Abstract
The delocalization of international commercial arbitration is an issue that has sparked series of debates for over 3 decades. The basic proposition of the theory is that international commercial arbitration should not be limited by the procedural laws of the state. This line of reasoning has provoked acceptance by the advocates of delocalization on the one hand, and criticism on the other hand, by traditionalist. The local courts in different jurisdictions have tilted more in favour of the law of the Seat of arbitration. This is a result of various factors influencing the court, such as the perceived need to protect the national laws. But if international commercial arbitration results from contractual relationships, parties should be free to decide on the determining laws to the extent of public policy. This is called party autonomy. Party autonomy is a foundational principle of the delocalization theory. It presupposes that since parties are the live-wire of international commercial arbitration, they are at liberty to determine how their dispute is to be resolved provided no legal or public policy issues of the seat of arbitration or place of enforcement of the arbitral award are breached. Critics of the delocalization of international commercial arbitration maintain that the laws of the Seat of arbitration are important to serve as a standard to maintain fairness and equity. However beautiful the arguments of the both schools have been, we have attempted to show that international commercial arbitration will run at its best with the understanding that delocalization of the process is not an end to the law of the Seat of arbitration, but that there should be a peaceful coexistence between the concept of delocalization and the seat theory. The research work adopted doctrinal method using descriptive, analytical and comparative approaches in the analysis of materials relevant to the research work that is perusal of judicial decisions, journals, articles and legal texts by renowned authors. In this work, the author observes that the courts incline more to protecting the local laws, thereby jettisoning delocalization. This should not be the case as in reality; the concept of delocalization is not an alternative to the seat theory. Rather, both concepts should run hand-in-hand to ensure justice in international commercial arbitration.

Keywords: Delocalization, international arbitration, international commercial arbitration, seat theory, lex arbitri, dispute resolution.

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1. Introduction

Delocalization when used in the field of international arbitration denotes a system and structure for resolving conflicts arising from international arbitration, independent of the local legislations binding the seat of arbitration. The

delocalization theory has roots with the law of the merchants- "*Lex Mercatoria*" which comprised of generally accepted trade laws for merchants far back in history.

One of the obvious reasons for the delocalization of international arbitration is because of the different state legislations in independent states. Most of these laws come into being as a result of the peculiar beliefs of the states. Because arbitration as a whole is a form of dispute resolution, it must have a place of arbitration. There is therefore, a need for uniform set of laws independent of the laws of the seat of arbitration to rid every imbalance or likelihood of partiality.

The status quo in reality of delocalization in international commercial arbitration comprising the whole process of commencement of arbitral proceedings, down to enforcement of awards is a result of the healthy interplay between party autonomy and limited intervention of national laws reflected in model arbitration laws. While we recognize the resort to institutional arbitration, our focus here is centralized on adhoc arbitration.

In this article, the author addresses practical issues bordering on the concept of delocalization of international arbitration while analyzing the attitude of the courts in different States.

(e) **The Concept of Delocalized Arbitration**

The concept of delocalized Arbitration also called floating arbitration was propounded by Jan Paulson[549]. It was derived from the concept of party autonomy and the theory that, the parties have the power to stipulate that the law giving binding effect to the proceedings is not the law of the place of arbitration, but the law agreed by the parties as the binding law for that purpose.

The advocates of floating or delocalization theory argue that unless the courts of the place of Arbitration have other basis of jurisdiction over the parties or subsequent matter, the courts have no particular mission to rule on challenges to awards only because they are rendered within their territorial jurisdiction.

