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Legitimacy and Legality within the Seat and Delocalisation Theory of International Commercial Arbitration

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ABSTRACT

Within the world of international commercial arbitration, two opposite views consider the arbitration procedure differently. The seat theory, also known as jurisdictional theory, asserts that the arbitration must be supervised by a court of law to sustain the validity of the arbitration agreement and the final award. On the contrary, the delocalisation theory alleges that the arbitration proceedings should not be anchored to the legal system where the award has been issued. Proponents of this theory focus on the party autonomy principle stating that parties have chosen the seat due to its neutrality and are not subject to its legal system. As a result, several scholars have debated which theory is appropriate to rule the international arbitration practice. In that respect, this article will support the seat theory and the importance of the lex arbitri within the arbitration procedure. Nevertheless, a potential problem of the seat theory is that it might allow excessive court intervention, thus, undermining the efficiency of arbitration. Greenberg and Weeramantry agree that the jurisdictional view is the more appropriate, albeit a more diluted approach is the best solution. This article acknowledges that the legitimacy of the arbitration is conferred by the party autonomy of the disputants who have submitted their controversy to arbitration. In terms of legality, the article asserts that the court's supervision and intervention are imperative to support the arbitration procedure and its award. Such intervention must not be seen as an intrusive action but rather a supportive tool for the parties.

Keywords: lex arbitri, seat theory, delocalisation theory, legitimacy, legality

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I. INTRODUCTION

This article will first outline the fundamental principles of arbitration including a brief definition of the lex arbitri, explore why the lex arbitri is important, and the significant power of the national courts. Following that, the essay will highlight the two different international arbitration perspectives, the traditional view and the delocalised view. The analysis will focus on illustrating the seat theory and its approach under the common law perspective. Thereupon, the essay will elucidate the wording of the New York Convention; particular importance will be given to articles V and VII which have been the subject of much debate among scholars due to the facultative wording of the provisions. In the second part of this article, the paper will explain the delocalisation theory and its foundations, such as the party autonomy principle and the fact that an award should not be anchored to the lex arbitri of the country of origin. The paper will take the French system as an example of jurisdiction that applies delocalisation concepts. Afterwards, the article will discuss the judicial intervention of the courts and its effect on arbitration proceedings. To conclude, this paper will criticise the pure delocalised view by introducing a possible hybrid approach. Moreover, the essay will discuss the statement proposed by Greenberg and Weeramantry, which states that the legitimacy of the arbitration is conferred by the lex arbitri. Thus, this essay proposes that the legitimacy aspect of the arbitration agreement is conferred by the autonomy of the parties; nevertheless, the supervision and intervention of the courts are necessary to uphold the legitimacy and legality of the arbitration procedure.

II. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL ARBITRATION

When two contracting parties draft a commercial contract, they include an arbitration clause where they autonomously agree to refer their eventual disputes to an arbitral tribunal. The consent given by the parties to the arbitration agreement is of utmost importance in the context of international arbitration.[1] The arbitration procedure depicts the intention of both contracting parties to arbitrate; indeed, such intention is included in the 'party autonomy' principle.[2] The arbitration clause stipulates, inter alia, the place of the arbitration, the substantive law

1 M Dickson, 'Party Autonomy and Justice in International Commercial Arbitration' (2018) 60(1) International Journal of Law and Management 114.

2 C Lau and C Horlach, 'Party Autonomy– The Turning Point?' (2010) 4(1) Dispute Resolution International 121; S Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6 Journal of Sustainable Development Law and Policy 222.

governing the contract, and the applicable law governing the arbitration clause (hereinafter lex arbitri).[3] Indeed, arbitration is a convoluted synergy of laws; thus, it is feasible to have different laws governing the dispute.

While the lex arbitri is the law governing the arbitration agreement, the dispute itself may be judged on a different law, sometimes referred to as the 'substantive law' of the dispute. Indeed, such distinction of laws is possible under the principle of separability which provides that an arbitration clause is separate and distinct from the main contract.[4] This principle is further reflected in the idea that even where the main contract containing the arbitration clause is terminated or invalid, the arbitration clause itself is deemed to survive.[5]

A. WHY IS THE LEX ARBITRI IMPORTANT?

The lex arbitri plays an essential role in the context of international arbitration. For instance, it defines the arbitration agreement and how it should be expressed i.e., writing. It also specifies which matters can be settled by arbitration, i.e., arbitrability of the dispute. Indeed, the concept of arbitrability bestows powers to the arbitrators to deal only with issues circumscribed by the law governing the arbitration agreement. This principle is paramount since some issues affecting public policy or third parties' rights cannot be addressed to arbitration.[6] Nevertheless, if a particular matter is not arbitrable in one country due to the infringement of national public policy, it could be arbitrable in another jurisdiction whereby the dispute does not infringe on public policy concerns. The lex arbitri covers a wide range of aspects of the arbitration procedure such as the constitution of the arbitral tribunal, the procedure to nominate arbitrators, and the concession of interim measures of protection such as anti-suit injunctions to protect the arbitral proceedings.[7] More importantly, it inspects the validity and finality of the award provided by the arbitrators.[8]

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3 N Blackaby and C Partasides QC, *Redfern and Hunter on International Arbitration* (6th edn, 2015) 71.

