

Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application

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Introduction

In 1958, the New York Convention was introduced by 24 signatories, superseding the previous international instruments and ushering in a new era of transnational commercial arbitration.¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also referred to as the New York Convention (NYC), was created to encourage the settlement of international disputes through arbitration.² It has been characterised as “one of the boldest attempts to enhance ... arbitration and to achieve unification in state practice ...”.³ This is buttressed by the fact that courts are perceived as having a pre-bias against hearing arbitration appeals.⁴ Ultimately, this is rooted in the objectives of the NYC and the courts’ respect for the contractual autonomy of the parties; thus courts exercise their discretion when faced with arbitral appeal.⁵ Party autonomy represents the autonomous will of the parties to a contract.⁶ However, the mere fact that parties contracted to go to arbitration can then appeal their award in national courts, demonstrates the extent to which arbitration is undeveloped as an independent, alternative dispute resolution mechanism. It is not surprising, therefore, that scholars have voiced concern over continued judicial intervention in arbitration under the umbrella of delocalisation theory. Thus, delocalisation supports the premise that arbitration should be wholly

independent. However, without an appeal arbitral body, it would be difficult to give practical significance to this theoretical view. This raises the question of whether a diluted version of delocalisation, where court intervention is limited by the presence of an arbitral appeal body, is possible, and, if so, which form should it take? As a solution, we consider the possibility of creating an international appeal body modelled upon the international Centre for Settlement of Investment Disputes (ICSID) Additional Facility, which provides for appeal in international investment disputes.

Against that background, the aim of this article is twofold. First, it will explore the development of the delocalisation theory with particular emphasis on the theoretical debate for and against continued court intervention. The aim is to find justification for delocalisation by limiting court intervention in arbitration. Secondly, it will explore the scope for reform through the institution of an appeal body. The aim is to consider implementing an international commercial arbitral body to complement ICSID Additional Facility. Last but not least, a circumspect conclusion will be reached in regards to the direction of future legal development in this area.

Party autonomy and delocalisation theory

Party autonomy has its foundations in the freedom of parties to determine the conduct of the arbitral process and in the parties’ selection of substantive law. Consequently, they choose all aspects of the arbitration which includes the seat of arbitration, the choice of law, the appointment of arbitrators and the language of the arbitration, among others.⁷ With regard to the choice of substantive law, the principle refers to the rule that the arbitral tribunal shall apply the law chosen by the parties as relevant to the substance of the dispute.⁸ Party autonomy in contracts, through which parties assign a particular law to govern their disputes, developed alongside the principle of state sovereignty. It was first put forward by the French jurist Charles Dumoulin (1500–66), who is regarded as the founding father of party autonomy.⁹ Dumoulin expressed that party autonomy was the primary factor governing the law of contract. Thus, intention is a key determinant of the law or body to govern a particular contract.¹⁰ Furthermore, he observed that in the absence of express selection of law

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¹ As of December 2015, the NYC has been ratified by 156 states. Previously, we had Geneva Protocol 1923 and the Geneva Convention 1927.

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 330 U.N.T.S. 38; International Council for Commercial Arbitration, ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (ICCA, 2011); Gillis Wetter, “The Present Status of the International Court of Arbitration of the ICC: An Appraisal” (1990) 1 Am. Rev. Int’l Arb. 91; and John Mustill, “Arbitration: History and Background” (1989) 6 J. Int’l Arb. 43.

³ Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Westport, CT: Quorum Books, 1994), pp.17–18.

⁴ Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Deventer: Kluwer Law International, 1981).

⁵ Albert Jan van den Berg, “Should the Setting Aside of the Arbitral Award be Abolished?” [2014] *ICSID Reviews* 1; Peter Gilles, “Enforcement of International Arbitration Awards: The New York Convention” (2004) 2 *International Trade and Business Law Review* 2; (2004) 9 *International Trade and Business Law Review* 19.

⁶ A.J. Bělohávek and J.N. Rozehnalova, *Czech (& Central European) Yearbook of Arbitration—2012: Party Autonomy versus Autonomy of Arbitrators* (Juris, 2012), p.134.

⁷ C. Chatterjee, “The Reality of the Party Autonomy Rule in International Arbitration” (2003) 20 *Journal of International Arbitration* 539.

⁸ Bělohávek and Rozehnalova, *Czech (& Central European) Yearbook of Arbitration* (2012), p.134.

⁹ M. Elcin, *The Applicable Law to International Commercial Contracts and the Status of Lex Mercatoria: With a Special Emphasis on Choice of Law Rules in the European Community* (Boca Raton, FL: Universal Publishers, 2010), p.9.

