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DELOCALISATION OF ARBITRAL PROCEEDINGS AND *LEX ARBITRI*: A SOJOURN INTO THE EQUILIBRIUM

BY

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Abstract

*This paper examines two important issues in relation to international commercial arbitration. First, whether the notion that international commercial arbitration is conducted entirely outside the framework of national legal systems is correct or too good to be true. In other words, is there anything like floating arbitration (i.e. delocalised or denationalised arbitration)? Secondly, whether there is no such thing as a *lex arbitri*. That is, is there anything like the law of the country in which the arbitration is held in the conduct of international commercial arbitration? The paper ends with a concluding remark on the true position of the arguments.*

1.0 Introduction

The basic principles of international commercial arbitration is the freedom of the parties to agree to have disputes arising from their contract resolved outside the national court regime resorting to the alternative dispute resolution mechanism as well as using the applicable law of their choice.

A subsidiary tenet to the main principle of party autonomy is the argument over the role of national law in the mechanism of international commercial arbitration. There are those who argue that, because of the doctrine of party autonomy, arbitrators owe their powers to the parties who appointed them. Therefore, arbitration should be freed "from the local peculiarities of a place of arbitration chosen either fortuitously or for reasons of neutrality, having nothing to do with the parties' attachment to local rules of arbitrations. However, two general views concerning the role of national authorities in international commercial arbitration are: One view advocates the involvement of national courts at various stages in the arbitration process in the event of conflict between the parties¹ (*Lex arbitri* proponent). Another view prefers that the national courts should be left out of the arbitration system altogether and prescribe a supranational body to supervise arbitration (delocalisation theory proponent). Structured in to four parts, the focus of the paper in part two is an examination of what constitute delocalised arbitration. In part three, the article discusses the *lex arbitri* and the role of same in arbitration processes. The paper ends in part five with concluding remarks.

2.0 Delocalised Arbitration

Delocalised arbitration means to detach an international commercial arbitration from control by the law of the place in which it is held.² An international commercial arbitration is delocalised when it is detached completely from the law of the place of arbitration to the extent that there is no need for support by local courts, e.g. for enforcement purposes.³ Accordingly, Hong-lin Yu observed that 'the delocalisation theory seeks to detach international commercial arbitration from controls imposed by the law of the place of arbitration (the *lex fori*).⁴ Delocalised arbitration results in floating award and

¹ Park W.W.: "The *lex arbitri* and International Commercial Arbitration" (1983) 32 I.C.L.Q. 21; and Mann F.A., "England Rejects

"Delocalised" Contracts and Arbitration" (1984) 33 I.C.L.Q. 193.

² Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4 edn Sweet & Maxwell, London 2004) 90.

³ Molife and Hong-lin Yu, 'The impact of national law elements on international commercial arbitration.' (2001) IALR 4(1) 17.

⁴ Hong-lin Yu, 'Minmentals Germany GmbH v Ferco Steel Ltd-a step further than localization?' (1999) IALR 2(3) 83.

is often referred to as floating, supra-national, a-national, transnational or expatriate arbitration.⁵

Redfern and Hunter⁶ have submitted that the whole gist behind delocalised arbitration is 'the idea being that instead of a dual system of control, first by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control—that of the place of enforcement.' Furthermore, Paulsson has forcefully argued that arbitration should be freed 'from the local peculiarities of a place of arbitration chosen either fortuitous or for reasons of neutrality, having nothing to do with the parties attachment to local rules of arbitration.'⁷In support of delocalised arbitration at one time or the other are countries like Switzerland, Belgium and France.⁸ It is important to note that the proponents of floating arbitration or delocalised arbitration often based their arguments on two principal submissions:

a. Party autonomy

The first argument is that party autonomy is the philosophy that underpins international commercial arbitration.⁹ The will and consent of the parties is the underlining consideration for the purpose of determining the process of resolving international commercial arbitration as opposed to that of the state.¹⁰ This submission is against the historical view that the power of determining the process of disputes resolution rest with the national legal systems as a public power. This is known as the jurisdictional theory.

