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THE EFFECT OF THE DELOCALISATION THEORY IN THE CONTEXT OF ART. V (1) (E) OF THE NEW YORK CONVENTION – AN INVESTIGATIN OF UNIFORMITY IN ENFORCEMENT OF AWARDS IN VARIOUS JURISDICTIONS: DELOCALISATION IN PRACTICE

The article depicts the advantages and disadvantages of delocalisation theory. And it is given real examples and cases from practice. In providing a fair response to the debatable questions discussed in the entire work, we can undoubtedly not only say that the delocalisation theory is needed not only as an absolute doctrine but also investigate as a qualified doctrine, support and encourage this idea henceforward. Notwithstanding, it is still contentious whether to treat the delocalisation of arbitration as the breakwater in retaining uniformity of awards in the landscape of international commercial arbitration, the trend towards delocalisation theory is shedding new light on issues that were debated vigorously in the last five decades. In any case, application of delocalisation theory has its own strengths and weaknesses as well as other modern doctrines.

Key words: delocalization, arbitration, New York Convention, arbitration award, entry into force, jurisdiction, case, enforcement.

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Нью-Йорк конвенциясының V (1) (е)-бабының контексінде делокализация теориясының әсері – әртүрлі юрисдикциядағы арбитраждық шешімдердің орындалуындағы бірегейлікті зерттеу: тәжірибедегі делокализация

Мақалада делокализация теориясының артықшылықтары мен кемшіліктері бейнеленген. Және тәжірибеден нақты мысалдар мен істер берілген. Жұмыста талқыланған пікірталастарда мәселелерге әділ жауап беру кезінде біз делокализациялау теориясы тек абсолюттік доктрина ғана емес, осы тұста білікті доктринаны зерттеу де, осы идеяны қолдайтынын және оны көтермелеу де керектігін айта аламыз. Дегенмен, халықаралық коммерциялық арбитраж ландшафтындағы шығарылған шешімдердің біртектілігін сақтай отырып, арбитражды делокализациялауға қатысты мәселе екендігі әлі күнге дейін екіұшты болып тұр, соңғы бес онжылдықта қарқынды түрде талқыланған мәселелер бойынша жаңашылдық теориясы үрдісіне жаңа жарық түсіріп жатыр. Кез келген жағдайда, деокализациялық теорияның қолданылуының/орындалуының басқа да қазіргі заманғы доктриналары сияқты өзінің күшті және әлсіз жақтары бар болып табылады.

Түйін сөздер: делокализация, арбитраж, Нью Йорк конвенциясы, арбитраж шешімі, күшіне ену, юрисдикция, кейс, орындалу.

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Влияние теории делокализации в контексте статьи v (1) (e) Нью-Йоркской конвенции – исследование единообразия в обеспечении исполнения арбитражных решений в различных юрисдикциях: делокализация в практике

В статье представлены преимущества и недостатки теории делокализации. Приведены реальные примеры и кейсы из практики. В обеспечении справедливого ответа на спорные вопросы, обсуждаемые во всей работе, можно, без сомнения, не только сказать, что теория делокализации необходима только как абсолютная доктрина, но и расследовать как квалифицированную доктрину, поддерживать и поощрять эту идею впредь. Несмотря на это, до сих пор остается спорным, следует ли рассматривать делокализацию арбитража как волнорез в сохранении единообразия решений в ландшафте международного коммерческого арбитража. Тенденция к теории делокализации проливает свет на вопросы, которые активно обсуждались в последние пять десятилетий. В любом случае применение теории делокализации имеет свои сильные и слабые стороны, как и другие современные доктрины.

Ключевые слова: делокализация, арбитраж, Нью-Йоркская конвенция, арбитражное решение, вступление в силу, юрисдикция, дело, исполнение.

Certain clear-cut benefits of delocalisation

Each concept has positive and negative sides: lucid side composing the triumph and success of the whole idea or speculation and dark antithesis which contains the seeds of mere potential failure. (Jan Paulsson,1995:61) Some obvious and perceived pros of delocalized arbitration which should be mentioned are: it ensures neutrality of forum with respect to procedure; it constrains the role of national courts in the process; it surmounts limitations of the lex fori; it offers state agencies and governments the potential to enter dispute resolution agreements without submitting themselves to the laws of a foreign state; it liquidates conflict of laws problems; it enables parties to create procedural rules, which best fit the definite features of the transaction and parties' interests. (Dejan Janićijević, 2005: 70) It can be inferred that the main advantage of delocalisation theory and the main reason why all countries should accept delocalised system of law is party autonomy. It is a cornerstone of international arbitration where the states do not restrict the capacity of the parties to dictate choice of law and forum via contract. (Theodore C. Theofrastous, 1999: 465)