4 *Fiona Trust and Holding Corporation and ors v Privalov and ors* [2007] EWCA Civ 20, [2007] 1 ALL ER (Comm) 891, [2007] Bus LR 686, [2007] 2 Lloyd's Rep, [2007] ALL ER (D) 169 (Jan); A Mustafayeva, 'Doctrine of Separability in International Commercial Arbitration' (2015) 1 Baku State University Law Review 93.

5 Arbitration Act 1996, section 7; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 WLR 42, [1993] 3 ALL ER 897, [1993] 1 Lloyd's Rep 455, [1993] 1 WLUK 964. See also, *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm), [2013] 2 ALL ER (Comm) 463, [2013] 2 Lloyd's Rep 61, [2013] 5 WLUK 30, [2013] 1 CLC 906.

6 *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 at 40, [2012] Ch 333, [2012] 2 WLR 1008, [2012] 1 ALL ER 414, [2012] 1 ALL ER (Comm) 1148, [2012] Bus LR 606, [2011] 7 WLUK 630, [2011] BCC 910, [2012] 1 BCLC 335, [2012] 1 CLC 850, [2011] Arb LR 22, [2012] CLY 517.

7 Arbitration Act 1996, section 15-29.

8 ibid, section 46–58.

In the case of *Paul Smith Ltd*,[9] Steyn J asserted that '[t]he law governing the arbitration [lex arbitri] comprises the rules governing interim measures, the rules empowering the exercise by the Court of supportive measures to assist an arbitration […] and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations.'[10] More importantly, the lex arbitri is characterised by mandatory rules that apply directly to the arbitration procedure; hence, the lex arbitri inspects the proceedings and ensures that it complies with certain legal requirements in order to be admissible for enforcement.[11]

III. SEAT THEORY – JURISDICTIONAL PERSPECTIVE

The seat theory derives its principles from the jurisdictional perspective of arbitration, which asserts that the supervision of the national law is a fundamental aspect of the legitimacy of the arbitration procedure. The jurisdictional view declares that the validity of the arbitration agreements and its procedure must be supervised by the domestic laws; therefore, the seat of the arbitration bestows the validity of the arbitral award.[12] The ratio is that the lex arbitri ensures the legality and legitimacy of the arbitration procedure and its resulting award.

Advocates of the jurisdictional view, such as Francis Mann supported the importance of the lex arbitri in the arbitration proceedings.[13] He proposed that '[i]n the legal sense no international arbitration exist[s]'[14] and that there is no legal system which would allow individuals '[…] to act outside the confines of a system of municipal law […].'[15] Indeed, he believed that '[…] the idea of the autonomy of the parties exists only by virtue of a given system of municipal law […].'[16]

Furthermore, Mann argued that, since the procedural law of the country supervises the arbitral proceedings, '[…] every arbitration is a national arbitration, that is to say, subject to a specific system of national law.'[17] It can be noticed the insistent focus on the municipal law (lex arbitri) of the country. Other scholars such as Luzzatto have also made clear their stance in terms of the lex arbitri and the arbitration proceedings; indeed, he stated that the international commercial arbitration practice is capable of performing by virtue of the legal system of the

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9 *Paul Smith Ltd v He&S International Holding Inc* [1991] 2 Lloyd's Rep 127.
10 ibid 130.
11 Steyn J, Towards a New English Arbitration Act (1991) 7 Arbitration International (No.1) 17-26.
12 Yu Hong-Lin, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemporary Asia Arbitration Journal 255, 258.
13 FA Mann, '*The UNCITRAL Model Law – Lex Facit Arbitrum*' (1986) 2(3) Arbitration International 241.
14 ibid 245.
15 ibid.
16 ibid.
17 ibid.

seat.[18] Luzzatto has declared that '[…] international commercial arbitration cannot exist as a legal institution truly international in character [and] is subject to alterations […] as a result of the operation of municipal principles […].'[19]

However, the seat selection is of utmost importance for the seat theory since it is an expression of the parties' intention to be subject to that situs and its lex arbitri. Saville LJ stated that '[b]y choosing a country in which to arbitrate the parties have, ex hypothesi, created a close connection between the arbitration and that country and it is reasonable to assume from their choice that they have attached some importance to the relevant laws of that country […].'[20] As such, in the United Kingdom, the courts have been prone to support the parties' choice of law, and nonetheless, in the absence of a clear expression of the lex arbitri, the court will clarify the parties' intention.

A. SEAT THEORY – COMMON LAW PERSPECTIVE

The approach adopted by English courts has always been characterised by their pro-arbitration stance and supervisory role. Indeed, judges have been supportive of the seat theory in a wide range of cases. For instance, in the case of *Naviera Amazonia Peruana,*[21] the court provided a coherent analysis of the choice of the seat and whether the lex arbitri was English or Peruvian. In particular, Kerr LJ claimed 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.'[22]

Such a stance has been confirmed in the modern case of *Enka Inssat Ve*,[23] which established that in the absence of an express choice of law, the arbitration agreement would be governed by the law which has the closest connection to it.[24]Furthermore, it was concluded that English courts will always have jurisdiction to intervene in the proceedings and grant anti-suit injunctions notwithstanding the interference of the law of another country. Popplewell LJ

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18 R Luzzatto, 'International Commercial Arbitration and the Municipal Law of States' in Collected Courses of the Hague Academy of International Commercial Law (1977).

