THEORETICAL AND PRACTICAL PERSPECTIVE OF THE DELOCALIZATION OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE LEGISLATION OF SOME STATES

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Abstract: *The concept of delocalization in international commercial arbitration refers to the reduction or elimination of the connection between arbitration and national legal systems, particularly the law of the seat. It allows the arbitral process to function more independently, supported by international conventions and the principle of party autonomy. This article explores the theoretical foundations and historical development of delocalization, with a comparative legal analysis of its application in the legal systems of France, Switzerland, England, Singapore, Hong Kong, and Russia. Drawing from doctrinal sources, case law, and academic critique, the paper examines both the advantages and limitations of delocalization and evaluates its practical implementation in different jurisdictions. The study contributes to the understanding of how different legal systems respond to the tension between autonomy and control in international arbitration.*

Key words: *arbitration, delocalization, international law, party autonomy, lex arbitri, state intervention, e-arbitration.*

JEL: K10, K20

1. Introduction

In the evolving framework of global commerce, international commercial arbitration has emerged as a central dispute resolution mechanism due to its flexibility, confidentiality, enforceability of awards, and the neutrality of forum. Arbitration offers businesses the advantage of selecting the applicable substantive and procedural laws, the venue, language, and even the arbitrators—enhancing predictability and control over dispute resolution processes.

Historically, arbitration was viewed through a territorial lens, governed primarily by the procedural law of the seat (lex arbitri). This model—often called the localization thesis—grants the state of the seat supervisory jurisdiction over various procedural elements of the arbitral process, including annulment and enforcement. However, with the increasing internationalization of trade, the suitability of strict territorial oversight has been questioned. The rise of multinational contracts, e-commerce, and decentralized digital platforms has necessitated a rethinking of arbitration as a transnational institution detached from the state-centric order.

The theory of delocalization, rooted in the jurisprudential ideas of Berthold Goldman, Jan Paulsson, and Emmanuel Gaillard, challenges the traditional notion that arbitration must be tethered to a legal seat. Instead, it proposes that arbitration can function as an autonomous legal order governed by international norms and party autonomy. This decoupling allows arbitration to remain adaptable in complex, cross-border contexts, where national procedural frameworks may conflict or introduce unwanted interference.

Yet, delocalization remains controversial. Critics argue that removing the anchor of national law may weaken legal certainty and reduce procedural safeguards. Courts may hesitate to enforce awards that appear detached from any recognized procedural framework. Despite these concerns, numerous jurisdictions—France and Switzerland foremost among them—have embraced variations of delocalization. Others, like Russia or even Moldova, remain skeptical, often citing public policy or the need for state oversight.

This paper addresses the theoretical underpinnings of delocalization and investigates how various legal systems have responded to its development. It analyzes the interaction between party autonomy and state sovereignty, explores the implications for e-arbitration and virtual tribunals, and surveys the principal doctrines, legislative texts, and jurisprudence shaping the global delocalization landscape. This paper addresses the theoretical underpinnings of delocalization and investigates how various legal systems have responded to its development. The analysis draws from both doctrinal perspectives and case studies from leading arbitration jurisdictions.

2.Basic content

2.1 Origins and Conceptual Developments

The delocalization theory was first systematically formulated in the 20th century by scholars such as Berthold Goldman, Jan Paulsson, and Emmanuel Gaillard. Paulsson's pluralist theory emphasized the legal independence of arbitral awards from the country of the seat. [6] Gaillard further advocated for a transnational legal order in arbitration, grounded in the autonomy of the parties.[4]

2.2 International Conventions and Model Law Support

The UNCITRAL Model Law and the New York Convention (1958) provide substantive ground for delocalization. Article 19(1) of the Model Law affirms the procedural autonomy of the parties,[8] allowing them to agree on rules independent from the domestic law of the seat. This is particularly crucial in contexts involving multiple jurisdictions or when the parties prefer institutional rules such as those of the ICC, LCIA, or SIAC.

The Model Law further reflects a global consensus on minimizing court intervention, as seen in Articles 5 and 34. Article 5 restricts court involvement to instances explicitly provided in the law, while Article 34 limits the grounds on which an award may be set aside, promoting finality and autonomy.

The New York Convention, a cornerstone of international arbitration, also supports delocalization. Article V(1)(d) permits recognition and enforcement of awards even when the arbitral procedure deviates from the procedural law of the seat, provided it conforms to the agreement of the parties. This provision enables arbitral proceedings to occur without strict adherence to lex arbitri, further reinforcing the delocalized character of the arbitral process [9].

Additionally, Article VII allows enforcement under more favorable national laws, opening the door to delocalized enforcement frameworks. Jurisdictions like France and the Netherlands have made use of this clause to enforce awards annulled at the seat.

Soft law instruments such as the UNCITRAL Notes on Organizing Arbitral Proceedings and the IBA Rules on the Taking of Evidence in International Arbitration complement this framework by offering transnational procedural standards that operate independently from national procedural law. These tools enhance predictability while respecting party autonomy.