Moreover, Jean-Flavien Lalive explicitly remarked the practical advantages of delocalised arbitration and benefits of resorting to transnational law in settling the dispute:

(a) When the contract is vague with respect to the applicable law, except that there are clear negative factors pointing to a „delocalisation" or „denationalisation" of this law, transnational law offers a convenient and sound alternative; (Jean-Flavien Lalive,1964:1010)

(b) It will be less necessary to prove foreign law, and the judge will have more flexibility in finding the rules available;

(c) The judge will be in a position to make extensive use of the comparative law method to find these principles and in case of doubt he will develop the best and more suitable ones;

(d) The judge will not be a prisoner of the false problem created by the dilemma between „national law or public international law," resulting in artificial solutions;

(e) There will be no dogmatic attempt to reconcile the application of international law with the fact that one at least of the two parties and sometimes both of them are not a subject of international law, in the classical sense.

There are four arguments drawn by proponents of delocalisation theory which can be contemplated as the manifest and evident privileges:

1. The idea behind Article V (1) e NYC is discretionary, not mandatory. It is subject to discretion of the enforcing courts – it means that it is not compulsory to refuse the recognition and the enforcement of an award, if the enforcing courts are not persuaded in its appropriateness and propriety;

2. The decision or judgement of the enforcing courts are reasonable, valid and cogent in enforcing awards annulled in the country of rendition, if there is an 'issue of estoppel' where the losing party is estopped from presenting the basis for nullification. The ground of estoppel has been acknowledged as

an inherent foundation for enforcement of foreign awards; (Herbert Kronke, Patricia Nacimento, Dirk Otto, Nicola Christine Port, 2012: 332-333)

3. There is a thought wave that affirms 'international arbitration flourishes on the assumption that the seat of arbitration or the country of origin would maintain a minimum standard of supervision and control'. (Philip Wahl, 1999: 332-333) Accordingly, delocalisation of arbitration reflects an idea of limiting the oversight of national courts and disuniting arbitration from the national law;

4. There is a 'leg-up' provision of NYC – Art. VII (1) – which can back-up the decision of the enforcing courts. 'More favourable rights' provision provides a pillar of support to contention of enforcing courts which express that awards vacated in the country of origin can still be enforced elsewhere.

There was a presentment of abstract and theoretical underpinning advantages of delocalisation in this section which will be provided and practically proved by the assistance of detailed case law in further chapters. We are aware that every theory, every doctrine or every approach has its precariousness and deficiencies as well, therefore these issues will be deliberated in the next section.

Drawbacks of delocalised arbitration

Presently, the concept of denationalised award or delocalised arbitration is attractive and deserves more endorsement and encouragement by all countries in order to retain uniformity in enforcement of awards. However, the inadequate legal basis and the lack of recognition by most national courts make the consensus for 'denationalised' arbitration a perilous and dicey undertaking full of legal pitfalls. Gaillard pointed out three criticisms (Emmanuel Gaillard, John Savage, Fouchard, Gaillard, Goldman, 1999:892) concerning the transnational rules in which the existence of delocalisation theory is considered to be a key ingredient:

1. Conceptual criticism – it implicates the denial of the idea that lex mercatoria can form a genuine legal order in the same fashion as national laws or public international law;

2. Ideological criticism – there are sometimes problems such as misguide or mislead the concept of transnational rules or lex mercatoria, thus lex mercatoria is symbolised as only existing for the benefit of more powerful parties to a contractual relationship;

3. Practical criticism – in comparison with national law, the use of transnational rules in settling arbitration disputes is depicted as being incomplete and vague. Critchlow argued vigorously that 'the delocalisation process seeks to divorce arbitration from the curial law'. (Julian Critchlow, 2002: Arbitration 387) He mentioned that delocalisation theory adds little to the understanding the whole dynamic arbitration. Another opponent of the theory, which does not accept and recognise, Kerr L.J. asserts that delocalised awards are "floating in the transnational firmament, unconnected with any municipal system of law" which implies that the theory falls short of localised arbitration.