19 ibid 50.

20 *Union of India Ltd v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48, 50.

21 *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116. See also, M Parish, 'The proper law of an arbitration agreement' (1986) 52(1) Chartered Institute of Arbitrators.

22 *Naviera Amazonica Peruana* (n.23) 4. See also, *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48; cf *Star Shipping AS v China National Foreign Trade Transportation Corp* [1993] 2 Lloyd's Rep 445.

23 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117, [2020] Bus LR 2242, [2020] 2 Lloyd's Rep 449, [2020] 10 WLUK 70. See also, F De Ly, 'The Place of Arbitration in the Conflict of Laws in International Commercial Arbitration: An Exercise in Arbitration Planning' (1992) 12(1) Northwestern Journal of International Law & Business 48.

24 *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2013] 1 WLR 102, [2012] 2 ALL ER (Comm) 795.

asserted that the intervention of the curial court granting anti-suit injunctions is an essential characteristic of the court to safeguard the integrity of the agreement to arbitrate.[25] Indeed, his Lordship declared that the anti-suit injunction would bring into effect '[…] the parties' legitimate expectations of certainty and business efficiency arising from their agreement to arbitrate and choice of seat are to be given effect.'[26]

In *PT Garuda Indonesia*,[27] a dispute arose between two contracting parties concerning a lease agreement being held in Jakarta. Nevertheless, the chairman of the tribunal held that for the purposes of the forum non conveniens rule, Singapore shall be the proper forum for hearing the arbitration. The Court of Appeal of Singapore held that notwithstanding the hearing was being entertained in a different place, the seat of the arbitration had not been replaced. In particular, Chao Hick Tin JA declared that '[t]he significance of the place of arbitration lies in the fact that for legal reasons the arbitration is to be regarded as situated in that state or territory […] whose laws will govern the arbitral process.'[28] For this reason, the seat theory is also named as the jurisdictional view since it is the legal concept behind the chosen place that matters;[29] hence, the seat will not be jeopardised by the peripatetic character of proceedings.[30] The nature of the arbitration agreement is purely procedural and not substantive; as a result, it derives its validity from procedural law which is the law of the seat of the arbitration.[31]

IV. International Convention

The importance of the seat is illustrated in several international conventions such as the 1923 Geneva Protocol and the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958). Indeed, the former states that '[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'[32] The New York Convention (NYC) supports the fact that the seat is an important aspect when a party desires to enforce its award. Indeed, Article V of the Convention stipulates the grounds under which a requesting party could be denied recognition and enforcement. An award might

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25 *Enka* (n.24) para 55.

26 ibid. See also, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2014] 1 ALL ER (Comm) 1, [2013] UKSC 35.

27 *PT Garuda Indonesia v Birgen Air* [2002] 5 LRC 560, [2002] 1 SLR 393 (CA), [2001] SGHC 262.

28 ibid 561.

29 *ABB Lummus Global Ltd v Keppel Fels Ltd* (1998) 12 CLN 1, 26.

30 *Himpurna California Energy Ltd v Indonesia* (2000) 15 Mealey's International Arbitration Report 1, A-i.

31 A Tweddale and K Tweeddale, '*Arbitration of Commercial Disputes: International and English Law and Practice*' (OUP 2007) 234.

32 Geneva Protocol 1923, Article 2.

be refused if the law of the country of issuance is satisfied that: the competent arbitral authority has not been composed in conformity with the domestic law;[33] or the award has been suspended or set aside by the same country;[34] or the agreement is invalid under the same domestic law; or one of the parties is under some incapacity.[35] This clearly demonstrates a strong link between the lex arbitri of the place of origin and the country where recognition and enforcement are sought. Indeed, a suspended award in a particular country could negatively compromise the enforceability of the award in another state.

A. FACULTATIVE ASPECT OF THE CONVENTION

Furthermore, it must be stated that refusal is discretional, and it depends on the court where recognition is sought.[36] Article V of the NYC states that '[r]ecognition and enforcement of the award may be refused […].'[37] The use of the word 'may' has led to an extensive debate between proponents of the seat and delocalised perspective.[38] The flexible wording in the article demonstrates that national courts are not obliged to refuse recognition or enforcement of a foreign arbitral award.[39] Further complexities arise if article V is read in conjunction with article VII of the Convention. The latter states that the provisions of the Convention should 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 […].'[40] Therefore, article VII permits a country to enforce an award since parties should not be deprived of their right to have the award enforced; thus, an annulled award is legally enforceable in other jurisdictions.[41]

By virtue of Article VII of the Convention, certain countries have adopted a liberal approach to creating their legislation regarding the enforceability of awards. This stance might increase the problem of forum shopping in the enforcement phase; thus, parties will seek countries with similar attitudes towards annulled arbitral awards.[42] In practice, the winning

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33 New York Convention 1958, Article V(1)(e).
34 ibid Article V(1)(d).
35 ibid Article V(1)(a).
36 R Seyadi, 'Enforcement of arbitral awards annulled by the court of the seat' (2018) 84(2) Arbitration 128.
37 New York Convention, Article V(1).
38 J Hill, 'The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958' (2015) Oxford Journal of Legal Studies 1.
39 U Mayer, 'The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention' (1998) 3 Uniform Law Review 583.
40 New York Convention 1958, Article VII (1).
41 K Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 Texas International Law Journal 43.
42 R Kreindler, 'Arbitral Forum Shopping' in J Lew, B Cremades and others (eds), *Dossiers ICC Insitute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing 2005)

party of an award will seize the assets of the losing party where such assets are located, leading to multiple enforcement proceedings.[43]