Together, these international and soft law instruments form the normative backbone of delocalized arbitration, anchoring its legitimacy in the consensus of the international legal and business community.

3. Comparative Perspectives on National Practice

3.1 Western Jurisdictions: France and Switzerland

France and Switzerland are often considered pioneering jurisdictions in the evolution of delocalized arbitration. France, in particular, has embraced a robust form of delocalization since the 1980s. The French Code of Civil Procedure (Articles 1504–1527) explicitly distinguishes between domestic and international arbitration and supports the autonomy of international arbitration from the procedural law of the seat. In the landmark *Putrabali v. Rena* case, the French Court of Cassation upheld the enforcement of an award even though it had been set aside at the seat (Indonesia), reaffirming France's commitment to the international character of arbitral awards.[10]

This French approach is rooted in the belief that the international arbitral award is not a product of any particular legal order but an autonomous decision derived from the agreement between the parties. French courts have consistently maintained a non-interventionist stance and have shown deference to arbitral autonomy unless fundamental principles of international public order are violated. Switzerland also represents a pro-arbitration environment through its Private International Law Act (PILA), especially Article 176, which limits judicial review and allows foreign parties to opt out of Swiss procedural rules. Swiss jurisprudence supports the minimal intervention doctrine and emphasizes party autonomy and finality of awards. The Swiss Federal Tribunal has rarely annulled international arbitral awards, thus reinforcing Switzerland's status as a preferred seat for arbitration [11].

3.2 Asian Common Law Hybrids: Singapore and Hong Kong

Singapore and Hong Kong have developed reputations as arbitration hubs by combining the procedural rigour of common law with pro-arbitration policy frameworks. Singapore's International Arbitration Act (Cap. 143A) incorporates the UNCITRAL Model Law and allows extensive party control over the arbitration process. Courts in Singapore have generally respected the independence of tribunals. In *Malini Ventura v. Knight Capital*, the High Court upheld the tribunal's authority to grant emergency relief, emphasizing that procedural autonomy is central to party expectations in international arbitration.

Hong Kong's Arbitration Ordinance (Cap. 609) also implements the UNCITRAL Model Law. Its jurisprudence demonstrates a clear policy of non-intervention, with courts refusing to re-examine the merits of arbitral awards. The case of *X v. Jemmy Chien* (2013) exemplifies how Hong Kong courts defer to the procedural integrity of international arbitration even when awards conflict with domestic expectations.

Both jurisdictions have adopted liberal approaches toward interim measures and enforcement mechanisms, reflecting a practical and flexible attitude conducive to delocalized arbitration. They have also advanced frameworks for online and virtual hearings, recognizing the changing nature of transnational dispute resolution.

3.3 Resistance Models: Russia and Moldova

Unlike the jurisdictions above, Russia and Moldova reflect resistance to delocalization, primarily by upholding a strong connection between arbitration and state legal authority. As outlined in Astakhova's study (2019), Russian courts often annul or refuse enforcement of arbitral awards rendered abroad by invoking broad interpretations of public policy. The 2015 reform of Russian arbitration law re-centralized control under authorized arbitral institutions and discouraged party-driven models not pre-registered with state authorities.

In Moldova, Law No. 23-XVI (2008) reflects formal adoption of the UNCITRAL Model Law, but in practice, courts continue to rely on local procedural standards. For instance, enforcement of foreign awards has been hindered by judicial interpretations that equate Moldovan public order with procedural conformity. There is also limited domestic experience with institutional arbitration that operates independently of the judiciary.

Moreover, the Moldovan legal framework does not yet accommodate innovations such as emergency

arbitration or remote hearings. To promote delocalization, Moldova would need to adopt reforms similar to those of Singapore or Switzerland, including court training, clearer legislative guidance, and support for institutional independence.

3.2 Asian Common Law Hybrids: Singapore and Hong Kong

Singapore and Hong Kong are among the most arbitration-friendly jurisdictions. Singapore's Arbitration Act (Cap. 143A) embraces the UNCITRAL Model Law, permitting delocalized procedures subject to minimal court oversight. Hong Kong's Arbitration Ordinance (Cap. 609) echoes this principle, granting enforceability and support for party-chosen rules.[13]

3.3 Resistance Models: Russia and Moldova

In contrast, Russia and Moldova maintain stricter judicial scrutiny. As noted by Astakhova (2019), Russian courts often rely on public policy grounds to refuse enforcement of awards lacking a local procedural anchor.[1] Moldova's Law No. 23-XVI (2008) regarding arbitration aligns formally with UNCITRAL but courts remain interventionist.[15]

4. E-Arbitration and the Evolution of Seatless Arbitration

The development of e-arbitration has accelerated interest in seatless and virtual arbitral proceedings. As Ceil (2020) highlights, electronic arbitration defies traditional territorial constructs, allowing the entire proceeding to occur online without a defined physical seat.[3] This evolution is deeply connected with technological innovation, the rise of blockchain-based dispute resolution systems, and the increased use of decentralized platforms such as Modria, Kleros, and Aragon Court.

