of interest and shed better light on the issue of *lex mercatoria*. UNIDROIT principles referred to as codified *lex mercatoria*- read [peter burgess- creeping qualification of *lex mercatoria*]. He describes the process of these free floating principles to a codification. UNIDROIT referred to as restatement of *lex mercatoria*. Looked at commercial and contract laws of the world. Looked at the laws of the merchant how did they resolve and what principles did they apply. Second generation principles.

²⁶⁰ Such problem had been inserted with the idea of almost creating a pathological clause to assess the interpretation that would be adapted by the interviewees.

²⁶¹ Appendix 1: Sr No.2

this point the parties are already at dispute it would be difficult to reach a consensus. On another front the arbitrator could alternatively rule *ex aequo et bono*²⁶².

Since in this case the parties have opted out of the procedural laws. Taking the Model law as an example. Not all provisions in the Model law are mandatory so parties can change it and waive it or agree something separate. Few laws say which provisions are mandatory. There is a majority view that there are certain provisions that go to the core issues such as just and fair process and right to be heard. Is it therefore, possible to have the seat of arbitration in France and wish for the procedural laws of Switzerland to apply. There have been plenty of cases which have seen such situations. The interviewee further commented that this could not be done as would the French courts or the Swiss courts exercise their supervisory powers. It therefore, creates a lot of issues that can't be resolved. Some interviewees viewed it as a pathological clause that would cause the parties to revert to the courts.

Bjorn Gehle²⁶³ further brought to light an interesting case that arose 3- 4 years ago. In a case in Singapore the parties chose ICC rules but had SIAC as the governing institution. Therefore, SIAC was applying the ICC rules. However, due to the consistency between the rules it worked.

Richard Harding²⁶⁴ a third subject that was asked to interpret this clause commented that it would be marvelous for conducting the proceedings but complications would arise depending on who would be interpreting the clause. If the parties get an award and the party ordered to pay pays well and good, if not the party will have to enforce the award. Then the question will arise if the arbitration that was conducted subject to this clause is enforceable? What would be the seat of such an arbitration? If there is no seat, then it would be contended the Convention would not apply as the award not issued in a seat. It would also need to be checked if there has been compliance as there could be serious non compliance with the laws that could affect the validity of the award. He further emphasized that it would be a dangerous approach with a court ultimately needing to look into the terms of enforcement and from a practical point if not looked at by the seat.

When Emmanuel Gaillard²⁶⁵ was asked if an arbitration clause is subject to the *lex mercatoria* laws would such a clause be enforceable, he provided an optimistic answer and deemed that such a clause indeed could be enforced. Due to time constraints he was not availed the actual clause and thus his comment was generic and broad.

Based on the foregoing comments and interpretation perhaps the clause could be revised as follows:

'Any dispute arising out of the formation, performance, interpretation, nullification, termination or invalidation of this contract or arising there from or related thereto in any manner whatsoever, shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules ("the Rules"), by one or more arbitrators appointed in compliance

²⁶² This can be done in small disputes or where it is difficult to find the applicable law or the law is ambiguous about a practice area that it would be better for the arbitrator to undertake a fair and just valuation.

²⁶³ Appendix 1: Sr No.2

²⁶⁴ Appendix 1: Sr No.3

²⁶⁵ Appendix 1: Sr No.4

with the Rules. The Parties agree that the seat of arbitration shall be Geneva and the Convention of International Sale of Goods²⁶⁶ shall be the substantive law for this contract.'

The idea of the clause was to examine the possibility of opting out of the laws of the seat of arbitration and having a delocalized arbitration clause. Bearing in mind the foregoing analysis if the award is signed in the UAE it would be subject to challenges at the UAE courts. Therefore, the best the parties could do if they preferred to use the DIAC rules would be to have the DIAC rules but have the seat as Geneva. Considering that Geneva is an arbitration friendly jurisdiction this would assist the parties' process. The DIAC rules would still apply and operate in running the arbitration²⁶⁷. As for the substantive laws the parties could opt for their preferred jurisdiction or even an international instrument if they so desire²⁶⁸. Notably, the importance of the seat continues to infiltrate. The possibility in the foregoing clause of instead having the procedural laws of the enforcing state to apply could be a way to go around it but if the same could be enforced under the Convention would be an important issue.

²⁶⁶ Available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> accessed 13 April 2013

²⁶⁷ Article 20 of the DIAC Arbitration Rules 2007 states, 'The parties may agree in writing on the seat of the arbitration. In the absence of such a choice, the seat shall be Dubai, unless the Executive Committee determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is appropriate.'