V. DELOCALISATION THEORY

The delocalisation theory professes that international arbitration should not be anchored to the legal system where the award was issued, i.e., lex arbitri.[44] Contrary to the jurisdictional perspective, some scholars believe that international arbitration should be free from any municipal law; nevertheless, the only connection should be with the place where enforcement is sought.[45] Therefore, the award is considered 'a-national' and free to float from the national legal system where it was created. Indeed, under of Article VII of the NYC, suspended awards in the country of origin will not be deprived of their right to be enforced in other jurisdictions; hence, they can float and be recognised elsewhere.[46]

Jan Paulssen, an ardent proponent of the delocalisation theory, claimed that '[s]o the question is not so much whether an award may float […] but whether it may also drift, that is to say enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered.'[47]He advocates that if an arbitral award is rendered in a certain country and the courts of such a place have overruled the decision, it might be enforced in a different country nonetheless.[48] He supports this position by stating that many judicial systems are inclined to enforce an award provided that it is satisfied that the award is binding in their national law.[49]

According to Paulssen, instead of having two places of judicial control, such as the lex arbitri and the country of enforcement, only the latter should prevail.[50] Such an approach would not consider the grounds for refusal established in Article V(1)(e) of the NYC, which states that if an award has been suspended in the country of origin, it may be refused enforcement in another jurisdiction. This is possible by virtue of Article VII of the New York Convention, which asserts that an interested party should not be deprived of the right to have its arbitral

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43 L Silberman and M Scherer, 'Forum Shopping and Post-Award Judgments' (2014) 2(1) PKU Transnational Law Review 115.

44 Li, 'The Application of the Delocalisation Theory in Current International Commercial Arbitration' [2011] ICCLR 1.

45 J Paulssen, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32(1) International and Comparative Law Quarterly 53.

46 ibid. See also, Seyadi (n.37).

47 J Paulsson, 'Arbitration Unbound' (1981) 30(2) International and Comparative Law Quarterly 358.

48 ibid 363.

49 ibid.

50 ibid.

award enforced in the country where enforcement is sought.[51] Indeed, several countries follow this type of theory, such as the French and the US system.[52] A pure delocalised system, however, has been proved to be inappropriate in Belgium. The country prevented its national courts to annul an award unless one of the disputants was Belgian. The criticism forced the country to follow the Swiss approach, whereby parties are allowed to exclude judicial supervision if they so agree.[53] Nevertheless, it seems that most foreign disputants do not exclude the intervention of the courts. This demonstrates that parties do prefer to have some supervision of their dispute.[54]

A. DELOCALISATION – PARTY AUTONOMY

The delocalisation theory is characterised by its focus on the party autonomy principle.[55] The theory declares that both parties should have decided voluntarily to be subject to a specific legal system. Therefore, without a clear expression of the legal system in their arbitration agreement, the parties should not be anchored to the place chosen only for its geographical convenience or its neutrality.[56] Indeed, some parties might choose a specific place to have the arbitration proceedings due to the lack of connection of both parties to such a place in order to obtain fairness and equal treatment.

Dumoulin developed the concept of party autonomy, asserting that the principle was the cornerstone of contract law.[57] Therefore, the contracting parties' intention is crucial to determine the law that will govern the contract.[58] The New York Convention seems to endorse the principle of party autonomy in Article V, which states that an award might be refused if '[…] the procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'[59]

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51 New York Convention 1958, Article VII (1).

52 M Barry, 'Enforcing Awards Following a Decision at the Seat: the US or the French Approach' (*Kluwer Arbitration Blog*, 27 November 2014) < http://arbitrationblog.kluwerarbitration.com/2014/11/27/enforcing-awards-following-a-decision-at-the-seat-the-us-or-the-french-approach/> accessed 20 March 2021.

53 J Savage and E Gaillard, '*Fouchard, Gaillard and Goldman on International Commercial Arbitration'* (Kluwer Law 1999) 74.

54 B Leurent, 'Reflections on the International Effectiveness of Arbitration Awards' (1996) 12 Arbitration International 269.

55 C Chatterjee, 'The Reality of the Party Autonomy Rule in International Arbitration' (2003) 20 Journal of International Arbitration 539.

56 H Yntema, 'Autonomy in Choice of Law' (1952) 1(4) The American Journal of Comparative Law 341.

57 E Lorenzen 'Validity and Effects of Contracts in the Conflict of Laws' (1921) 30(6) The Yale Law Journal 565.

58 M Zhang, 'Party Autonomy and Beyond: International Perspective of Contractual Choice of Law' (2006) 20 Emory International Law Review 511.