Bucher – the opponent of delocalisation theory stated such powerful and accurate arguments about the weaknesses of the conception as follows:

"The main purpose of delocalising arbitral procedure is to promote awards that are not subject to review under any national law except the applicable law in the country where the enforcement is sought. Such purpose, however, can also be achieved by linking the arbitration to a jurisdiction where no challenge of the award is admitted or where the parties can make an agreement to that effect. Delocalisation nevertheless will have the effect of depriving the parties of any court assistance in support of arbitration, inter alia with respect to the enforcement of the agreement to arbitrate". (H.L.Yu, 2002:198) However, it is not veracious concerning the unnecessity of court assistance in delocalised arbitration – the supervisory powers are merely limited. Professor Park accurately pointed out that trend towards delocalisation theory, that is accepting the delocalised awards as enforceable, valid and the delocalisation theory as practicable and viable theory, does not mean that courts at the place of arbitration should never review awards. The prospect of no court scrutiny and discretion have lots of unfavourable, disadvantageous harms to the victims of defective arbitrations, to the solidity of international arbitration, and in some circumstances to the intense interests of the reviewing state or to public ends. Suffice it is to say that the existence of basic procedural safeguards will be helpful and boost rather than deteriorate the arbitral process.

The powerful arguments against the delocalisation process are subsequent important factors which should be carefully considered insofar as they have direct influence in examining the viability of the theory:

1. The freedom to resolve the disputes by arbitration is concession, a derogation from the monopoly claimed by the State in the management of justice; and the concession is made subject to such conditions, including the supervision, control and

administration of arbitral process by the local law, as the State may choose;

2. The parties or arbitrators may wish to take the assistance of national courts during the arbitral proceedings, and the courts may refuse to assist if the arbitration is insulated from the local law;

3. The courts may be reluctant to enforce the awards which are not grounded in some system of national law. As a matter of fact, the delocalisation of arbitrations is only viable if the local law permits. There are of course elements of critique. If a minimum of centrally managed judicial control is retained, the emancipation of the arbitrator from the strong ties of state rules – putting in order both procedural matters and the choice of law – would come out altogether as an auspicious and advantageous thing, which Professor Mayer Pierre stressed in one of his publications. (Pierre Mayer, 1995:37)

Notwithstanding to these drawbacks most of the EU states such as France, Switzerland, Netherlands, Belgium are applying the delocalisation theory in practice indicating success and triumph in the enforcement and recognition of arbitral awards. Because the main objective of delocalised arbitration remain to eliminate the unintentional or unexpected effects of certain arbitration-hostile peculiarities of the law of the place where the arbitration was held. Taking into account some disadvantages of delocalised arbitration, in my opinion, however, advantages of delocalisation theory asserting, proving and persuading its viability and existence outweigh the drawbacks and criticisms concerning it. Some exemplifying cases are used in conviction to paramount and substantial importance and in support of the idea; therefore following chapter is dedicated to evaluation the theory in the light of the practice in England, France and Switzerland.

Delocalisation in practice

Paulsson investigated two different contrasting doctrines in relation to awards – Local standard annulments (LSAs) and International Standard Annulments (ISAs). It is clear from his famous article that ISA is something which falls within the ambit of the first four paragraphs of Article V (1) of the NYC. Everything, apart from that would be an LSA, and entitled only to local effect. However, there should be no supposition that the courts in the place of rendition of an award are insulted if foreign judges ignore their decisions about the validity of awards. Individual national systems should be entitled to bring into being local rules tailored to regional awareness and perceptions without being obstructed by the thought that they are legislating for the entire world.

Unambiguously, Paulsson by recommending LSAs disregard by enforcement courts, wants to emphasise the significance, further dynamic development and validate feasibility of delocalisation theory. For example, in SA Coppe Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd, Lord Mustill represented delocalisation as ‘a self-contained juridical system’, by its very nature and legal framework separate from national systems of law. (Poon Nicholas, 2012:139) As this case, there are numerous cases to illustrate the triumph of delocalisation in the history of international commercial arbitration. We should seasonably explore the „cultural, judicial and legal diversity“ of disputes that permeate the debate on the enforceability of foreign annulled awards.

Firstly, in order to demonstrate cases which are giving effect to the existence and importance of the theory in practical terms, it is appropriate to analyse them jurisdiction by jurisdiction basis. Different governments have different attitudes towards delocalisation theory in the field of international commercial arbitration which will be discussed hereinafter.