Party autonomy ensures that the parties have the freedom to select and control the substantive and procedural laws applicable in respect of their arbitration. This autonomy is expressed in the parties' freedom to select and control the arbitrators and arbitration rules applicable to their dispute. Accordingly, the arbitration rules as well as the arbitrators' jurisdiction and powers are all derived from the parties' consensual agreement.¹¹ It is argued that most national legal systems of the world now recognise and accept party autonomy as the threshold upon which international commercial arbitration rest. This allows the parties to choose the applicable law (whether substantive or procedural) to govern their arbitration.¹²

b. Single Control

The second submission in support of delocalised arbitration does not totally reject the intervention or involvement of the framework of national legal systems, but however argued that the intervention or involvement of the national systems should be at the place of enforcement of award. It is the submission of the advocate of delocalised arbitration that the involvement or intervention of the framework of the national legal systems should only be by the law of the place of enforcement.¹³

According to Model Law art 36(1), the recognition and enforcement of arbitral award may be refused *irrespective of the country in which it was made*. (emphasis added). This provision is similar to but not identical to the New York Convention art V (1). It should be noted that art V (1) (e) of the New York Convention contemplates that the parties may select a procedural law other than the *lex arbitri* to govern their arbitration.¹⁴ This may however have practical impossible consequences on the arbitration.¹⁵

Article 19(1) of the Model Law provides that subject to the provisions of the [Model] law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Further, art 15(1) of the ICC Rules provides that the proceedings before the Arbitral Tribunal shall be governed by these [ICC] Rules and where these [ICC] Rules are silent, by any rules which the parties or failing them [parties], the

⁵ Paulsson, 'Delocalisation of International Commercial Arbitration.: When and Why It Matters' (1983) 32 ICLQ 53-61.

⁶ Redfern & Hunter, p.51.

⁷ Paulsson, p.53.

⁸ Hong-lin yu, p. 88.

⁹ Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin (1981) 30 ICLQ 358, 362-368.

¹⁰ JDM Lew, 'Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards' (Oceanic Publication, New York 1978) 81.

¹¹ Ibid at p.83.

¹² Park W.W & Mann F.A, p.265

¹³ Paulsson, pp. 54-57.

¹⁴ Naviera Amazonia Peruana SA v Compania Internacional de Seguros de Peru [1988] 1 Lloyd' Rep 116, 120, CA.

¹⁵ Park W.W & Mann F.A, p.428.

Arbitral Tribunal may settle on whether or not reference is thereby made to the rules of procedure of a national law to be applied to arbitration.

It is submitted therefore that the essence of the foregoing provisions are to internationalise arbitration and detach it from the *lex arbitri*. Accordingly, Paulsson stated that 'the delocalised award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin.'¹⁶ Importantly therefore, it is argued that the whole essence of single control of arbitration by the place of enforcement is to detach arbitration from the local laws of the place or seat arbitration including its overriding mandatory provisions.¹⁷

Notwithstanding the foregoing persuasive arguments in favour of delocalisation of arbitration, it is submitted that the proposition that international commercial arbitration is conducted entirely outside the framework of national legal systems is too good to be true. This is so because to seek completely to avoid national jurisdiction would be misguided. Indeed, the international arbitral system would ultimately break down if no national jurisdiction could be called upon to recognise and enforce awards.¹⁸

It must be conceded that party autonomy is the benchmark on which to test the conduct of international commercial arbitration today. However, the principle of party autonomy must be balance with that of the national legal systems.¹⁹ To this end, Redfern and Hunter have correctly argued that 'an international arbitration is governed not only by the rules adopted by the parties and the arbitral tribunal, but also by the *lex arbitri*.'²⁰ It is therefore submitted that both the parties and *lex arbitri* shall have dual control over the conduct of international commercial arbitration.

It is important to note that the intervention or involvement of the national legal systems is strictly limited. The conditions under which the national courts may intervene in international arbitration are statutory provided in each State. The involvement of the national legal systems also extends to the national legal systems overriding mandatory provisions. These overriding mandatory rules are fundamental or core rules of the seat, place of enforcement and/or arbitral institution rule from which the parties cannot derogate.²¹

It is also submitted that the proponent of delocalised arbitration recognises the control of the national legal systems of the place enforcement. Delocalised arbitration supporters recognise and accept the importance of the intervention or involvement of the framework of the national systems in international commercial arbitration but only at the place of enforcement. Accordingly, the arguments by the advocates of delocalised arbitration that international business community has successfully carried on arbitration proceedings detached from national legal systems or the fear that one of the parties would breach the arbitration agreement by litigating at the national courts in order to delay, disrupt or stop the arbitration process is inherent faulty. This is so because international business community cannot successfully carry out international arbitration without the intervention or involvement of the national courts. The national courts may be require to set up the process of arbitration in referring the parties to arbitration, appointing arbitrators or granting interim measures to protect it.

Further, the fear that one of the parties may delay or halt the arbitral process through the involvement or intervention of the national legal systems is misconceived and unfounded. The practical reality is that most national legal systems of the world today has undergone policy shift in favour of arbitration with strict limits on the involvement or intervention of the national courts. It is in the light of this shift that Model Law art 5 provides that no [national] court shall intervene except where so provided in this law.