The argument of the proponents of the Delocalization theory is that the actual proceedings should be detached from inferences of the local courts. They insist that the local courts should have neither supervising authority over the arbitral proceedings or jurisdiction over the arbitral award. It is in this regard that they view the theory from two perspectives: The delocalization of the arbitration process and the delocalization of the award. While the advocates of the delocalization of arbitration jealously propose for an arbitration process

[549]J Paulsson, "*Delocalisation of International Commercial Arbitration: When and Why It Matters"* [1983] 32 ICLQ 53.

independent of the constraints and prejudices of state laws, it insists this deregulation must be extended to the nature and enforcement of awards, as the finality of every arbitration is in the recognition and enforcement of arbitral awards. Although it is agreed that the relevant national laws can influence arbitration agreement,[550] it has been argued that arbitration has a contractual character that originates in the parties' arbitration agreement. Accordingly, with the exception of arbitrability and public policy which are reserved for the *lex fori* (Law of the Seat), the *lex fori has* very little influence over the procedure and outcome of the arbitration.

Moreover, the concept of delocalization emphasizes that national Arbitration Laws are only to supplement and fill lacunae in the parties' agreement as to the arbitration proceedings and to provide a code for regulating the conduct of arbitration.

(f) **Uncitral Model Law and Events of Court Intervention**

International commercial arbitration by default serves the purpose of expediency. This however has been frustrated by parties who approach national courts for interim or conservatory reliefs as a device for procedural delay. The provisions of the Model Law firmly state limitations imposed on court intervention by providing in Article 5 that *"In matters governed by this Law, no court shall intervene except where so provided in this Law."* The main purpose of Article 5 is not to preclude court intervention altogether, but rather that the power to intervene is limited to certain circumstances. In fact, no arbitration law or institutionalized arbitration rule in existence precludes court intervention altogether. Rather, the arbitral process is legitimized by the very enforcement role of the courts.

Two very important and related doctrines have been developed which impact on the integrity of the tribunal: "*competénce de la competence"* and "separability". Article 16(1) of the Model Law adopts these principles. While the doctrine of *competénce de la competence* promotes the inherent power of the arbitration panel to rule on its own jurisdiction, the doctrine of separability provides that an arbitration clause within a contract is distinct from the main contract, and therefore continues to be valid even if the main contract is void.

(g) Fundamental Issues Preceding the Commencement of International Arbitration

There are circumstances when national laws provide that courts have jurisdiction to grant interim reliefs. This could be to preserve the party's right or an asset from being dissipated before the tribunal assumes jurisdiction over that dispute.

[550]New York Convention, Article II (1) and (2); UNCITRAL Model Law, Article 8(1).

National courts can intervene at this stage, and it will not be an affront to the principle of party autonomy.

Moreover, there are certain fundamental issues preceding commencement of international commercial arbitration such as appointment of arbitrators, location, choice of law, or when one of the parties refuses to accept the referral to arbitration. When parties fail to arrive at a consensus in like manner, there is the likelihood that one of the parties may proceed to court without recourse to the provisions of the arbitration agreement, and the other party will thereafter have to request a stay of the proceedings until such time as the issues have been resolved through arbitration.

In respect of such applications for the stay of legal proceedings in court, the Model Law allows a court very little discretion to reject such an application. The Model Law provides that the court shall refer the parties to arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed.[551]

The scenario is however, different in intuitional arbitration like ICSID and ICC where, under the rules, appointment will be made by the institution or resolved one way or the other.

This reaffirms the importance of the national court of the seat of arbitration minding the complimentary role it offers to ad hoc tribunal. For instance in the case of *Cangene Corp v Octapharma AG*,[552] it was the claimant who attempted to jettison the agreement to arbitrate by opting to go to the High Court of Manitoba, the Defendant raised objection on the grounds of the arbitration agreement. In referring parties to arbitration, the court examined the agreement to arbitrate and held it valid. The court further stated that under the local arbitration Act, referral of parties is mandatory unless where the court makes a finding that the agreement is null and avoid. This case has been brought in to show how the court saved the arbitral processes in this case by ordering parties to take steps to constitute the tribunal. This line of judgment has been followed in *Dalimpex Ltd and Janicki*,[553] and *National Iran Oil Company v State of Israel*.[554] National Courts are therefore in place to compliment and facilitate the process of international commercial arbitration.