¹⁰ O. Lando, “Contracts” in Kurt Lipstein (ed.), *International Encyclopaedia of Comparative Law* (Brill, 1971), Vol.3, Ch.24, Pt III.

by the parties, the law to govern the contract must be sought in agreement with the parties' inferred and likely intentions.¹¹

Party autonomy is endorsed by the NYC art.V(1)(d).¹² An award may be declined recognition

“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”.¹³

In addition, art.19(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law 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”.¹⁴ However, the power of the parties to act as the orchestrators of the arbitral proceedings is not absolute, indicating that party autonomy is limited.¹⁵ Consequently, opposition to the unwarranted judicial intervention in arbitration resulted in the development of the delocalisation theory.¹⁶ As such, the discussion will now turn to the theory of delocalisation, the development of which is a result of hostility to the unwarranted interference with party autonomy to arbitrate.¹⁷

Delocalisation is a modern development, and while difficulty arises in defining it, the concept is nevertheless regarded as a theoretical shield for the arbitral process.¹⁸ According to Pryles, delocalisation is a security blanket, enabling the arbitral process to be independent of the national legal system at the seat of arbitration.¹⁹ Weiner, however, argues that it is a concept simply associated with established rules, which are customary to transnational commercial matters.²⁰ Nonetheless, the interpretation advocated by Pryles is widely favoured, with party autonomy being the core fabric of the arbitral process. It is this doctrine which provides the basic features of the concept of delocalisation and which is defined as “the ‘unfettered’ rights of parties to determine how their dispute may be resolved”.²¹ Accordingly, delocalisation has been endorsed as it facilitates the core features of arbitration, namely the process being private and confidential, which the theory aims to uphold by protecting arbitration from external intrusion.

Arguments for delocalisation

The importance of delocalised arbitration is established upon certain distinct arguments. The first is the parties' autonomy to arbitrate. Their choice to select arbitration rather than being subject to national laws is an imperative feature which is respected by contemporary legislation, such as the UNCITRAL Model Law.²² On this basis, delocalisation views the arbitral procedure and any award as originating autonomously and independently of the national legal systems.²³ Furthermore, the arbitral agreement is central to the arbitral process from which the right to arbitrate arises rather than from *lex loci arbitri*, the law of the seat.²⁴ Thus, arbitral awards granted as a result of arbitration are recognised by national courts, averting national court intervention, as provided by the doctrines of arbitral finality and *res judicata*.²⁵

Secondly, the arbitral process is “self-regulating”, which enables parties to abide by certain procedural rules selected by themselves as a result of ad hoc arbitration or supplied under institutional arbitration.²⁶ Delocalisation provides for disputes to be resolved through mutual understanding and co-operation between the parties and arbitral tribunals.²⁷ Thus, judicial intervention is not required as parties agree to resolve disputes in a manner compliant with arbitration; in theory, delocalisation is a concept which has practical workability in international arbitration. Given the above support for delocalisation, it can be correctly stated that, as arbitration is a private matter—one which the parties have autonomously agreed to embark upon to resolve their disputes—judicial intervention is unwarranted.

Thirdly, supporters of delocalised arbitration espouse the view that arbitration should be observed as supra-national and that national laws should have no power over the arbitral process.²⁸ Essentially, this appears to be justifiable as arbitration is conducted in private. Thus, marrying delocalisation with court oversight is wholly contradictory because intervention by national courts is contrary to the core principles of arbitration. Despite that, judicial interference remains the leading factor that endangers delocalisation. Judicial review from the *situs* is regarded as being a *fait accompli* and a

¹¹ M. Zhang, “Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law” (2006) 20 *Emory International Law Review* 511.

¹² NYC art.V(1)(d).

¹³ NYC art.V(1)(d).

¹⁴ UNCITRAL Model Law art.1.

¹⁵ O.S. Perepelynska, “Party Autonomy vs. Mandatory Rules in International Arbitration” [2012] *Ukrainian Journal of Business Law* 38.

¹⁶ R. Goode, “The Role of the Lex Loci Arbitri in International Commercial Arbitration” (2001) 17 *Arbitration International* 1, 21.

¹⁷ Goode, “The Role of the Lex Loci Arbitri in International Commercial Arbitration” (2001) 17 *Arbitration International* 1, 21.

¹⁸ O. Dike, “Delocalisation of Ad Hoc Arbitral Proceedings: To What Extent Can the Jurisdiction of the Court of the Seat of Arbitration be Excluded?” [2008] C.A.R. 1.

¹⁹ M. Pryles, “Limits to Party Autonomy in Arbitral Procedure” [2008] *International Council for Commercial Arbitration* 1, 6.

²⁰ Jarrod Wiener, “The ‘Transnational’ Political Economy: A Framework for Analysis” [1996] *SISU* 1, 5 (online). Available at: <http://www.jus.uio.no/lm/the.transnational.political.economy.a.framework.for.analysis.jarrod.wiener.ukc/landscape.a4.pdf> [Accessed 30 May 2016].

²¹ Alan Redfern, M. Hunter et al., *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell, 2004), p.11.

²² UNCITRAL Model Law on Commercial Arbitration 1985 (with amendments as adopted in 2006).

²³ Goode, “The Role of the Lex Loci Arbitri in International Commercial Arbitration” (2001) 17 *Arbitration International* 1, 21.