59 New York Convention 1958, Article V(1)(d).

Several provisions contained in the UNCITRAL Model law enshrine the principle of party autonomy. For instance, article 28(3) states that arbitrators can act ex aequo et bono or as amiable compositeur only if both parties have bestowed them with such powers.[60] Furthermore, article 19 states that 'subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.'[61] Additionally, arbitrators possessed the principle of Kompetenz-Kompetenz, which confers to them the authority to rule on their jurisdiction.[62] Some scholars argued that this power is derived from the arbitration agreement;[63] conversely, others asserted that it derives from domestic law since if the arbitral tribunal regards the agreement void, they do not have to require the court to provide support in such matters.[64]

However, there are certain limitations to the party autonomy principle;[65] for instance, both parties must adhere to certain mandatory provisions stated in the law governing the arbitration agreement.[66] Indeed, Schedule 1 of the English Arbitration Act 1996 enumerates a number of mandatory requirements, such as the immunity of the arbitrator,[67] the stay of legal proceedings,[68] general duties of parties,[69] et cetera.[70]

B. DELOCALISATION – THE FRENCH APPROACH

The French jurisdiction has been favourable to the delocalisation theory to enforce annulled awards and consider the arbitration 'anational'. For instance, in the case of *Société Pabalk Ticaret Limited Sirketi*,[71] the Court of Appeal of Paris stated that pursuant to Article V(1)(e) of the New York Convention, it would refuse recognition and enforcement of an award

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60 UNCITRAL Model Law, Article 28(1).

61 UNCITRAL Model Law, Article 19(1). See also, E Gaillard and J Savage, '*Fouchard, Gaillard, Goldman on International Commercial Arbitration*' (Kluwer Law International 1999) para 1550.

62 UNCITRAL Model Law, Article 16. See also, A Kawharu, 'Arbitral Jurisdiction' (2008) 23 New Zealand Universities Law Review 238.

63 J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arbitration International 179.

64 A Kawharu (n.63) 240.

65 G Cordero, 'International Commercial Arbitration – Party Autonomy and Mandatory Rules' (1999) 68(3) Nordic Journal of International Law 375.

66 V Luke, 'Breaking in the 'unruly horse': the status of mandatory rules of law as a public policy basis for the non-enforcement of arbitral awards' (2011) 18 Australian International Law 155.

67 Arbitration Act 1996, s 29.

68 ibid, ss 9, 10, and 11.

69 ibid, s 40.

70 O Perepelynska, 'Party Autonomy vs. Mandatory Rules in International Arbitration' [2012] Ukrainian Journal of Business Law 38.

71 *Société Pabalk Ticaret Sirketi v Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1884; G Petrochilos, 'Enforcing Awards Annulled in their State of Origin under the New York Convention' (1999) 48(4) International & Comparative Law Quarterly 856. See also, S Gravel and P Peterson, 'French Law and Arbitration Clauses – Distinguishing Scope from Validity: Comment on *ICC Case No. 6519 Final Award*' (1992) 37 McGill Law Journal 510.

since it has been set aside by a competent authority in the country of origin. As a result, the Court of Appeal concluded to deny the enforcement of the award partially. Nevertheless, the Supreme Court of Paris overruled the judgement of the Court of Appeal by asserting that the enforcement of an award is possible if the law of the country where enforcement is sought permits it.[72] Indeed, the Supreme Court stated that the Court of Appeal should have revised the French Civil Code to analyse whether Palbak could enforce the award under French law.

French courts have been reluctant to accept an arbitral procedure attached to the country where the award is rendered. Indeed, despite the situs being chosen for its neutrality, the place of the arbitration is considered irrelevant since it is not an expressed intention of the parties to be subject to it.[73] This approach is illustrated in the case of *Gotaverken Arendal*,[74] where Gotaverken and the Libyan Maritime Transport (LG) entered into a lease agreement regarding the construction of three oil tankers. LG was reluctant to accept the delivery of the tankers due to the alleged breach committed by Gotaverken. Indeed, Gotaverken utilised some components from Israel to construct the tankers, which clearly violated Libyan law. Furthermore, LG argued that the way the tankers were built was not in accordance with the detailed conditions both parties had agreed. The arbitration agreement provided Paris as the place of the arbitration under the ICC rules. However, the tribunal rendered an award in favour of Gotaverken; consequently, LG challenged the award before the Court of Appeal in Paris and argued that French law governed the arbitration agreement; ergo, it had jurisdiction over the dispute. Subsequently, the court dismissed the appeal that the nationality of the award was not French; instead, the arbitral award had an 'international' hallmark.[75] Consequently, Gotaverken went to Sweden to have the award enforced; indeed, it was argued that the court of Sweden was the most appropriate to deal with such a matter. However, by virtue of the New York Convention 1958, the exequatur of the award in the country of origin is not a necessary requirement to enforce it in another State. The conclusion taken by the court is that, firstly, both parties did not have any connection to the French legal system; indeed, both parties had different nationalities. Secondly, the transactions undertaken by both parties did not have any relationship with the French territory; the two contracting parties had chosen Paris as the seat of the arbitration for neutrality purposes and did not consent to be subject to the French legal system.

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72 Société Pabalk (n 72).

73 M Ahmed, 'The influence of the delocalisation and seat theory upon judicial attitudes towards international commercial arbitration' (2011) 77(4) Arbitration 406.

74 *Gotaverken Arendal AB v Libyan General National Maritime Transport Co*, Cour d'Appel de Paris (21 February 1980).