(h) **Matters Arising From the Establishment of an Arbitral Tribunal**

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[551]*[Article 8(1), Model Law.]* It must be noted that the Model Law gives no discretion to the presiding court as is evidenced by the use of the word "shall".

[552]2000 MBQB 111(CanL11) Judgement delivered by the Court of Queen's Bench, 30th June, 2000. Also cited in Yearbook Commercial Arbitration Volume 25 by Albert J. Van den Berg.

[553]2007 Can L1133118

[554]Tribunal de Grande Instance de Paris January 10 1996 (Order) ASA Bulletin 1996, 319

Upon establishment, the tribunal assumes jurisdiction over the parties and proceeds to discharge its mandate. We may then argue that the constitution of an arbitral tribunal brings into existence a new set of contractual relationships concerning the arbitrators themselves.[555] In which case, the freedom of the parties to alter the arbitral procedure without the consent of the arbitrators is circumscribed on the one hand. Or choose to uphold the overriding principle of party autonomy on the other hand.

One thing is however clear, that assistance may be required of the Court either prior to the commencement of the arbitral process, or during the proceedings, in the form of interlocutory orders, such as orders for discovery, security for costs, interim applications maintaining the status quo, orders for the inspection or production of evidence, and other applications of this nature.

5.1 Jurisdictional Challenge

As a follow up to the constitution of the arbitration panel what follows is the determination of jurisdiction of the adhoc tribunal. Thus, Jurisdictional challenge may be partial or total. Generally, every tribunal, under the competence-competence rule has jurisdiction to determine whether or not it has jurisdiction. Consequently, whether the challenge to jurisdiction is partial or total, a tribunal is competent to decide on the issue and to proceed to hear the dispute or to decline to hear the matter for want of jurisdiction. This premise of course, is not oblivious of the fact that there are jurisdictions that do not recognize the competence-competence rule.

However, the competence-competence rule cannot be invoked randomly. In Shaw Satellite *G.P v Pleekenhagen,*[556] the Ontario Court of Appeal held that a party seeking to apply the principle must admit it is a party of the arbitration agreement. The court held as follows:

> This principle should not be used by a party that does not admit it is a party to the arbitration agreement. A party must admit it is a party to the arbitration agreement to rely on the competence-competence principle.[557]

In summary, this decision changes the competence-competence principle by requiring a party relying on that principle to admit that it is a party to the arbitration agreement.[558]

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[555]Pryles. "M Limits of Party Autonomy" Legal\103364080.1.

[556]2012 ONCA 192.

[557]Section 7 of Ontario Arbitration Act 1991.

[558]Thomas G Heintzman, O C FCIArb, what are the limits of Competence-Competence for Arbitral Tribunals (www.heintzmanadr.com).

5.2 Impertinence of the Arbitrator

It is expedient to exercise dedication in appointing arbitrators. International Arbitration Law recognizes high moral character as an imperative quality of an arbitrator. Article 2 of the Statute of the International Court of Justice provides that '*The court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of* ***high moral character*** *who possess the qualifications required in their respective countries…'* Similarly, Article 14(1) of the International Centre for Settlement or Investment Disputes Rules lists three qualities required of an arbitrator – **high moral character, competence and independence.** Article 57 of the same Rules provides that a lack of any of the qualities in Article 14(1) would constitute a valid ground for disqualification of an arbitrator. Thus we may infer that impertinence may well be a valid ground for challenging the appointment of an arbitrator.

In ad hoc arbitral proceeding, the role of the court will be crucial to save the arbitral Process in this regard.

5.3 Interim Measures

As in matters to preserve the res, interim measures such as injunctions, security of costs, and application for the preservation or detention of property, active interim measures, passive interim measures are vital where there is an imminent risk of irreparable harm. However, it is judicially unhealthy to rely on the arbitral tribunal to make such orders, as arbitration only binds parties to the agreement. Parties seeking such orders therefore approach the court which has jurisdiction to make interim orders to bind a third party.