²⁴ Matthew Secomb, “Shades of Delocalisation Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore” (2000) 17 *Journal of International Arbitration* 123, 128.

²⁵ P. Read, “Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium” (1999) 10 *American Review of International Arbitration* 177. See *Walkinshaw v Diniz* [2000] 2 All E.R. (Comm) 237 QBD; and *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All E.R. (Comm) 315; [1999] C.L.C 647; *Times*, 1 March 1999 QBD.

²⁶ Jie Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 3.

²⁷ Fali S. Nariman, “The Spirit of Arbitration: The Tenth Annual Goff Lecture” (2000) 16 *Arbitration International* 261.

²⁸ Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 6.

consequence of intervention by national courts. It is also regarded as an unruly source imposing upon the practicability of the NYC.²⁹

Furthermore, the NYC supports delocalised arbitration. Article V(1)(e) is often cited by advocates of delocalisation. For instance, Goode expresses that art.V(1)(e) grants enforcing states the authority to enforce annulled awards notwithstanding their invalidation.³⁰ Despite this, critics of delocalisation argue that the aforementioned article actually endorses judicial interference in the arbitral process. As such, this portrays delocalisation as merely theoretical as states are empowered with the ability to ignore or suspend invalid arbitral awards. Thus, it is this judicial intervention which undermines delocalisation. However, over time, scholars and practitioners have come to recognise the notion of the non-controlling function of the state. The role of the national courts is now viewed as supportive of the arbitral process, rather than controlling it.³¹

Arguments against delocalisation

While delocalised arbitration is an ideal concept, it is regarded as a far-fetched reality.³² Hostility towards it is to an extent a universal phenomenon.³³ Critics of delocalisation classify it as “wholly unrealistic”,³⁴ arguing that it endeavours to place arbitration in a “legal vacuum”.³⁵ Redfern and Hunter regard delocalisation as deceptive.³⁶ They propose that the arbitral procedure should instead be regulated by the laws of the seat of arbitration and by the laws of the enforcing state. Mann states that delocalisation is impractical as

“every arbitration is necessarily subject to the law of a given state ... Every right ... a private person enjoys is inexorably ... derived from a system of municipal law which may conveniently ... be called *lex fori* ...”³⁷

While this statement is reasonable, delocalisation is not motivated by the attempt to evade the constraints of national jurisdictions. Rather, municipal law may not be required to impose limits on arbitration, thus enabling the

arbitral process to be liberated by the restrictions of *lex loci arbitri*.³⁸ Thus, opposition to delocalised arbitration is rooted in the argument that it is vital for arbitration to have a seat and to be entrenched in the national law at the seat.³⁹

Furthermore, it is necessary for judicial review to be maintained in order to safeguard justice and provide checks and balances by monitoring “the quality of decisions benefiting from the treaty scheme”.⁴⁰ The integrity of the arbitral process is reflected in the relationship between⁴¹ the UNIDROIT, *Principles of International Commercial Contracts*⁴² and the courts. UNIDROIT consists of a variety of rules which are utilised to resolve international contractual disputes. These soft law rules have been drafted with party autonomy in mind so that individuals have full confidence in the institution and the rules used to regulate the arbitral process. Therefore, procedural justice is a key component of the arbitral rules and is recognised by international arbitral institutions.⁴³ Thus, court intervention in arbitration conflicts with these recognised rules of international law. However, judicial intervention indicates that arbitration is not a mechanism deemed efficient and trustworthy. Thus, while delocalisation is a supportive and encouraging theory, in practice, it may in fact create many injustices.⁴⁴ On that ground, further court involvement in protecting national commercial or jurisdictional interests is justifiable.⁴⁵

Consequently, to have a process that is almost completely separate from national laws without any court intervention could damage the practicality of arbitration. Therefore, there must be a balance between party autonomy and contract law jurisprudence. Article 11(4) of the UNCITRAL Model Law recognises the pivotal function of the courts to ensure that the arbitral process does not end in stalemate.⁴⁶ Judicial intervention may be required in circumstances where certain issues arise prior, throughout or following the arbitral procedure. As such, it is vital to observe the instances where judicial interference may be necessitated. For instance, a party may challenge the agreement to arbitrate by commencing

²⁹ Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 6.

³⁰ Goode, “The Role of the *Lex Loci Arbitri* in International Commercial Arbitration” (2001) 17 *Arbitration International* 1, 23.

³¹ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334; [1993] 1 All E.R. 664; [1993] I.L.Pr. 607 HL; and *Eagle Star Insurance Co Ltd v Yuval Insurance Co* [1978] 1 Lloyd’s Rep. 357 CA (Civ Div). See also K. Hafez, “The General Principles of Law Applicable to International Disputes” (1998) 64 *Arbitration* London 12.

³² W. Park, “The *Lex Loci Arbitri* and International Commercial Arbitration” (1983) 32 *International & Comparative Law Quarterly* 21; and J. Mustill, “The New *Lex Mercatoria*: The First Twenty-Five Years” (1988) 4 *Arbitration International* 86.