Position of England in relation to the delocalisation theory

The theory of a transnational curial law and the possibility of so-called ‘floating’ arbitrations have received little encouragement in English law, because English law does not accept the transnational arbitral procedural law and of transnational arbitration proceedings. (William W. Park, 1983:148) Applied to procedural law, the transnational theory involves a movement to set apart arbitration proceedings from any control by the curial law of the place of the arbitration. Therefore, the awards that are based on transnational law are generally perceived to be hostile to non-legal standards, namely English annotators have implied scepticism, or even outright condemnation about the enforcement of awards. However, the judgement of the case DST v. RAKOIL can serve as a proof that there was partial recognition by the English Courts of the concept of transnational commercial law. In Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru, Kerr made clear by stating that ‘‘English law does not recognise the concept of a “delocalised” arbitration. It only goes to show that every arbitration must have a “seat” or locus arbitri or forum which subjects its procedural rules to the

municipal law which is there in force''. Thus, recent English case law proposes a trend toward judicial respect for the independence of the arbitral proceedings. (William W. Park, 1986: 661)

In Minmetals Germany GmbH v Ferco Steel Ltd case, English courts all over again substantiated their adverse relationships towards delocalisation theory. The court dismissed the application following Article V of the New York Convention which applied to the awards. The case of Bank Mellat v. Helliniki Techniki depicts that arbitration proceedings can be conducted in different countries, however because of that reason the arbitral seat should not change in any case. The arbitral seat appears to hold pivotal degree. It "subjects the procedure accepted in the arbitration to the oversight of the national law of that country" It can be derived that England mostly endorses and conforms to the territorial approach or seat theory.

However, Aramco and Texaco were the very first cases where arbitral proceedings were detached from the law of the situs. They were in complete opposition with territorial approach. It is a mere proof that delocalisation theory is applicable to States as well as to private parties in arbitral proceedings. Alternatively, in Apis AS v. Fantazia KeresKedelmi KFT case, the court proved conclusively that an award that had been set aside in the country of origin is not a bar to enforce it abroad. Judge Jack in that case stated that 'Slovakian courts should decide whether to enforce or refuse enforcement of an award vacated at the seat of arbitration'. (Herbert Kronke, Patricia Nacimento, Dirk Otto, Nicola Christine Port, 2010:325; Giulia Carbone, 2012:220) It was the partial acknowledgement and recognition of existence of delocalisation theory by English courts. This judgement gives possible and eventual likelihood in acceptance and approval of this theory in implementation and preservation of uniform awards by English common law system.

Another case, where English courts gave effect to annulled award by enforcing it, is Yukos case. In a Russian arbitration, Yukos Capital v Rosneft, Yukos was a successor. Those arbitration proceedings were held in Russia under the rules of the International Commercial Arbitration Court at the Chamber of Trade and Industry of the Russia. The tribunal in a sequences of awards held in favour of Yukos but the awards were hereinafter set aside by the Russian Arbitrazh Courts, in a series of annulment decisions on the basis of grounds in the UNCITRAL Model Law: breach of the equal treatment right, the concerted rules of procedure or the occurrence of absence of impartiality and independence of the arbitrators. In 2009, Yukos applied for enforcement proceedings in the Netherlands and the Amsterdam Court of Appeal determined that the annulment decisions should not be recognised, the award was enforceable and the sums were paid. The Amsterdam Court of Appeal refused to recognise the annulment on the basis that the decision of the court was "partial and dependent" and the Dutch court was clearly impacted by evidence and obviousness about the Russian state's campaign against Yukos. This therefore adds a discretionary element to article V (1) (e) or a public policy ground under article V (2) (b). The Cour de Cassation denied an appeal. It is explicitly seen that Dutch courts enforced an award set aside in Russian Federation. In 2011, Engish courts re-examined this case, subsequently the award was rendered in favour of Yukos. The court upheld Amsterdam court's decision that Rosneft was issue estopped from negating that the annulment decisions were the outcome of a partial and dependent judicial process. It can be seen from the abovementioned case that English courts enforced an award set aside in the country of origin. It is yet other evidence by which we can determine that delocalisation theory is inherent in modern dynamic international commercial arbitration.

Some scholars are in favour of such position, namely, the position of Dutch courts – enforcing vacated awards, whereas others argue that the vacated awards cannot be enforced elsewhere insofar as they have no existence after annulment. According to the view of Park, enforcement of an award set aside in its country of origin would seem appropriate only where the local judiciary that annulled the award is corrupt, or where the award was set aside for reasons so peculiar to the municipal law of the place of the arbitration that non-recognition would defeat the objectives of the New York Convention. For instance, in Ciments Francais v OAO Sibirskiy Tsement, the Court of Cassation held that the recognition and enforcement of an arbitral award, in the event when there exists a judgement about the annulment of award on basis of which the award was rendered, would be in contravention with the public policy of the Russian Federation pursuant to the Arbitrazh Procedure Code of the Russian Federation. In 2011, Russian Federal Arbitrazh Court examined an application to enforce an award annulled in Turkey – it was ended unsuccessfully; the court refused to recognise the award which was set aside in the country of origin.