5.4 The Enforcement Stage

The court plays a fundamental role in enforcement of arbitral awards. The parties seeking to affect the award make an application to court in order to make the award an order of court. Failure to comply with the order then has the effect of a contempt of court by the party in breach of the order. The court may set aside the award or remit the award back to the arbitrators in order to rectify defects in the award.[559]

6 Case Studies

There are no shortages in specific instances of abuse of court interventions in international arbitration. Local court rulings in various jurisdictions from Indonesia and India, to the Middle East, and even to western states including Canada and South Africa demonstrate the limits of arbitration. In such circumstances, parties and government agencies have employed local court orders

[559](Article 34 (2)-(5) of the Model Law.] (Mark Hunter & Alan Redfern, Law and Practice of International Commercial Arbitration 23 (2d ed. 1991).

to delay or block international arbitration proceedings in favour of judicial review of claims ranging from the validity of the contracts to arguments of public policy, force majeure, fraud and corruption.

Indonesia

In Indonesia, the case of the state-owned electric company PT Perusahaan Listruik Negara (PLN), which entered into Energy Sales Contracts (ESCs) with two project companies, which were established as subsidiaries of MidAmerican Energy Holdings (formerly CalEnergy), the primary foreign sponsor of these projects is instructive in light of courts disregard for arbitral proceedings.

Faced with huge exchange rate fluctuations as a result of the crisis, PLN considered its obligations to purchase power from projects like Himpurna and Patuha impossible to perform. Himpurna and Patuha initiated arbitration proceedings against PLN, claiming breach of the ESC contracts and three-member panel awarded $391 million in damages to Himpurna and $180 million to Patuha.

PLN retaliated against these actions by filing a motion to vacate the arbitration award in civil court in Jakarta. The project companies unsuccessfully motioned to dismiss and the civil court refused to enforce the award. As a result, PLN was successful in obtaining an injunction suspending execution of the awards in civil court. This among other cases buttresses the case in Indonesia.

United Arab Emirates

In the United Arab Emirates, the rapport between the national courts and arbitral tribunals seemed complementary until the recent case of the Dubai Court of First Instance[560] which required that the courts enforce for ICC awards[561]. The ICC arbitration was in favour of the Claimant, la Compagnie Française Enterprises S.A (CFE). The claimant had in their claim sought for payment for sums outstanding for works duly performed in the construction of the Canal de Jongle in South Sudan. The Government of the Republic of Sudan refused to comply with the award which is why enforcement was sought through the UAE courts. Before this case came along, the UAE had showcased a positive attitude of adherence to the

[560] Dubai Court of First Instance (see Case No. 489/2012, ruling of the Dubai Court of First Instance of 18 December 2012) Sourced at http:kluwerarbitrationblog.com/blog/2013/03/2012/recent-ruling-of-dubai-court-of-first-insatnce-on-enforcement-of-foreign-arbitral-awards-back-to-square-one/ accessed 15 March 2017.

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

Convention[562] . Unfortunately, in this case the UAE Court took a step back in the enforcement of foreign arbitral awards. The Court in its ruling stated that it was not cloaked with the jurisdiction as a matter of public policy to hear the case because the party was not domiciled in the UAE and nor had the contract taken place in the UAE. Thus if the notion of delocalized arbitration were raised amongst the judiciary it is expected that their reaction would not be favourable.

South Africa

In South Africa the South African Arbitration Act allows a wide and discretionary power of intervention to the South African judiciary.

South African courts have on many occasions in the past exercised their discretion in favour of refusing to refer matters to arbitration and in favour of setting aside agreements. In the past, 'good cause shown' has been applied in situations where legal issues were central to the dispute between the parties, to situations where joinder against second defendant or plaintiffs were appropriate, and generally, where it could be shown that any of the parties to the dispute would be inconvenienced or prejudiced by a referral to arbitration. Courts are generally overzealous in guarding the ambit of their jurisdiction, and often display a hostile attitude towards all attempts to circumscribe or limit their jurisdiction to intervene in matters with a connection to their legal system, or concerning their citizens[563].