³³ F. Mann, “England Rejects ‘Delocalized’ Contracts and Arbitration” (1983) 33 *International & Comparative Law Quarterly* 193; L. Collins, “The Law Governing the Agreement and Procedure in International Arbitration in England” [1986] *Contemporary Problems in International Arbitration* 126; and M. Rubino-Sammartano, *International Arbitration Law and Practice* (The Hague: Kluwer Law International, 2001).

³⁴ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford: Oxford University Press, 2007).

³⁵ Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 4.

³⁶ N. Blackaby and C. Partasides, with A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, 6th edn (London: Sweet & Maxwell, 2015), p.187.

³⁷ F.A. Mann, “*Lex Facit Arbitrum*” in P. Sanders (ed.), *International Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967), p.157.

³⁸ Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 4.

³⁹ D. Janicijevic, “Delocalization in International Commercial Arbitration” (2005) 31 *Law and Politics* 63, 65.

⁴⁰ William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford: Oxford University Press, 2007), p.149.

⁴¹ Klaus P. Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation and Arbitration* (The Hague: Kluwer Law International, 2006).

⁴² UNIDROIT, *Principles of International Commercial Contracts* (2010).

⁴³ Berger, *Private Dispute Resolution in International Business* (2006).

⁴⁴ Secomb, “Shades of Delocalisation Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore” (2000) 17 *Journal of International Arbitration* 123, 129.

⁴⁵ J.D.M. Lew, “Does National Court Involvement Undermine the International Arbitration Process?” (2009) 24 *American University International Law Review* 489, 494.

⁴⁶ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, s.11(4).

litigation, prior to the creation of the tribunal.⁴⁷ As such, the courts will be enlisted to determine whether there was indeed an arbitral agreement and to establish its enforceability.⁴⁸ Likewise, in the event that the respondent declines to assign an arbitrator or where the parties are unsuccessful in consenting to sole arbitration and there is no existence of applicable rules, assistance from national courts can be sought to select arbitrators.⁴⁹

Furthermore, where there is confusion regarding the arbitral clause, parties can apply to the court to provide clarification on a certain point, as evidenced in *Dalimpex Ltd v Janicki*.⁵⁰ The parties had chosen an arbitral institution that had ceased to exist when the dispute occurred. One party sought clarification from the court to ascertain whether the clause could be construed to permit the dispute to be heard by the successor-body of the original institution. The court held this was acceptable, and thus the parties commenced the arbitral procedure. This highlights one of the many instances in which assistance from national courts “saved” the arbitral process, thus demonstrating the usefulness of judicial interference. Similar cases such as *National Iran Oil Co*⁵¹ and *Cangene Corp*⁵² illustrate the unrealistic practicality of delocalisation. In *National Iran Oil Co*, the court required the selection of an arbitrator to ensure that justice was granted even though France’s statutory requirements for arbitration were not satisfied.⁵³ Likewise, in *Cangene Corp*, a dispute arose between parties with regard to the arbitral agreement and the court found the agreement valid, thus directing the parties to constitute the arbitral tribunal.

Judicial intervention is also vital in circumstances where the arbitral tribunal requires the taking of interim measures. While the tribunal is possessed with this ability, if it has not been assigned to do so, where it does not have authority or in cases where the interim measures concern third parties, judicial intervention may be essential.⁵⁴ Preliminary measures may further be necessitated to ensure that evidence is safeguarded or to defend particular entitlements afforded to parties. This must take place before the tribunal assumes power. In the absence of this, the commercial welfare of the parties may be damaged. Consequently, national laws bestow upon the courts the power to facilitate interim relief, in accordance with party

autonomy.⁵⁵ Therefore, this portrays delocalisation as ineffective in practice as it is unable to resolve the issues detailed above.

Procedural impropriety presents another circumstance where judicial intervention is required. Fundamentally, this takes place where the arbitrator(s) are biased in support of one party as a result of being bribed. Alternatively, this may exist where the tribunal falls short of the required registration to be certified as an arbitral tribunal.⁵⁶ Consequently, if judicial intervention is not made available in such situations, disputes cannot be adequately settled, resulting in potential miscarriages of justice. This is illustrated in the English case of *Fiona Trust*.⁵⁷ Assistance was sought from the court with regard to whether the arbitration clauses were wide enough to include whether the contract that comprised the arbitral clauses was obtained as a result of bribery.⁵⁸ Another issue in *Fiona Trust* was in relation to the doctrine of separability. This was with regard to whether it was the tribunal or the court that possessed jurisdiction to determine whether the parties should be obliged to arbitrate. Essentially, this was a case where there existed a contention that, in the absence of the bribery, the party would have failed to be a participant in the contract.⁵⁹ The court adopted a different approach from previous case law with regard to the issue surrounding the arbitral clauses.⁶⁰ It expressed that the clauses should be liberally construed, an approach that was echoed in *Premium Nafta Products Ltd*.⁶¹

Fiona Trust illustrates the vital function of the court in the above-mentioned circumstances. While delocalised arbitration is an appealing phenomenon which upholds party autonomy, it cannot be ignored that such a concept does not sufficiently manage matters such as the above. Nevertheless, parties are free to arbitrate once the court has supplied clarification with regard to the matter. Thus, this indicates that judicial interference and delocalisation can, to a certain degree, work together to achieve a more desirable process of arbitration.