Nowadays, delocalisation of court control is a matter of choice to the parties, but legal delocalisation of the procedure is not yet feasible in English

jurisdiction. Because where an award has been set aside by a court in the place of the seat of the arbitration, an English court will usually refuse to enforce the award. The attitude of France towards delocalised process is precisely the opposite. (Pierre Mayer, 1995:37)

France's attitude in respect with delocalised arbitration

Some countries such as France, Belgium, Netherlands and Switzerland have gone a step further and adopted international public policy which gave rise to the gradual adoption of delocalisation theory. Although a signatory of the New York Convention, France does not comply with the Convention, when it comes to enforcing foreign arbitral awards, but its local standard for enforcement, which it regards more expedient to the enforcement of awards than the Convention. In contrast, a delocalized arbitration undertaken in England will be respected by the court under section 46 of the 1996 Act which states that "arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties."

France is the most common jurisdiction with the most creative and probing contemporary experimentation, mostly chosen by parties to settle their dispute which is also popular with its wide acceptance and recognition of the phenomenon of delocalisation theory. Consequently, French judicial practice promotes the eradication of national restrictions on the international arbitration process. There is a total liberty not found in most countries relating to the selection of procedural or substantive rules. With regard to procedural law, one can totally escape the effect of any national law, provided there is abidance by the requirements of international public order. (Pierre Bellet, 1991: 26)

As early as 1981, France enacted a Decree, Titles V and VI (Arts 1492 to 1507), concerning with the recognition and enforcement of arbitral awards and awards rendered in international arbitration in France. The soul and spirit of the delocalisation theory can be found in Article 1502 of the French New Code of Civil Procedure 1981 (NCCP) which reads:

1. If the arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired agreement;

2. If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;

3. If the arbitrator decided in a manner incompatible with the mission conferred upon him;

4. Whenever due process has not been respected;

5. If the recognition or enforcement is contrary to international public policy.

In the light of these facts, the extreme delocalization of French law is evident which ensures the judiciary with only very narrow bases for vacating an award by ignoring Article V (1) e of New York Convention. (Theodore C. Theofrastous, 1999:467)

One of the substantial complications with the courts' supervision is that their assistance must not be transmuted into control of the arbitrators throughout the proceedings – gratefully, French judges have served as role models in this regard. However, one of the weakest sides of French position regarding to delocalised arbitration is that they argue that 'international arbitral awards are independent from all States, thus each state decides on the award's enforceability in its territory'. Regarding to this point, Mayer asserts that if that position were accepted by all other countries, it would be impossible to have an award set aside anywhere. Appositely, Berg depcts the French legal system of enforcing annulled awards as the granting of „asylum" status to annulled awards and caustically ridiculed in a following way 'if an award is set aside in the country of origin, a party can always try his luck in France'. It is yet another ineffectual opinion of opponents of delocalisation theory which did not affect the application of delocalisation theory.

It can be illustrated better phenomenon and victorious triumph of delocalisation theory in recent cases such as Norsolor, SEEE Arbitration, General National Maritime Transport Company v. Gotaverken Arendal A.B., Hilmariton and etc. which present that a foreign award might be enforced even though the award was detached from the country of origin by the application of New York Convention. (Hong – lin Yu, 1999:196; Jay R. Sever, 1990-91:1690)

They are the most explicit and evident proofs of its feasibility and viability in every country which is against and misguides this theory.

The Paris Court of Appeal in Bargues Agro Industrie case precisely demonstrated the French approach towards delocalised arbitration in the form of statement the following:

'*An award is not integrated into the legal order of the State of the seat with the consequence that ita possible setting aside by the courts of the seat does not affect its existence by precluding its recognition and enforcement in other national legal orders*'. (Emmanuel Gaillard, 2010:139) In one of the cases examined by the Court of Appeal of Paris in 1975, there was a proposition about the issue which stated that the rules that apply to international commercial arbitration need not be integrated into any national

law. For instance, in the Polish Ocean Lines case, the award set aside in Poland was enforced in France because the Cour de Cassation found that it would permit leave to enforce on the basis that the revocation was taken on the ground that is not provided for under French law. In the Saint-Gobain v. Fertilizer Co. of India case, The Cour d'appel de Paris affirmed the decision of the President of the Tribunal de Grande Instance de Paris upheld the enforcement order. It discarded all of the allegations raised by Saint-Gobain based on the predicated violation of due process and public policy. Moreover, Société S.A. Lesbats et Fils v Volker le Docteur Grub case is another obvious illustration where the Cour d'appel de Paris held that the setting aside of the award in the country of origin is not a ground for refusing enforcement. Striking balance between the objectives of arbitral autonomy and judicial scrutiny of the fundamental procedural integrity of arbitration, French arbitration law permits courts to set aside. It follows that French courts recognise that public policy requirements may be of a procedural nature and traditionally accept that the lack of impartiality of one of the arbitrators sitting in parallel arbitral proceedings should constitute grounds to refuse recognition of an arbitral award which can be seen in some cases.