²⁶⁸ M Pyles, 'Choice of law issues in international arbitration' (1997) 63 (3) Arbitration 208

CHAPTER VI: CONCLUSION- THE REALITY OF DELOCALIZED ARBITRATION

There is an emergent pattern that has arisen from the examination of cases of countries operating under civil legal systems. Such that countries such as France and Switzerland seem to be pioneering international commercial arbitration whereas, common law jurisdictions such as England and USA appear to be lagging behind. However, bearing in mind the theoretical debate on the subject of delocalization and comments from the interviewees this subject of delocalization seems more diplomatically rooted to the particular country's general overall attitude towards arbitration and not so much to the type of legal system. Of course this idea also ties into the notion that one cannot perceive a particular legal system to be better than the other, but it does transcend into the fact that the restrictions that stem from each legal system have the ability to either aid in the progression or regression of delocalized arbitration.

From the foregoing analysis and examination of the hypotheses undertaken in this dissertation it is noted that the debate surrounding delocalized arbitration and impact on its growth is more to do with what it represents rather than the type of legal system that the country operates in. It is the authors view that whilst the type of legal system sets the groundwork for its absorption the key determining factor is whether such attitude is pro- arbitration or not. Furthermore, it is clear that countries retain control over what happens within their boundaries even if parties try to opt of having a seat. Moreover, the nationality of an award is deemed important for purposes of enforcement under the Convention. Therefore, it would not be possible unless a constitutional overhaul was undertaken or another revolutionary international instrument created, for an arbitration to only be subject to the procedural laws of the enforcing country or to a composition of international norms.

Emmanuel Gaillard in his interview with the author was asked if he thought delocalized arbitration was progressing and where he saw its future. However, in any case looking at the international scheme of things he predicted that in 10 years time, delocalized arbitration will be the norm of operating and will no longer be an issue of debate.

There is a present gap in the Convention as although it limited the double exequatur requirements compared to its predecessor the 1927 Geneva Convention on Execution of Arbitral Awards it did not address the question of how courts of the place of arbitration were to deal with awards issued in their jurisdiction. Since this is one of the areas that orthodox supporters of the seat theory often use in their argument, future research may be undertaken in this area on whether a transnational public policy can be achieved and incorporated into the Convention. Another area of further research could be the possibility of having an arbitration subject solely to the procedural laws of the enforcing state.

Overall the idea of delocalized arbitration has not been achieved to the extent advocated by Jan Paulsson or Fouchard but aspects of it can be seen as pioneering countries such as France lean more towards the idea of an arbitral award being an international award rather than associated to a particular state. Whether Gaillard's prediction would eventually come true remains to be seen.

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Appendix 1

Details of Subjects interviewed for this Dissertation

Sr No.	Name	Profile	Interview Date	Interview Venue
1.	Thomas P. Wilson	<p>Partner at Patton Boggs LLP Dubai Office</p> <p>Thomas Wilson has represented a range of construction and engineering industry clients, throughout the Gulf region, in the United States and beyond. Thomas Wilson has amassed considerable experience in resolving Middle East region disputes through arbitration and alternative dispute resolution and is regularly involved in DIAC, ICC and LCIA arbitrations as advocate. Further, Thomas Wilson occasionally accepts appointments to sit as arbitrator.</p>	5 February 2013	Offices of Kilpatrick Townsend
2.	Bjorn Gehle	<p>Partner at Pinsent Masons</p> <p>Bjorn Gehle specialises in international commercial arbitration including trade, corporate and major infrastructure disputes. He has significant experience in representing clients in international arbitrations under various rules including those of the ICC, DIAC, LCIA, ICDR, SIAC, ACICA and UNCITRAL. He has advised governments and private sector clients in many jurisdictions throughout Asia, Europe, Africa, the Middle East and Australia</p>	5 March 2013	Lobby of the Address in Burj Khalifa
3.	Richard Harding QC	<p>Barrister with Keating Chambers</p> <p>Richard Harding QC has been described as “without a doubt the leading English barrister practicing in the field of international arbitration of construction disputes in the Middle East and Gulf regions.” He regularly acts in cases, as either counsel or arbitrator, under the laws of the</p>	19 March 2013	Vide telecom to London

		Middle East, and has particular experience of the laws of the UAE, Egypt, Qatar, Kuwait and Jordan.		
4.	Emmanuel Gaillard	<p>Partner at Shearman and Sterling LLP</p> <p>Emmanuel Gaillard has advised and represented corporations, States and State-owned entities in international arbitration cases for over 25 years. He has also acted as sole arbitrator, party-appointed arbitrator or Chairman under most international arbitration rules and is frequently called upon to appear as expert witness on arbitration law issues in international arbitration proceedings or enforcement actions before domestic courts.</p> <p>He has written extensively on all aspects of arbitration law, in French and in English. Amongst other publications in 1999, he co-authored Fouchard Gaillard Goldman On International Commercial Arbitration, a leading publication in this field.</p>	22 March 2013	Vide telecom to France
5.	Nizar Fadhlou	<p>Nizar Fadhlou is the Registrar at the DIFC-LCIA Arbitration Centre. As the Registrar he is involved in addressing procedural irregularities arising in arbitrations.</p> <p>He is an external lecturer of the British University in Dubai and regularly speaks at conferences.</p>	4 April 2013	DIFC