Furthermore, judicial review is supported by the challenges posed by the doctrine of separability and the principle of competence–competence. The contract and the arbitration agreement are regarded as two separate documents under the doctrine of separability, which ensures that the arbitration agreement survives the main

⁴⁷ Lew, “Does National Court Involvement Undermine the International Arbitration Process?” (2009) 24 *American University International Law Review* 489, 496.

⁴⁸ NYC art.(2)(3); and UNCITRAL Model Law art.8.

⁴⁹ English Arbitration Act 1996 s.18 and UNCITRAL Model Law art.11.

⁵⁰ *Dalimpex Ltd v Janicki* (2003) CanLII 34234 (see Henri C. Alvarez et al., *Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), p.65).

⁵¹ *National Iran Oil Co v State of Israel* (1967) 35 I.L.R. 136.

⁵² *Cangene Corp v Octapharm AG* (2000) 9 W.W.R. 606.

⁵³ J.D.M. Lew et al., *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003).

⁵⁴ D. Sutton and J. Gill (eds), *Russell on Arbitration*, 23rd edn (London: Sweet & Maxwell, 2007), paras 7.005–7.097.

⁵⁵ Dike, “Delocalisation of Ad Hoc Arbitral Proceedings” [2008] C.A.R. 1, 4.

⁵⁶ Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 7.

⁵⁷ *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] 1 All E.R. (Comm) 891; [2007] Bus. L.R. 686.

⁵⁸ *Fiona Trust* [2007] EWCA Civ 20.

⁵⁹ D.A.R. Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10 *Asian International Arbitration Journal* 137.

⁶⁰ Previous case law had attempted to depict the differences between alternatively expressed clauses.

⁶¹ *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; [2007] 4 All E.R. 951; [2007] Bus. L.R. 1719.

contract under which the agreement is contained. This is vital, especially where issues arise regarding the enforceability of the main contract.⁶² The separability doctrine emanated from *Harbour Assurance*,⁶³ which consequently led to its being incorporated into the English Arbitration Act 1996 under s.7.⁶⁴ The court held that arbitration clauses could only be regarded as void where one party refuted the argument that an agreement to arbitrate had been assumed, or where there was an error with regard to the identity of the opposing contracting party.⁶⁵ An assertion of illegality was considered as inadequate to regard the main agreement and the arbitration agreement as void. This was advanced in the *Gosset*⁶⁶ case, where the French Cour de Cassation established that invalid contracts do not impinge on the concept of separability, and therefore the arbitration agreement continues to be valid. Once again, the *SNE v Joc Oil*⁶⁷ case shed light on the application of the separability doctrine. Despite the main agreement being invalid as a consequence of SNE's failure to provide appropriate signature, the arbitration agreement was not affected, and accordingly it was observed that it was correct for the arbitral tribunal to assume jurisdiction. This was further recognised and endorsed in *Dalmia Dairy Industries*,⁶⁸ where it was acknowledged by the court that, under the International Chamber of Commerce rules, arbitrators were granted authority to determine their own jurisdiction. Again in *SNE v Joc Oil*, as a consequence of the competence–competence principle, the arbitral tribunal was able to assume jurisdiction. This verdict was given recognition by the court and, consequently, the award was enforced.⁶⁹

The “competence–competence” principle which is enshrined under art.16 of the UNCITRAL Model Law⁷⁰ authorises arbitration tribunals to rule on their jurisdiction.⁷¹ The principle is further endorsed by the separability doctrine, which confirms that an arbitration clause is independent of the commercial contract, enabling the clause and jurisdiction to survive any termination or invalidity of the contract.⁷² The competence–competence principle provides that in circumstances where there is uncertainty with regard to the validity or extent of the arbitration agreement, the tribunal is granted authority to rule on its jurisdiction. This capacity originates from

relevant national law, as opposed to the disputed arbitral agreement, as the tribunal is granted the power to declare that the agreement is void without conflicting itself. As the tribunal is bestowed with such power, there is no necessity for the parties or the tribunal to request national courts to intervene and resolve jurisdictional issues.⁷³ Furthermore, as a consequence of this principle, arbitrators may be requested to determine their own competence in order to resolve disputes, which is often viewed as controversial. While it is true that the jurisdiction of a tribunal may be contested as a premeditated ploy by one party, there are, however, many instances where there are serious concerns regarding a tribunal's jurisdiction to resolve a particular dispute.⁷⁴ Consequently, jurisdictional challenge is a conferred right of the parties and can be partial or total.