These platforms use smart contracts and distributed ledgers to initiate and administer arbitration, relying on algorithmically guided procedures and crowdsourced juror pools. The absence of a traditional seat raises substantial questions concerning applicable law, recognition of awards, and procedural fairness. Critics warn that without a physical or virtual legal anchor, such arbitral processes may face enforceability challenges, especially in jurisdictions requiring clear legal oversight mechanisms.

Nevertheless, the hybrid concept of "functional localization" proposed by Ceil seeks to resolve this tension. It recommends assigning a nominal legal seat—often based on the server location or institutional affiliation—for the sole purpose of fulfilling recognition requirements under the New York Convention.

In 2022, the IBA and UNCITRAL jointly launched initiatives exploring the regulatory challenges and benefits of e-arbitration, focusing on data security, cross-border enforceability, and procedural legitimacy. Reports from the ICC Commission on Arbitration and ADR further support the standardization of e-arbitration practices, including uniform guidelines on electronic filing, digital evidence, and secure communications.

In practice, institutions such as SIAC and the LCIA have adapted rapidly by revising their rules to explicitly allow for online hearings and remote deliberations. The COVID-19 pandemic further catalyzed this shift, solidifying the legitimacy of fully virtual proceedings. Arbitral awards issued in these settings have already been upheld by courts in jurisdictions like Singapore, the UK, and the Netherlands, provided that fundamental due process standards were met.

Thus, e-arbitration represents not only a procedural innovation but a structural realignment of arbitration's foundations. While full delocalization in cyberspace may not yet be universally accepted, the emergence of digitally native dispute resolution systems signals a transformation that challenges the supremacy of the territorial seat in international arbitration.

5. Jurisprudential Insights: Case Studies

5.1 ***Mobil Cerro Negro v. PDVSA*** **(ICSID, 2008):** The annulment proceedings exemplify challenges in public international arbitration when seat doctrine clashes with investor expectations.

5.2 ***Essar Oilfields v. Norscot*** **(England, 2016):** The English court upheld a tribunal's decision on third-party funding costs, despite absence of seat-based limitations—reflecting deference to institutional rules over domestic procedural principles.

5.3 ***Econet v. Vee Networks*** **(Nigeria/UK, 2006):** A tribunal seated in London issued an award despite Nigerian courts asserting jurisdiction, highlighting the tensions of seat-based oversight versus party autonomy.

6. Doctrinal Criticism and Practical Limits

Delocalization has been criticized for weakening procedural safeguards. According to Rodriguez Pulido (2025), delocalization without cooperation from national courts risks legal uncertainty in areas such as interim relief and award enforcement.[7] Saghir and Nyombi (2016) argue for a middle path, suggesting the creation of a transnational arbitral appellate body to standardize review without national court involvement.[5]

7. Recommendations and Conclusion

Delocalization represents an evolution toward a more autonomous and party-driven system of international arbitration. However, its full realization requires coherent policy responses from legislators, arbitral institutions, and the judiciary. To mitigate the risks of legal fragmentation and enforcement uncertainty, the following policy recommendations are proposed:

- **Codify functional seat frameworks**: Legislative reforms should recognize functional or nominal seats to bridge the gap between virtual arbitral practice and territorial legal requirements. This is particularly important in the context of e-arbitration, where blockchain-based or fully online procedures may lack traditional anchors.
- **Harmonize institutional rules**: Leading arbitral institutions should adopt harmonized model clauses and procedural templates that accommodate delocalized proceedings. For example, the ICC, SIAC, and LCIA could standardize rules that support optional seat designations, cross-border enforceability, and remote hearings.
- **Train national judiciaries**: Judges must be equipped to interpret and enforce awards arising from delocalized or virtual proceedings. This includes understanding the relevance of international conventions, soft law instruments, and the limits of public policy exceptions.
- **Promote multilateral cooperation**: The international legal community should encourage convergence through diplomatic and institutional cooperation. Instruments similar to the Hague Judgments Convention or the Singapore Convention on Mediation may inspire frameworks for recognition of delocalized awards.
- **Introduce appellate review mechanisms**: To address concerns over procedural legitimacy and coherence, the arbitration community should debate the merits of an optional transnational appellate arbitral body. This would provide a safeguard for parties and strengthen the rule of law in a seatless environment.

In conclusion, the trajectory of delocalization reflects the growing global trust in arbitration as an autonomous system that operates parallel to national legal orders. While complete detachment from the seat remains contentious, hybrid models—combining autonomy with limited, deferential judicial oversight—offer a promising way forward.

The long-term viability of delocalization depends not only on doctrinal acceptance, but also on practical enforceability, user confidence, and regulatory adaptability. As international arbitration continues to modernize, delocalization—if properly institutionalized—can become a cornerstone of transnational legal governance.

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