Canada

The situation in Canada is critical as demonstrated in *Deco Automotive Inc v G.P.A.* Gesellschaft Fur Pressenautomation MbH[564], where the Court went as far as refusing to stay proceedings despite the existence of the arbitral proceedings at the International Chamber of Commerce.[565]

Nigeria

In Nigeria, a high court can intervene in arbitral proceedings governed by the Arbitration and Conciliation Act only where specifically provided for under the act[***566***].

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[562] The UAE acceded to the Convention by the implementation of UAE Federal Decree No. 43 of 2006.

[563]Butler DW, "South African Arbitration Legislation – the Need for Reform" 1994.

[564] [1989] O.J. No. 1805.

[565](UNITED NATIONS Document: "*General Assembly: Distr. GENERAL:* A/CN.9/SER.C/ABSTRACTS/34: of, 12 June 2001).

[566]*Section* 34 of the Arbitration and Conciliation Act.

A foundational principle of the modern law of arbitration is that of competence-competence. This principle is one which acknowledges that an arbitral Tribunal is competent to decide on its own competence. According to section 12(1) of the Arbitration and Conciliation Act of Nigeria, the competence of a tribunal to rule on its own jurisdiction is proper.
There are matters which are incapable of arbitration in Nigeria. In general, criminal matters, matters that leads to a change of status of the parties involved, illegal and void contracts, or disputes which arise out of tax matters. As such, only disputes arbitrable under the The Arbitration and Conciliation Act are capable of enforcement as was the case in *United World Ltd. Inc. v M.T.S. Ltd*[567]. A critical analysis of the provisions of the Arbitration and Conciliation Act and case law make plain that not all disputes are arbitral in nature in Nigeria. Only disputes arising from a commercial transaction can be referred to arbitration.

Although section 34 of the Nigerian Arbitration and Conciliation Act 2004 states that, "*a Court shall not intervene in any matter governed by this Act except where so provided in this Act"*[568]*,* courts have not always followed these provisions. In the case of *Federal Inland Revenue Service v Nigerian National Petroleum Corporation and Others*[569], the Nigerian Federal High Court held that section 34 of the Arbitration and Conciliation Act which is derived from Article V of the UNCITRAL Model Law, will not bar a court from forbidding arbitration where an allegation is raised that the matter submitted to the arbitrators is not arbitrable. In a subsequent case, *Nigerian National Petroleum Corporation v Statoil (Nigeria) Limited and others*[570], the Federal High Court of Nigeria issued an *ex parte* injunction which restrained arbitration.

From the above case studies, we discover that the local courts are frequently used to interfere with international commercial arbitration. While the national courts in these jurisdictions do this in protection of their municipal laws, the defaulting parties resort to this trick to favour them in the arbitration process.

7. Conclusion and Recommendation

In conclusion, parties may deplore the intervention of local courts, but, as described in this article, such courts are employing widely supported legal

[567] [1998] 10 NWLR (Pt. 568) 106.
[568] *Section* 34 Arbitration and Conciliation Act.
[569] FHC/ABJ/CS/774/2011.
[570] FHC/L/CS/1043/2012.

doctrines as a basis for their interventions. While careful decisions about the terms of transactional agreements may reduce the force of the legal arguments, the presence within the host State of the parties‟ assets or project facilities assures that local court intervention in arbitration cannot be completely neutralized.[571]

In view of our observations and analysis, we recommend the following:

1. That the courts should see delocalization as complementing its jurisdiction and not divesting it of its local laws.
2. That the proponents of the delocalization theory and the loyalists of the Seat theory should come together in thoughts, to find common grounds for the workability of international commercial arbitration.
3. That the parties should be allowed to choose the laws governing the arbitration to the extent that it does not prejudice the standard of justice and fairness.

[571] *Ashaf El Motel, Local Court Intervention in International Arbitration Journal of Model Associate.*