Moving on, the “positive effect” of the separability doctrine enables arbitrators to continue proceeding with arbitration despite challenges to the validity of the agreement.⁷⁵ Consequently, this positive effect along with the arbitrators' innate power to rule on their jurisdiction should compel the courts to restrict their review to a prima facie determination that the agreement is not “null and void, inoperative or incapable of being performed”.⁷⁶ This is acknowledged as the “negative effect” of competence–competence and provides that arbitrators are the first but not the only judges of their jurisdiction. As such, national courts that are presented with issues regarding the legality of the arbitration agreement are obliged to abstain from conducting any hearings concerning the authority of the arbitrators until the latter have had the chance to do so. Thus, this priority afforded to arbitrators is in harmony with NYC art.II(3) and does not propose that national courts renounce their ability to reconsider the legality of the arbitral agreement.

However, while the power bestowed upon arbitrators is protected, it is nevertheless a cause for concern, especially where there are issues regarding the integrity of arbitrators. Here, court intervention is necessary, as permitting the courts to intervene after the final award has been decided may cause further issues. This indicates that delocalisation is inadequate in dealing with such situations and that judicial intervention is required, as there would simply be no justice if the courts did not

⁶² James Carter and Hannah Kennedy, “English High Court Addresses Separability of Arbitration Clauses”, *International Arbitration Newsletter*, 26 June 2013. Available at: https://www.dlapiper.com/en/uk/insights/publications/2013/06/english-high-court-addresses-separability-of-arbitration-clauses/#_ftn3 [Accessed 30 May 2016].

⁶³ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701; [1993] 2 W.L.R. 42; [1993] 1 Lloyd's Rep. 455 CA (Civ Div).

⁶⁴ Arbitration Act 1996 s.7.

⁶⁵ *Harbour Assurance* [1993] 1 Lloyd's Rep 455.

⁶⁶ *Gosset* case, Cour de Cassation, Ire Chamber [1963].

⁶⁷ *Sojuznefteexport (SNE) v Joc Oil Ltd* [1990] XV Y.B.C.A. 31.

⁶⁸ *Dalmia Dairy Industries v National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223; (1977) 121 S.J. 442 CA (Civ Div).

⁶⁹ *SNE v Joc Oil* [1990] XV Yearbook Commercial Arbitration 31.

⁷⁰ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, art.16.

⁷¹ Julian D.M. Lew, “Achieving the Dream: Autonomous Arbitration” (2006) 22(2) *Arbitration International Law* 179, 193.

⁷² Amokura Kawharu, “Arbitral Jurisdiction” (2008) 23 *New Zealand Universities Law Review* 238.

⁷³ Kawharu, “Arbitral Jurisdiction” (2008) 23 *New Zealand Universities Law Review* 238, 240.

⁷⁴ Aiste Sklenyete, “International Arbitration: The Doctrine of Separability and Competence-Competence Principle” [2003] *Arhus School of Business* 25.

⁷⁵ Obinna Dike, “Delocalisation of Ad Hoc Arbitral Proceedings”, p.6. Available at: http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_2_230684919 [Accessed 30 May 2016].

⁷⁶ Emmanuel Gaillard and Yas Banifatemi, “Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators” in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (London: Cameron May Ltd, 2008), p.259.

intervene. Furthermore, once an arbitral award has been afforded, the arbitral tribunal no longer exists. The award must be recognised and enforced and this can only be conducted by national courts.⁷⁷ Consequently, the court of the place where the award is to be enforced along with the legal systems of the place must be utilised in order to ensure the victorious party is given their due. As such, it is evident that the courts play a very integral role in the arbitral process and this clearly indicates that “delocalised arbitration” is simply theoretical in nature and in practice.⁷⁸

A middle ground

The solution is to find a middle ground, where delocalisation and court oversight can coexist in harmony. Hence, Paulsson rationalises that

“the question is rather whether in certain situations ... arbitration may be liberated from the local peculiarities of a place of arbitration ... having nothing to do with the parties’ attachment to local rules of arbitration”.⁷⁹

Furthermore, Bucher, despite being a critic of delocalisation, understood the legitimacy of Paulsson’s argument. However, he proposed that the objective behind delocalised arbitration could be accomplished by connecting arbitration to a jurisdiction where the arbitral award could not be disputed or where the parties have the ability to enforce an agreement that would ensure there was no challenge to the award.⁸⁰ Li advocates this as the “true meaning of delocalisation and ... also the method suggested by the theory to realistically achieve delocalised arbitration”.⁸¹

Furthermore, academics such as Greenberg and Weermantry suggest that, in the absence of pure delocalisation, a diluted version of the concept exists.⁸² Here, national legal systems and courts have conceded to legislative and practitioner demands to assume a relaxed stance to arbitral procedures occurring within their territories. Ultimately, this makes sense as the core of arbitration is the autonomy of the parties. However, as has been established, in certain circumstances judicial intervention is required. Thus, rather than completely separating the two with very little success, it may be better to acknowledge that they can both work together to an extent. Nevertheless, where does this leave the principle of party autonomy? If the autonomy of the parties is being impinged upon, how can this be upholding their freedom? While it is true that anything less than pure delocalisation imposes upon party autonomy, from the above

examination it is evident that such cannot exist. Judicial assistance is required. Thus, it makes sense to have a diluted version of delocalisation. However, it is not beneficial to simply concede to this without giving some thought to possible reforms. As such, suggestions are made with regard to what can be modified and, further, what can be introduced to ensure that the core fabric of arbitration, the principle of party autonomy, is maintained.