In Norsolor case, the Court found that Article V (1) e is just a minimum standard of preventing enforcement and recognition of award in France, under the French Arbitration law, of an award which had been set aside at the seat of the arbitration. Therefore the Court held that, Article VII of New York Convention authorises to enforce the award notwithstanding annulment in the country of origin. When the judge pointed that the validity of the choice of the new lex mercatoria as the substantive law of the contract was dubious, the court of Appeal in Vienna annulled an award. Hereinafter, inquiry to enforce the award and appeals against the decision of Court of Appeal of Austria were lodged to French and Austrian courts separately. The tribunal de grande instance of Paris granted leave to enforce the award while the appeal was still under consideration in the Supreme Court of Austria by stating that "it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legal system, be it Turkish or French, and to apply the international lex mercatoria." However, this judgment was disproved by the Paris Cour d'appel on the ground of Article V (1) (e) of the Convention. Finally, the Cour de Cassation held that 'the judge cannot refuse enforcement while his national law empowers it'. (Eric Loquin, 2003:754)

Another case which can be exemplified as the tremendous victory of delocalisation theory and the enforceability of awards in the other jurisdiction which were annulled at the place of arbitration is 'Hilmarton saga' case. Hilmarton contracted with OTV to procure a public contract for OTV in Algeria. The contract governed by Swiss law, provided for arbitration in Switzerland under the rules of the ICC. The award was in favour of Hilmarton, despite OTV's assertion about bribery and corruption. The tribunal held that although Algerian law had been infringed, there was no evidence of bribery or corruption and public policy have not been violated. The award rejecting the claim was subsequently set aside in Switzerland, but nevertheless granted recognition and enforcement in France. A Geneva cantonal court annulled an ICC award in which the arbitrator refused a claim for consulting services emanating out of a contract to be performed in Algeria. The arbitrator mistakenly believed that the illegality under Algerian law made the contract null and void as against Swiss public policy. In the course, Hilmarton sought enforcement of the award in the UK, whereas OTV resisted enforcement on a basis that the contract was illegal in its place of performance. The High Court of England held that there were no infringements and award was not unenforceable for public policy reasons – it did not violate neither the provisions of NYC nor the English public policy.

Again, a judgment in 1980 handed down by French Court of Appeal in Gotaverken Arendal produced a „de-localised" arbitral award. The detached nature of arbitral award and entirely proceedings can be seen in the Götaverken case where the Cour d'appel de Paris rejected the guiding rule of the lex loci arbitri promptly. The facts of the case were that the Libyan General Maritime Transport Co contracted with Götaverken for three oil tankers. At the time of the award, the arbitration clause provided that arbitration will take place in Paris under the Arbitration of the ICC in force. The Libyan GMT refused to pay to Götaverken, claiming that there were breaches of the specification. The arbitral tribunal awarded in favour of Götaverken. The Court applied Art. II of the ICC Rules rigorously: that rule excludes the application of any complementary national procedural law. Afterwards, Libyan GMT wanted to annul the arbitral award before the Cour d'appel of Paris which refused to set aside because of that the award was not French, but an 'international' award and therefore it had no jurisdiction to vacate the award. The arbitral award was enforced subsequently in success in Sweden. W. Park rightly and fairly mentioned regarding to the Götaverken

case that an international arbitration, rather than being "detached from its country of origin," receives substantially greater autonomy, and is subject to fewer constraints, than a domestic arbitration. (William W Park, 1983:26; Jp Van Niekerk, 1990: 148)

PT Putrabali Adyamulia v Rena Holding, the French courts enforced an award set aside in England. It is appropriate to provide some facts of this case in order to understand in depth the applicability of Article VII of New York Convention in practice. The Indonesian company Putrabali sold goods to a French company Rena. Hereafter, the goods were lost during shipment. The arbitral proceedings were commenced in London, where the arbitral tribunal held that Rena did not have to pay to Putrabali for lost goods. The appeal of Putrabali ended with the decision that the High Court partially annulled the award and held that Rena's failure to pay the price constituted a breach of contract. The case was lodged to the arbitral tribunal again which emanated the second award. The second award was in favour of Putrabali ordering Rena to pay the price of goods. Rena applied to the French High Court for the recognition and enforcement of the First Award in France and Putrabali applied for the recognition and enforcement of the Second Award in France where both applications were fortunate. However, the Court of Appeal of Paris upheld the first award and annulled the second award. Putrabali appealed both decisions before the Cour de cassation. Thereby, the Cour de cassation relied on Art.VII of the New York Convention which effectively acknowledges that there may be more favourable provisions under which an award may be recognised and enforced. The Cour de cassation held that: (Per Runeland, Gordon Blanke, 2009: 568)