75 M Amed (n 74) 409.

As mentioned at the beginning of the article, the grounds of refusal in the New York Convention are discretional. Legal systems are entitled to shape their criteria in their own manner. French courts do not consider certain awards to have nationality as in the case of Gotaverken; hence, if an award is suspended or set aside in one country, it can still be enforced in France.

In the case of *Hilmarton Ltd v Ommium de Traitement et de Valorisation (OTV)*,[76] the arbitral tribunal found itself favouring OTV and issued an award. Subsequently, Hilmarton challenged the decision before the Swiss courts, which ruled to set aside the award. Nevertheless, OTV enforced the arbitral decision before the French courts despite the Swiss court had set it aside. Indeed, the Cour de Cassation recognised the international aspect of the award and asserted that it would not compromise its enforcement in France despite being challenged in another jurisdiction. The court stated as follows: "the award 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."[77] Likewise, in *PT Putrabali v Rena Holding*,[78] the Cour de Cassation dealt with two awards, with the former being set aside. However, the court, influenced by the *Hilmarton* case, enforced the first award despite being set aside in London.

It is evident how French courts consider foreign arbitral awards as being 'international' and not attached to the legal system where it was issued.[79] Nevertheless, some countries have acknowledged the approach taken by the French system, but do not follow it. For instance, in the case of *Dallah Real Estate*,[80] the UK Supreme Court enlightened the French approach, which believes that the "[…] the arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law."[81] However, Kerr LJ had expressed his reluctance to approve the delocalisation theory in the case of *Bank Mellat*,[82] whereby he declared that "our jurisprudence does not recognise the concept

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76 *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)* [1994] (cour de cassation).

77 ibid. See also, *Omnium de Traitement et de valorisation (OTV) v Hilmarton Ltd* [1999] 2 All ER (Comm) 146.

78 *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* [2007] Rev Arb 507

79 ibid.

80 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2010] 3 WLR 1472, [2011] 1 AC 763, [2011] 1 ALL ER 485; See also, Star Shipping SA v China Foreign Trade Transportation Corp (The Star Texas) [1993] 2 Lloyd's Rep 445.

81 Dallah Real Estate [2010] UKSC 4 [15].

82 *Bank Mellat v Helleniki Techniki SA* [1984] QB 291, [1983] 3 WLR 783, [1983] 3 ALL ER 428, [1983] 6 WLUK 200.

of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law."[83]

C. DELOCALISATION – US APPROACH

The US seems to take a similar stance to the French system. In the case of *Cromalloy*,[84] the US court and the Court of Appeal of Paris enforced a foreign award that was set aside in Egypt. The enforcement in the two jurisdictions was possible since neither the US nor the French system regards the annulment of an arbitral award as a ground to refuse enforcement in their jurisdictions. Indeed, the US and French system consider that if an award is in breach of public policy in a certain state, it might not be contrary to the public policy system in France or the US; thus, enforcement is possible. As mentioned earlier, the interpretation of Article V of the New York Convention is discretional. The US court highlighted that the word 'may' in the article leads to a permissive approach to approve annulled foreign arbitral awards. Furthermore, the court sustains its position by arguing that the wording of Article VII of the Convention allows the State to support the right of the parties to have their awards enforced, despite being challenged in another jurisdiction.[85]

D. CRITICISM OF THE DELOCALISATION THEORY

The delocalisation theory has been criticised as "wholly unrealistic" or "far-fetched reality".[86] International arbitration cannot exist in a legal vacuum whereby there is no control or supervision of the arbitration proceedings.[87] The theory has been considered deceptive and impractical for many scholars; indeed, the theory not only provides uncertainty for both disputants but also unfairness for the losing party. The possibility to enforce an award in another jurisdiction despite being set aside is controversial from a legal perspective and does not respect the finality principle of the award.[88] Indeed, it is evident from the French cases that

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83 ibid 3. See also, *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 ALL ER (Comm) 315, [1999] 1 WLUK 570, [1999] CLC 647; *Whiworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583, [1970] 2 WLR 728, [1970] 1 ALL ER 796; *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224, [1974] 3 WLR 721, [1975] 1 ALL ER 242.

84 *Chromalloy Aeroservices v Arab Republic of Egypt* [1997] 95/23025 Paris Court of Appeal; *Chromalloy Aeroservices v The Arab Republic of Egyp*t 939 F. Supp 907 (DDC 1996).

85 New York Convention 1958, Article VII(1); Chromalloy (n.54) 909.

86 W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 International & Comparative Law Quarterly 21; Li, 'The Application of the Delocalisation Theory in Current International Commercial Arbitration' [2011] ICCLR 1.

87 Tweeddale (n.32) 250.

88 R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17(1) Arbitration International 19, 21.

the issue in dispute reached the highest court; thus, the French system has not promoted the principle of finality in its own jurisdiction. In conjunction with this approach, the losing party of an arbitral award might have to litigate in several jurisdictions where he has assets.[89] Consequently, the arbitration would be costly for a party who has to use its economic sources to finance the litigations in different countries.[90]

The support given to the party autonomy principle in the delocalisation theory is controversial. In the *Chromalloy* case, both parties agreed in their arbitration clause to be subject to Egyptian law and chose Cairo as the seat of the arbitration. As such, Roy Goode argues that '[…] on what basis could the Court of Cassation disregard the express choice of the parties and instead determine that the award was not integrated into the Egyptian legal system?'[91]