The way forward

While it was acknowledged that delocalisation proposed to safeguard the arbitral process from judicial interference, it nevertheless fell short of adequately dealing with certain issues. These included procedural improprieties in the arbitral process, among others.⁸³ Thus, in many circumstances, national courts were required to intervene, which was regarded as saving the arbitral process.⁸⁴ Consequently, this highlights a potential area for reform, enabling a purer form of delocalisation.

Arbitral tribunals lose their jurisdiction once an award has been rendered. Thus, enforcing the award and instances where parties wish to set it aside for procedural irregularities means that they must seek assistance from national courts. Nevertheless, there is great discrepancy involved. For instance, the parties select arbitration to resolve their dispute. As such, this process should not conclude once an award has been rendered. Rather, the arbitral process should also accommodate the need of the parties to enforce or challenge the award, without offloading them on to the national courts. Effectively, this would increase the benefits of arbitration.

As a solution, rather than parties depending on national courts in instances where there are procedural improprieties—challenging the arbitral award and other issues—a separate appeals chamber can be created to deal with such matters. This would be similar to the ICSID Additional Facility, which as an appeals chamber provides arbitration, conciliation and fact-finding services. These are for certain disputes that do not fall within the remit of the ICSID Convention.⁸⁵ Furthermore, there would be no need for another international treaty in creating this chamber. The NYC can circumvent requirements for an international treaty by including a provision that all decisions made by the chamber must be recognised by contracting states. This would enable efficiency and certainty in the recognition and implementation of the chamber’s decisions.

As a result, the appeals chamber would be independent from the arbitral tribunal to ensure there is no conflict of interest. Trained professionals would be appointed,

⁷⁷ Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 9.

⁷⁸ Dike, “Delocalisation of Ad Hoc Arbitral Proceedings”, p.14.

⁷⁹ Jan Paulsson, “Delocalisation of International Commercial Arbitration: When and Why It Matters” (1983) 32 *International & Comparative Law Quarterly* 53, 54.

⁸⁰ Paulsson, “Delocalisation of International Commercial Arbitration” (1983) 32 *International & Comparative Law Quarterly* 53, 54.

⁸¹ Li, “The Application of the Delocalisation Theory in Current International Commercial Arbitration” [2011] I.C.C.L.R. 1, 4.

⁸² S. Greenberg, C. Kee and J.R. Weermantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge: Cambridge University Press, 2011), p.79.

⁸³ Other matters include where a party may challenge the agreement to arbitrate by commencing litigation, prior to the formation of the tribunal and interim measures.

⁸⁴ Lew, “Does National Court Involvement Undermine the International Arbitration Process?” (2009) 24 *American University International Law Review* 489, 496.

⁸⁵ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules) 2006 art.2.

determining the issues in an unbiased manner. This would ensure that such professionals are of the same calibre and possess equal competence as national judges without actually being judges. Essentially, this enables the same quality of service as courts provide but without there being any judicial intervention. Furthermore, these appeal chambers can be created for each arbitral institution, as each institution has its own rules. Consequently, this would enable parties' easy access, if and when issues arise before, during or after the arbitral process.

However, while appeal chambers would be an ideal solution by enabling delocalisation to exist in its purest form, many issues remain. First, creating a new appeals chamber for each arbitral institution would cost a lot of time and money. Where will these funds be generated from? Who will oversee the creation of these chambers? In addition, while it may be easier and perhaps cheaper to have one chamber per contracting state, this would create unnecessary backlogs. Also, this would not be welcomed, as a key benefit of arbitration is its speed. In addition, each arbitral institute has its own rules, so it would not make sense for one appeal chamber in each state to be able to adequately deal with all appeals under one set of rules. Problems also exist in relation to the appointment of the professionals. Who will appoint them and how will they be selected? Will the parties select them as they choose arbitrators, or will they be appointed with no regard to the parties' choice? As such, does this not impede party autonomy? Furthermore, issues also arise with regard to modifying the NYC to include the provision of appeal chambers. It is difficult to amend the NYC with the requisite approval and the practical difficulties presented by ratification by existing members.⁸⁶

In addition, if the arbitral process is completely independent of the national courts and legal systems, then who will regulate the process? Although the chambers can take on a regulatory function, they are ultimately a branch of the tribunals, however independent they may be. Thus, if there is any bias by the appointed professionals in deciding matters, how will this be resolved? While it can be argued that judges in national courts can also be biased when resolving issues, the fact that they have been in existence and have successfully resolved a vast number of cases indicates their effectiveness. Therefore, creating new appeal chambers in light of an already established judicial system, removing their power to intervene and granting it to another institute is not feasible.

