The Party Autonomy in International Commercial Arbitration from the Delocalisation Theory

This report will focus on the principles of party autonomy as the proper base of the delocalisation realm. It will also argue that the only legal constraint of party autonomy might be known as the public policy.

The theory of delocalised arbitration is more comprehensive than the principles of party autonomy, in the contemporary system. Since the seat of arbitration plays a crucial role in defining the legal framework for international commercial arbitration, party autonomy theory means that the parties are entitled to designate the arbitral 'seat,' 'forum' or '*locus arbitri.*'[1] This would mean that the parties are able to choose substantive law, as well as the arbitration process, such as the appointment of the arbitrators, the timetable, and the language of the arbitration.[2]

Proponents of the party autonomy sphere assert that the development of this phenomenon is undoubtedly remarkable. The basis of this phenomenon is known as the derivation of feasible evolutions, within the different municipal jurisdictions, such as common law, civil law and socialist systems.[3] Certainly, the freedom of contract in the arbitration realm has been admitted globally. In this view, both UNCITRAL Model Law on International Commercial Arbitration 1985 and ICC Rules of Arbitration, confirm that the parties can freely select the applicable law at the time of making their contract.[4]

As a matter of fact, the different approach to the freedom to arbitrators is expressly cited under Art 28 (2) of the UNCITRAL Rules, which clearly states that 'the arbitrators shall apply the law determined by the conflicts of laws rules in which it considers applicable.'[5] In this regard, it is worth mentioning that the arbitrators are not able to directly choose the applicable law, since they are constrained to apply the conflict of laws rules that they consider admissible. This would mean that the strong role of party autonomy is undeniably objective, in the Model Law.

Crucially, Art 28 of the Model Law can be compared with Art 17 of the ICC Rules, which provides that the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal.[6] The question may arise regarding whether *lex*

[1] J Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 International and Comparative Law Quarterly 517, 518.

[2] Dursun, A. G. Ş. A CRITICAL EXAMINATION OF THE ROLE OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRA-TION AND AN ASSESSMENT OF ITS ROLE AND EXTENT, 162

[3] N Blackaby, C Partasides, A Redfern, M Hunter, *Redfern and Hunter on international arbitration* (5th edn, Oxford University Press 2009), 195

[4] ibid 196.

[5] UNCITRAL Rules, Art 28.

[6] ICC Rules, Art 17.

mercatoria could be selected as the law applicable to the substance of the dispute?[7] In practice, however, there is no proper answer to this question; under the principles of party autonomy, the arbitrators are permitted to choose the acceptable choice of law. The debate might be triggered either in the place of arbitration, or regarding the enforcement of the award.

Indeed, the basis of the ICC Rules go a step further, in contrast to the Model Law; therefore, the power of the arbitrators distinguishes differently between two instruments, where the parties do not opt for the law or the rules of the law enforceable to their contract. In this view, Goode vividly remarks that the arbitrators are able to designate the appropriate law, for example, the UNIDROIT principles, so that as is obvious, the ICC Rules do not restrict a choice of law for arbitrators.[8]

Art 35 of the UNCITRAL Rules also provides an explanation for the autonomy of parties, in which they select the rules according to their particular needs.[9] According to above-mentioned explanations the shift away from the courts and domestic jurisdictions towards the autonomous arbitral process are merely visible. As is clear the positive approach to model law means that every country shall move towards the temptation of a purely national law.[10]

Opponents of the adopting the UNCITRAL Modal Laws argue that the UNCITRAL is not a draft international convention; therefore if it were a convention, it would be undeniably adopted or rejected. Besides, The Convention on the Recognition and Enforcement of Foreign Arbitral Award, or New York Convention, assigns this with regards to Art V (1) (d), where the enforcement of the award can be denied if the composition of the arbitral authority is not based on the parties' agreement.[11] Therefore, the model laws and international conventions evidently consist of the parties' consent, in their context.[12]

In light of the move towards uniformity in international commercial arbitration, the parties should be entitled to opt for their choice of law, independently, in their contract. However, the question might arise regarding whether there are any restrictions on the controlling rule of the arbitration, or court, of the place of arbitration, in which the state court may reject jurisdiction, since it is contrary to

[7] DD Caron & LM Caplan, *The UNCITRAL arbitration rules: a commentary* (Oxford University Press 2013) 127-130.

[8] R Goode, H Kronke, E McKendrick & J Wool, *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007)

[9] UNCITRAL Rules, Art 35.

[10] HG Gharavi, 'Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention' (1996) J Transnat'l L & Pol'y 93, 103.

[11] Convention on the Recognition of Foreign Arbitral Awards – the "New York" Convention, Art V.

[12] E Shackelford, 'Party autonomy and regional harmonization of rules in international commercial arbitration' (2005) 67 U Pitt. L Rev 900.

public policy? It can be assumed that public policy, or *ordre public,* vividly confines the role of delocalised arbitration theory.[13] Art V (2) (b) of the New York Convention provides that the recognition of an arbitral award may be refused, where the award would be contrary to public policy.[14] In this view, Art 34 (b) (ii) of the UNCITRAL Model Law also refers to public policy, within its context.[15] Arguably, it can be noted that the New York Convention should refer to transnational public policy, rather than the public policy of the enforcing state.[16]

In this regard, the question may arise as to whether the international standards could be replaced with the public policy of the national jurisdiction. The restrictions of the public policy may be different, when applied to international rather than national arbitration. It is worth mentioning that the enforcement of a contract that violates public policy can be refused, under the principles of the common law sphere.[17] The New York Convention also allows the refusal of enforcement, the bedrock of public policy.

Since the parties are entitled to choose non-national rules as substantive law, therefore the international element of arbitration is not really feasible. Considering this the delocalisation theory might be a tempting idea, but it bears many disadvantages that mainly result in higher insecurity and risks for the parties involved in arbitration.

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[13] ML Moses, *The principles and practice of international commercial arbitration* (Cambridge University Press 2012) 84.

[14] New York Convention, Art V.

[15] UNCITRAL Rules, Art 34.

[16] ibid.

[17] WW Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1988)