"An international award, which is not integrated into the legal system of any State, is an international judicial decision whose regularity is examined in light of the applicable rules in the country in which its recognition and enforcement are requested. In accordance with Article VII of the New York Convention, Rena was allowed to present in France the award rendered in London on 10 April 2001 in accordance with the arbitration clause and the IGPA Rules, and had good reason to rely on French law provisions on international arbitration, which do not envisage the setting aside of the award in its country of origin as a ground for refusing the recognition and enforcement and the award rendered abroad." The question is whether or not the decision annulling an award at the place of the seat should bind other jurisdictions. The Cour de cassation confirmed that such a decision should only be binding at the seat of the arbitration. (Sir Vivian Ramsey, 2012:373) It is yet more proof that manifest the truth of a statement about delocalised system of arbitration.

The next successful case was Ministry of Public Works v. Société Bec Frères case where the enforcement based on 'mfr' provision implemented. Despite the declaration of the Tunis Court of First Instance that the arbitration agreement null and void, the arbitral tribunal rendered the award. Consequently, the request for enforcement was granted in France on the basis of the more-favourable-right provision – Article VII (1) of the NYC. French court found that 'the court may not refuse to grant exequatur when its national law permits it'.

Chromalloy case provides that the award was enforced in United States and in France which was rendered in Egypt, even though it was set aside in the Court of Appeal of Cairo. The dispute relating to the procurement of a military equipment contract between Egypt and a US firm was considered by a tribunal in Cairo in 1994. Decisions like Chromalloy do not violate the New York Convention 1958 – the fact is that courts cannot violate the Convention by enforcing a foreign award. Rather, a violation would occur if a court of a State bound by the Convention were to refuse enforcement in the absence of one of the limited exceptions defined in Article V. However, Albert Jan van den Berg argued against the statement that asserts 'there was a policy in favour of reviving annulled awards in Chromalloy case' by providing his counterargument. Questioning whether 'such policy is tantamount to the policy of refusing enforcement of foreign judgements', he declared that if ''U.S. public policy could be used in that sense, the setting aside of any arbitral awards in the country of origin as a ground for refusal of enforcement under Article V (1) (e) of the Convention would become a dead letter in the United States''. Suffice it to say that the domestic courts of law assiduously avoided reviewing arbitration awards. (Leon E Trakman, 2008:304) It is yet another opinion of the opponent of delocalisation theory which has critique point of view regarding to Chromalloy case.

Switzerland's standpoint about delocalisation process

Switzerland has an outstanding reputation in the field of international commercial arbitration insofar as it is one of the prominent jurisdictions where the concept and nature of delocalisation can be best attained. Lots of people from all over the world choose Switzerland as the seat of their arbitral process be-

cause of its neutrality and long arbitration history. The Swiss Federal Statute on private international law permits application of either cantonal or federal arbitration procedure. Article 176, Chapter 12 of the Swiss Private International Law Statute (PILS) states as follows:

'The provisions apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland'. Furthermore, Swiss law represents that "if both parties are not domiciled, do not have their usual place of residence and any place of business in Switzerland, they can, either by express allegation in the arbitration agreement itself or by discrete agreement, exclude any rights of appeal against the award of the arbitral tribunal". It is apparent that Court review may be eliminated by an explicit agreement under article 192 of the code, only if no party is a Swiss resident or has a permanent connection with Switzerland. In these abovementioned bulks of provisions, we can be aware of the fact that delocalised arbitration is accepted and easily attempted in practical terms. For instance, in Westland Helicopters saga – this case accentuates on the importance of 'transnational public policy'. The Federal Tribunal held that the reconsideration of awards in Switzerland were to be based on *''transnational or universal public policy including 'fundamental principles of law which are to be conformed to irrespective of the nexus between the dispute and a given country'.''*

Undoubtedly Swiss case law does not exclude that awards rendered in Switzerland would not be enforced in certain countries – thus it depends on the parties to scale the risk of the probable lack of recognition of the award. In Denysiana SA v Jassica SA case, Jassaica sought to enforce the award in Switzerland rendered in favour of him in France. The Tribunal Fédéral confirmed the judgement of the Cour de Justice de Genève about enforcement of an award in Jassaica's favour on a basis of Art. V(1) e and Art. VII (1) NYC. The Repubblica e Cantone Ticino case reflects the apparent application of Articles V (1) e and VII (1) of New York Convention. Based on Article VII (1), the Tribunale d'Appello held that X could reliance in the provisions of the NYC, which were less restrictive than the Convention between Switzerland and Italy concerning the recognition and enforcement of foreign awards regarding the documents required to be provided by a party seeking recognition and enforcement insofar as to the 'more favourable right' provision.