These challenges offer support to the anti-delocalisation campaign that legal principles should not exist in a vacuum. It is problematic for an arbitral process to be completely detached from the laws of the seat of arbitration. As such, arbitral proceedings that arise as a

result of private contractual stipulations should possess a national disposition.⁸⁷ This then brings the debate back to the idea of a diluted version of delocalisation, which is more practical than keeping the arbitral process completely independent of national legal systems. In this form, national laws and courts have taken a step back from legislative and/or practitioner demands. Instead they have adopted a more laid-back attitude to arbitrations held within their jurisdictions.⁸⁸

Consequently, the impact of an almost delocalised arbitration is that it can be exercised in certain jurisdictions, if the legal system and courts of that state allow it. However, although the ICSID Additional Facility is a separate appeals chamber, judicial intervention still occurs.⁸⁹ As such, this creates concerns for the proposed chamber. If its purpose is to curb judicial intervention and to ensure the purest form of delocalisation, perhaps it is safe to state that this would not be the case. This is because of the experience the ICSID Additional Facility has had with judicial intervention. Thus, it is likely that the proposed chambers will have the same experience. As a result, it is concluded that it may not be practical for pure delocalisation to exist in the context as suggested above. Therefore, it is more useful to enable arbitration to co-exist with the courts and legal systems to take a hands-off approach, as opposed to excessive interference.

The suggested reforms with regard to delocalisation have been examined. While an independent appeals chamber would be the best solution to ensure that delocalisation can purely exist, without excessive judicial intervention, it simply is not feasible. This is because, in practice, issues still exist which impede party autonomy. Having an absolute system of arbitration, free from the vestiges of national law, sits well on paper but has no practical significance. Thus it is proposed that as a diluted version of delocalisation currently exists, it should continue to be supported to ensure a more effective system of arbitration.

Conclusion

In conclusion, after critically exploring the case for a diluted version of delocalisation in international commercial arbitration, it is evident that delocalisation is a highly attractive concept. Essentially, it endeavours to enable the arbitration process to be free from the vestiges of national laws evidenced through the supervision of the arbitral process. While this may be achievable, judicial intervention is also an integral part of the arbitral process and cannot be ignored. Arbitral proceedings are often subject to many issues which require the assistance of national courts. This supportive function is extremely crucial, as courts can utilise their powers to ensure a successful hearing and the enforcement

⁸⁶ A.J. van den Berg, "Q & A with Albert Jan van den Berg" (2008) 3 *Global Arbitration Review* 21.

⁸⁷ Mann, "Lex Facit Arbitrum" in Sanders, *International Arbitration: Liber Amicorum for Martin Domke* (1967), pp.159–161.

⁸⁸ Greenberg, Kee and Weermantry, *International Commercial Arbitration* (2011), p.79.

⁸⁹ Additional Facility Rule 46(4): "The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal." See also C. Schreuer, "Interaction of International Tribunals and Domestic Courts in Investment Law" [2010] *Contemporary Issues in International Arbitration and Mediation* 71.

of the arbitral awards—powers which the arbitral tribunals lack. Furthermore, courts and national legal systems are vital in enforcing awards as the tribunals no longer exist once awards have been granted.

Therefore, it was proposed that, owing to the many circumstances where judicial intervention is necessitated in the arbitral process, it may be beneficial to create a separate appeals chamber. This would deal with issues for which the parties currently seek court assistance. For instance, where the parties wish to enforce the award or challenge it, the parties can request help from the chamber instead of the court. Ultimately, this would limit judicial intervention and uphold the theory of delocalisation and party autonomy. Consequently, it was proposed that the NYC should be amended to include the provision of this new chamber and that all its decisions should be binding on contracting states.

However, while a separate appeals chamber would be ideal, it simply would not be practical, owing to issues such as costs and regulatory functions. Also, modifying the NYC would be very difficult. Furthermore, having an arbitral process that is completely independent and existing in a legal vacuum does no favours. Often it pays to have judicial intervention, although this is contrary to delocalisation and to the core features of arbitration. This

is because case law illustrates a working system, a process that “saves the arbitral tribunal”. Therefore, if judicial intervention means that the arbitral process remains a functioning and subsisting dispute resolution mechanism, then is it so bad that interference from the courts exist? On the other hand, of course it matters. Party autonomy is the core feature of arbitration. As the parties have selected to arbitrate over litigation, the continuing intervention of the courts is not always welcome. Nevertheless, it was proposed that as a diluted version of delocalisation may already exist, it would be more reasonable to support it. This would be practical and would enable a more effective system of arbitration, as opposed to having a completely independent arbitral system or one with excessive judicial intervention.

In the future, thought must also be given to the way forward. It has been argued that a separate appeals chamber may not be the best solution to limit the restrictions on party autonomy. Therefore, perhaps actively implementing a diluted form of delocalisation across all contracting states is a step in the right direction. Courts and legal systems taking a more relaxed approach to arbitration may assist in limiting judicial intervention, which will enable both delocalisation and party autonomy to be upheld.