In *Netsys Technology Group AB v Open Text Corp*, the Ontario Superior Court of

¹⁶ Ibid (n 5) 53, 57.

¹⁷ Hong-lin Yu, 'is the territorial link between arbitration and the country of origin established by Articles I and V (1) (e) being distorted by the application of Article VII of the New York Convention.' (2002) 5(6), 196, 198.

¹⁸ Redfern & Hunter, p. 54.

¹⁹ Park W.W & Mann F.A, pp. 21 & 193 respectively.

²⁰ Redfern & Hunter, p. 83.

²¹ The overriding mandatory provisions include the followings: (i) the subject matter of the dispute must be capable of settlement by arbitration. That is, arbitrable, (ii) the subject matter of the dispute must not be contrary to public policy, (iii) natural justice rule of fair hearing-equality of parties and opportunity to be heard and present one case must be complied with, and (iv) third parties rights.

Justice has interpreted art 5 of the Model Law in relation to other provisions of the Model Law to mean strict limitation on the intervention or involvement by national courts in arbitration process.

It is submitted from the foregoing that the proposition that international commercial arbitration is conducted entirely outside the framework of national legal systems is theoretically possible but practically impossible because international commercial arbitration requires the support of the framework of national legal systems to be complete and successful.

3.0 What is *Lex arbitri*?

The *lex arbitri* is the law of the country in whose territory the arbitration take place.²² Simply put, a *lex arbitri* is the law of the place or seat of arbitration. It is the national law of the country which the parties have expressly or impliedly agreed to as the place or seat of arbitration. Pursuant to the Model Law art 20(1), the parties are free to agree on the place of arbitration. Failing such agreement [by the parties], the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.²³ In addition to this, the International Chambers of Commerce Arbitration Rules (ICC Rules) art 14(1) provides that the place of arbitration shall be fixed by the [ICC] Court unless agreed upon by the parties.

An important exception to this general rule of parties' freedom to choose the place of arbitration is investment arbitration conducted under the Washington Convention on the Settlement of Investment Disputes between States and National of other States which creates the International Centre for the settlement of Investment Disputes ("ICSID Convention") and arbitration conducted pursuant to the European Convention on International Commercial Arbitration.

The most important role of the place of arbitration (that is, *lex arbitri*) is simply to govern the arbitral proceedings (i.e. the procedural law of the arbitration). That is, it provides the supervisory, interim and supportive measures requires for international arbitration. The *lex arbitri* provides the body of rules which sets a standard external to the arbitration agreement. It follows that the *lex arbitri* governs not only the procedural law of the arbitration but also provides for overriding mandatory provisions from which the parties cannot derogate from.

i. Overriding mandatory

There are two broad categories of *lex arbitri* rules. First is the overriding mandatory *lex arbitri* rule and second are the non-mandatory *lex arbitri* rules. A rule of *lex arbitri* is overriding mandatory if it is fundamental or core rule which the parties cannot derogate from once the *lex arbitri* is choose. The non-mandatory provisions can be derogated from by the agreement of the parties. The main types of overriding mandatory provisions of the *lex arbitri* are rules relating to its public policy, capability that the dispute can settlement by arbitration, fair hearing and third parties interest.²⁴ The breach of public policy here refers to international accepted morality issues like drug trafficking or money laundering and not that of a state's individual interest. Other mandatory rule includes appointment of number of arbitrators, taking of evidence under oath or otherwise etc.

It is therefore clear from above that the notion that there is no such thing like *lex arbitri* is respectfully wrong. This is so because the *lex arbitri* provides a jurisdictional base for international arbitration. It provides supervisory and support functions as well as nationality for the arbitral award. The arbitral award carries with it the imprimatur of the state where it was made. To support this position, the role of the *lex arbitri* is now considered below.

3.1 The role of *lex arbitri*

The role of the role *lex arbitri* is strictly limited.²⁵ A combine reading of arts 1(2) and 6 of the Model Law is to the effect that the national courts of the place of arbitration (i.e. the *lex arbitri*) have the exclusive jurisdiction in relation to matters listed in arts 11(3), 11(4),

²² Redfern & Hunter, p. 79.

²³ Similar to UNCITRAL Arbitration Rule art 16(1).

²⁴ Ibid (n2) 86-87.

²⁵ Model Law art 5.

13(3), 14, 16(3) and 34(2) of the Model Law. The *lex arbitri* also share concurrent jurisdiction with other national courts on matters listed in arts 8, 9, 17H, 17I, and 17J of the Model Law. While the matters listed in arts 35 and 36 of the Model Law are for the exclusive jurisdiction of the national courts of the place of enforcement.

i. Enforcement of arbitration agreement

In furtherance of its concurrent jurisdiction, the *lex arbitri* perform certain supervisory functions. The *lex arbitri* may refer litigation matters before it to arbitration at the request of a party to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed.²⁶ This role is simply concerned with the enforcement of the arbitration agreement and it has been interpreted to mean that the *lex arbitri* or any court of the contracting state under the NYC Convention to refer the parties to arbitration if so requested.