The SEEE arbitration involved a dispute emerging from a railway construction project in the former Yugoslavia between Yugoslavia and a French company, later superseded by SEEE. To the claim of SEEE that they did not obtain total payment, an arbitral tribunal consisted of two arbitrators acted as amiable compositeurs and rendered an award in favour of the SEEE in Lausanne in 1956 and ordered Yugoslavia to pay SEEE. Yugoslavia tried to set aside this award in the cantonal Court of Appeal in Vaud, subsequently the Swiss court waived to hear the case. First enforcement attempt of an award in favour of SEEE ended with failure. Despite the fact that the award was detached from its country of origin, SEEE made another endeavour to enforce this award in the Cour d'appel in Rouen which became successful. The court accepted the award despite its absence of nexus with the place of the arbitration. The Cour d'appel in Rouen held:

– That this judgement only set forth that the award escapes the judicial sovereign of Vaud;

– that the law of the place of arbitration does not permanently and inevitably govern the arbitral process;

– that the 'procedural law' that governs the arbitration may pari passu be another national law;

– That in this case the arbitration clause excludes the application of national laws of procedure since it designates its own procedure.

Finally, the award was enforced in France by the application of the NYC. This case is regarded as a victory for the delocalisation theory since it illustrated that a foreign award might be enforced even though this award was detached from its country of origin.

Conclusion

Strengths

Clearly national legal systems incrementally appear to recognise and admit the need for uniformity in the course of operation of transnational commercial arbitration. Suffice it to say that in the world of globalization, phenomenon of delocalized arbitration seems like a very expedient and attractive solution. (Dejan Janićijević, 2005) Undoubtedly, it must be noted that the adoption of delocalisation by all countries would be more contributory to the goal of unification of arbitral procedural law, as the scope for the intrusion and pervasion of peculiar domestic laws would be decreased. Possibly, the time is ripe for arbitrators in international commercial arbitrations to "throw off the shackles of private interna-

tional law and to eschew dependence on any particular national law".

Weaknesses

Park argues that delocalized procedure provides a means of escaping from the "hometown justice" of the other party's judicial system. Moreover, one explicit weakness of delocalisation theory is that numerous scholars do not believe in a body of uncodified international commercial law as an independent legal norm 'floating in the transnational firmament'. However, in my personal opinion delocalisation theory is prolific and efficient conception which should necessarily penetrate or permeate into English common law system. The time may not be too far afield when one will be able to acknowledge of a single law of international commercial arbitration. Niekerk believes that there seems little possibility of the seat theory being unseated in English law.

Recommendations

The challenge and the enforcement of an award are of central concern for the establishment of a uniform model norm of enforcement of awards by application of delocalisation theory in practical terms. According to the investigation of scholars and academics concerning viability of delocalisation theory, the following recommendations may assist with the establishment of uniform enforceable awards by utilization of delocalised arbitration universally, especially in England:

1) An attractive way to achieve a true internationalisation of the international commercial arbitration would be for other national legal systems to follow the French example. It is clear that French approach towards delocalisation theory is that French civil law system is entirely recognizes and admits the existence of the theory by applying it in practice in resolving commercial disputes;

2) Having shown in the afore research increasing acceptance and growing application of the delocalised arbitration in enforcing awards by most European countries, delocalisation theory is gaining universal acknowledgement gradually. Therefore, in my individual opinion England should reconsider the issue regarding to the viability of delocalisation and should take further steps to application in practical terms, as it affect the uniformity of awards in enforcing them. It can be obviously noticed the prominent benefits for England, which still do not admit delocalised awards, rather than harms.

To conclude, according to the abovementioned statistics, statements and opinions, the advantages of delocalisation theory outweigh the disadvantages. Thus, in the extraordinary era of internationalisation of international commercial arbitration and harmonisation of transnational rules – the application of delocalised approach universally seems viable, essential and significant in proper preservation of uniformity of awards everywhere.

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