VI. JUDICIAL INTERVENTION

Frequently, contracting parties choose the place of the arbitration in a country that is considered 'neutral' and is commonly a place where neither of the disputants has residence or assets. Indeed, Lord Hoffman stated that '[…] the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services, and the unobtrusive effectiveness of the supervisory jurisdiction.'[92] Therefore, the place chosen by the disputants is crucial since it may influence the conduct of the arbitration proceedings. For instance, in circumstances where parties order interim measures of protection or anti-suit injunctions, it is necessary to intervene in order to provide assistance to the arbitration procedure.[93] A legislative illustration of this situation is laid down in Article 9 of the Model Law, which states that '[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'[94]

The supervisory role of the courts has been supportive of respecting the parties' legitimate expectations to arbitrate.[95] For instance, there are several cases concerning petitions to liquidate companies for overdue payments despite having an arbitration agreement

89 ibid.
90 ibid. 35.
91 ibid. 31.
92 *West Tankers v RAS (the Front Comor)* [2007] 1 Lloyd's Rep 391 [12].
93 Fiona (n.5).
94 UNCITRAL Model Law on International Commercial Arbitration, Article 9.
95 J Goldring, 'The Supervisory Jurisdiction of the Courts over Decisions of Law by the Tribunals' (1973) 9(4) Melbourne University Law Review 669.

governing their disputes.[96] Therefore, courts have been willing to dismiss those petitions to enforce the arbitration agreement between the disputants. Indeed, it is evident the proclivity of English courts to strike a balance between the party autonomy principle and judicial interference.[97] Indeed, the latter should not be regarded as intrusive; instead, it has been acknowledged as supportive. For this reason, the lex arbitri is a fundamental aspect of the arbitral proceedings if parties want to have their expectations to be respected.[98]

There are several risks of living in a jurisdiction that permits arbitral awards to be invulnerable from judicial review. Firstly, there might be a collision of opposite decisions concerning the same argument from two different tribunals, as happened in *PT Putrabali*. A further concern might be that, without judicial review, arbitrators might not perform their duty competently. On the other hand, excessive intervention from the courts might induce parties to avail themselves of their right to appeal to a country's judicial hierarchy, compromising the privacy aspect of international arbitration. Indeed, Secomb argues that '[…] if there is an opportunity to challenge an arbitral award, no matter what the nature is, the party would like to take it.'[99] A possible solution has been proposed by article 5 of the UNCITRAL Model Law stating that '[…] no court shall intervene except where so provided in this Law.'[100]

In extraordinary circumstances, English courts have decided obiter dictum the possibility to grant anti-arbitration injunctions. The guidance provided in the case of *Compagnie Nouvelle*,[101] has conferred an illustration whereby courts could grant anti-arbitration injunctions if the court is satisfied that the participation to arbitration would be '[…] oppressive and vexatious […].[102] Those circumstances were re-examined in the modern case of *Sabbagh,*[103] which despite the court did not grant such an injunction, it was agreed that it could be possible for English courts to grant such an injunction '[…] if England is the natural forum for the dispute.'[104] The foregoing does not represent the beginning of anti-arbitration injunctions in England; however, it simply clarifies the supervisory powers of English courts

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96 *Telnic Limited v Knipp Medien Kommunikation GmbH* [2020] ALL ER (D) 164 (Jul), [2020] EWHC 2075 (Ch). See also, *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449; *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics* [2020] HKCFI 311.

97 *West Tankers* (n.11).

98 cf Z Saghir and C Nyombi, 'Delocalisation in international commercial arbitration: a theory in need of practical application' (2016) 27(8) International Company and Commercial Law Review 269.

99 M Secomb, 'Shade of Delocalisation Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' (2000) 17(5) Journal of International Arbitration 129.

100 UNCITRAL Model Law, Article 5.

101 *Compagnie Nouvelle France Navigation SA v Compagnie Navale Afrique du Nord (The Oranie and The Tunisie*) (1966) 1 Lloyd's Rep 477, [1966] 3 WLUK 22.

102 ibid 487.

103 *Sabbagh v Khoury* [2019] EWHC 3004 (Comm), [2020] 1 WLR 187, [2019] 11 WLUK 177.

104 ibid [115].

and the significant influence of the chosen seat. Therefore, this type of intervention is only possible by the law governing the arbitration agreement.

In this sense, it can be argued that if several international jurisdictions allow the intervention of the court, this indicates that the arbitration procedure alone is not an efficient system to ensure that both parties receive a fair proceeding. Comparably, there would be a substantial risk of injustice among disputants in a pure delocalised world, where all sort of court intervention is removed.[105]

VII. HYBRID THEORY

Roy Goode believes that the lex arbitri and the principle of party autonomy do not constitute a dichotomy but rather a spectrum.[106] Nevertheless, it has been argued that a pure delocalisation model does not enhance the legal system, and it would not be possible to exist. A delocalised arbitration could bring concerns about whether a competent and professionally reliable arbitrator had issued an appropriate award.[107] Without the judicial supervision of the country of origin, the legality of an award could be doubted. Indeed, legality stands for 'the fact that something is allowed by the law.' Therefore, the State and its lex arbitri bestow legality to the arbitration procedure and its award. For that reason, a pure delocalisation approach might compromise the legality of the award.