Furthermore, the *lex arbitri* may hear appeal on question of the arbitral tribunals' jurisdiction including issue of existence or validity of the arbitration agreement.²⁷

ii. Granting and enforcement of interim measures

The *lex arbitri* may also grant interim measures to protect the arbitral proceedings at the request of parties.²⁸ The scope of the interim measures extends to arbitration conducted outside the territory of the *lex arbitri*.²⁹ Interim measures include such orders to preserve, maintain or restore the status quo of the subject matter pending determination of the dispute.

The role of the *lex arbitri* may also extend to assisting in the enforcement of the interim measures issued by an arbitral tribunal irrespective of the country in which it was issued.³⁰ It should be noted that interim measures issued by an arbitral tribunal may be refused recognition or enforcement by the *lex arbitri* if it contravenes art 17I of the Model Law.

iii. Consolidation of multiple arbitrations

The *lex arbitri* role may also extend to consolidation of multiple arbitrations. This mainly depends on the agreement of the parties, the arbitral institution rule adopted by the parties or the rule of the *lex arbitri*. To this end, section 7(1) of the International Commercial Arbitration Act ("ICA Act") provides for the consolidation of multiple arbitration proceedings by court order. This may also extend to situation of multiple arbitrations be consolidated where the national courts assist in appointment of arbitrators.³¹

iv. Appointment, challenge and termination of mandate of arbitrators

In accordance with its exclusive jurisdiction,³² the *lex arbitri* may also be involved in appointment of arbitrators if a party or arbitrators fails to do so.³³ In addition to this, the *lex arbitri* may at the request of any of the party take the necessary measure provided the agreement on the appointment procedure did not state otherwise.³⁴ Further, the *lex arbitri* may also hear issue of challenging of arbitrator by any of the parties or the termination of arbitrators' mandate.³⁵

v. Recourse against or enforcement of award

The *lex arbitri* may perform the role of setting aside of arbitral award if requested by any of the party.³⁶ In addition, where the assets of the losing party to arbitral award are in the *lex arbitri*, the *lex arbitri* may perform the function of recognising and enforcement of the

²⁶ Model Law art 8(1). Art II (3) of the NYC Convention also has similar provision.

²⁷ Model Law art 16(3)

²⁸ Model Law art 9; Similar provision in ICC Rule art 8(5)

²⁹ Model Law art 17J.

³⁰ Model Law art 17H

³¹ ICA Act 7(2)

³² Model Law art 6.

³³ Model Law art 11(3).

³⁴ Model Law art 13(4)

³⁵ Model Law arts 13(3) and 14.

³⁶ Model Law art 34(2)

arbitral award.³⁷

From the foregoing, it is submitted that international commercial arbitration cannot survive without the framework of the national legal systems especially as provided by the *lex arbitri*.

4.0 Conclusion

It is argued that international commercial arbitration cannot exist in legal vacuum. It must be supported by a national legal system. Thus, delocalised arbitration is often argued on the basis that the parties' freedom to select the place of arbitration is based on the expectation that arbitration will be conducted at a place that is neutral and has little or no connection with the dispute. The unintended consequence of nationalisation is that it brings with it the overriding mandatory provisions of the *lex arbitri* which the parties to arbitration must comply with. Furthermore, it is often argued that localisation of arbitration would result in unnecessary use of litigation by the party to delay, disrupt or stop arbitration through the intervention or involvement of the national courts at the place of arbitration.

Although the arguments in favour of delocalisation of arbitration are often persuasive, it is respectfully submitted that these arguments are not convincing for practical reasons. The party's autonomy to select and control arbitration must be balanced against that of the state to ensure that arbitration that goes on within its territory is done within the confines of the law. This also extends to the overriding mandatory provisions which are to ensure that the arbitration is lawful. Furthermore, the intervention or involvement of the *lex arbitri* is needed to ensure that arbitration is successful as opposed to truncate. The *lex arbitri* provides a platform to supervise and assist international arbitration by referring the litigant to arbitration, providing interim measures to protect, appoint arbitrators, set aside, recognise and enforce arbitral awards if the need arises.

In conclusion, it is submitted that international commercial arbitration must be conducted within the framework of the national legal systems and the *lex arbitri* is relevant and plays an important role to its success.

³⁷ Model Law art 36. Similar to NYC Convention (V)