Furthermore, the legitimacy of the arbitration is conferred by the intention of the parties to submit their dispute to arbitrate; therefore, the role of the court is only for supportive measures. As mentioned earlier, the comments of Popplewell LJ in the *Enka* case asserted that the injunction of the court is to support the legitimate procedural expectations; thus, the intervention of the courts does not harm the predictability of the parties that their autonomy will be protected. Therefore, it can be concluded that the party autonomy principle will be safeguarded despite the intervention of the court.

Goode had proposed six feasible models which countries could adopt.[108] Particularly, the second model proposes the right of a sovereign state to rule on matters that occur in its own

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[105] J Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?' (2009) 24(3) American University International Law Review 489.

[106] Roy Goode (n.89) 24.

[107] A Trend, 'Who will rid me of this turbulent arbitrator? Applications to Remove Arbitrators under English Law– Part 2: Procedural Impropriety and Loss of the Right to Object' (*Kluwer Arbitration Blog*, 16th August 2016) < http://arbitrationblog.kluwerarbitration.com/2016/08/16/who-will-rid-me-of-this-turbulent-arbitrator-applications-to-remove-arbitrators-under-english-law-part-2-procedural-impropriety-and-loss-of-the-right-to-object/?print=pdf> accessed 30 March 2021.

[108] Goode (n.89) 24.

country.[109] Nevertheless, Goode states that recognition of such decisions should not be erga omnes, and the foreign court of enforcement should respect the decision of setting aside an award made by the country of origin.[110]

A. GREENBERG – DILUTED VERSION

The utopian approach of the delocalisation theory has influenced the Model law, which prevents the excessive interference of the courts. Despite the Model law being influenced by the theory, there must be jurisdictional supervision of the arbitration procedure. Indeed, the ideological stance of the theory has resulted in a noticeable decrease in the amount of court intervention in several legal systems; nevertheless, to support both disputants, the role of the lex arbitri is of extreme importance.

Greenberg and Weeramantry argued that without the lex arbitri, an arbitration proceeding would not exist legally,[111] otherwise known as the traditional view. Furthermore, they have asserted that every arbitration procedure must be attached to the law of the seat of the arbitration. It follows from this assertion that it is the jurisdiction of the seat that grants legitimacy and legality to the arbitration procedure and the eventual award. However, they concluded that a pure delocalisation theory is impossible to exist; indeed, the need of the law of the seat is a fundamental aspect of the arbitration procedure.[112] Consequently, they asserted that a more diluted version of the traditional view is the most convenient form to supervise arbitration agreements. Furthermore, they argue that despite having a hybrid approach of the theories "[…] there is an essential link to the seat of the arbitration".[113] To conclude, they asserted that the delocalisation perspective of arbitration "[…] is not a phenomenon in its own right, but rather permitted by the state."[114]

VIII. CONCLUSION

The practice of international arbitration has led to two diverse positions regarding its procedure and its consequential award. The two main theories underpinning arbitration are the traditional

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109 ibid.

110 ibid. See also, A van den Berg, 'Residual Discretion and the Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards under the New York Convention of 1958' in K Sood Teo, *Current Issues in International Commercial Arbitration* (University of Singapore, 1997) 335.

111 S Greenberg, Kee and JR Weeramantry, 'International Commercial Arbitration: An Asia-Pacific Perspective' (Cambridge University Press 2011) 66.

112 ibid.

113 ibid para 2.90.

114 ibid.

and delocalised perspective. The former allocates the validity of the arbitration procedure in the seat of the arbitration and recognises the importance of the law governing the arbitration (lex arbitri) as a fundamental aspect of the procedure. On the contrary, the delocalised perspective stipulates that the arbitration proceedings should be detached from the lex arbitri of the country of origin; nevertheless, proponents of such a view claimed that the country of enforcement should be the only jurisdiction to supervise the award resulting from the arbitration procedure.

Furthermore, the delocalised view is founded on the principle of party autonomy; indeed, the theory states that despite both parties having chosen a seat, they have chosen it due to neutrality purposes and not to be subject to the lex arbitri of that country. In that respect, under what circumstances a court would rule that both disputants did not want to be subject to the chosen seat despite having expressly stated it in their arbitration agreement?

From the seat theory perspective, Mann argued that it is inconceivable to believe that a legal system could permit individuals to act outside of the law of that country. He drastically considered all arbitration procedures to be 'national' since they work under the aegis of the law. Luzzatto contributed to this viewpoint by stating that international arbitration cannot exist in an international context since it is continuously subject to municipal law alterations. For that reason, the chosen seat where the arbitration will take place is of utmost importance.

Additionally, the choice of the seat has allowed courts to intervene in the arbitration proceedings in a supportive manner. Indeed, in several cases, the courts have been eager to confer specific measures that protect the legitimacy of the arbitration procedure. For that reason, it is concluded in this paper that the lex arbitri is an essential instrument to enforce the predictability of the arbitration procedure and conserve the autonomy of the parties. Despite the legitimacy of the arbitration procedure being justified by the arbitration agreement, it is supported by the supervision of the courts. It is the latter that confers the legality of the arbitration procedure. Indeed, legality means that the arbitration procedure or award is allowed by the law.

Detaching an arbitration procedure from the lex arbitri is comparable to removing the reasoning from an individual and allowing him to make decisions based solely on his feelings, resulting in dire consequences.