

# ‘DELOCALISATION’ SCHOLARSHIP IN ICC ARBITRAL AWARDS

<b>1. INTRODUCTION</b> .....	<b>1</b>
1.1 TOPIC AND OUTLINE .....	1
1.2 METHODOLOGY .....	2
<b>2. THE MEANING OF ‘DELOCALISATION’</b> .....	<b>2</b>
2.1 INTRODUCTION.....	2
2.2 APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION .....	3
2.3 DELOCALISATION AS AN ASPECT OF THE LAW OF THE ARBITRATION PROCEDURE.....	4
2.4 OTHER CATEGORIES OF APPLICABLE LAW .....	5
2.5 CONCLUSION .....	7
<b>3. DEBATES ABOUT ‘DELOCALISATION’</b> .....	<b>7</b>
3.1 INTRODUCTION.....	7
3.2 ARGUMENTS .....	7
3.3 OUTCOMES .....	8
3.4 CONCLUSION .....	10
<b>4. ‘DELOCALISATION’ SCHOLARSHIP IN ICC AWARDS</b> .....	<b>11</b>
4.1 INTRODUCTION.....	11
4.2 SCHOLARSHIP AND AMBIGUOUS ATTITUDES TO ‘DELOCALISATION’ .....	11
4.3 SCHOLARSHIP AND THE BROADER INFLUENCE OF ‘DELOCALISATION’ .....	14
<b>5. CONCLUSION</b> .....	<b>16</b>

## 1. INTRODUCTION

### 1.1 TOPIC AND OUTLINE

There has long been an academic debate over the extent to which international commercial arbitration can be ‘delocalised’.<sup>1</sup> This chapter seeks to examine whether this debate has influenced the *practice* of arbitration. It does by examining the how much and in what ways arbitral decisions from the International Chamber of Commerce have referred to scholarship regarding delocalisation. The aim of the study is to comment on whether the practical relevance of delocalisation is proportionate to the academic interest it has generated. The article also tries to explain its findings, and to suggest how the situation may develop in the future.

The examination is connected with the overall theme of the present volume of *Scandinavian Studies in Law*, which is ‘law without State’. Delocalisation can be said to be about ‘arbitration without the State’. International commercial arbitration is thus one area where private parties may choose to reduce or perhaps even circumvent the role of the State, and the debate over ‘delocalisation’ is about exactly how far they can go.

Beyond this subsection on ‘Topic and Outline’, this chapter first describes the methodology that I used in selecting and examining arbitral awards (section 1.2). Section 2 discusses the

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<sup>1</sup> Other terms for ‘delocalised’ include ‘anational’, or ‘floating’ (Petrochilos, Georgios, *Procedural Law in International Arbitration*, Oxford University Press, Oxford 2004, p. 21; Moses, Margaret L., *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, Cambridge 2008, p. 60).

concept of ‘delocalisation’ in international commercial arbitration generally. Section 3 outlines how the concept has been approached in theory and practice. Section 4 presents the results of the examination of ICC awards. Finally Section 5 is a conclusion.

## 1.2 METHODOLOGY

I read through all ICC arbitral decisions reports in Yearbook International Arbitration from its first issue (1976) to its latest (2014). I chose to study arbitral awards from a single institution, since a more selection from different institutions would be arbitrary and may contain stylistic differences that could make comparison of decisions more difficult. The ICC awards are also easily accessible.

Delocalisation is not directly an issue before national courts, since they are necessarily tethered to their own national law. National courts may nonetheless have to decide questions regarding delocalisation when reviewing arbitral awards, and the attitudes of national courts should therefore be of interest to arbitral tribunals. They could therefore have been included in the present study, but ICC awards were preferred for the reasons specified above.

Delocalisation is not an issue before international courts and tribunals, including investment arbitration (for example under the International Centre for Settlement of Investment Disputes).<sup>2</sup>

While reading through the ICC arbitral awards, I noted down all references to scholarship. I used those notes as the basis for writing Section 4 of the chapter. It is also likely that arbitrators are influenced by scholarship that is not cited in awards, but this is not revealed by the survey undertaken in the present chapter.

I define ‘scholarship’ as ‘books and articles, purporting to answer legal questions, being used when ascertaining the content of’ the law.<sup>3</sup> This definition is instrumental, in that its purpose is only to allow me to answer the question set out at the beginning of this chapter, rather than to provide a general definition of the term ‘scholarship’.

References to scholarship that were not part of the arbitral award itself have been excluded from my study.

## 2. THE MEANING OF ‘DELOCALISATION’

### 2.1 INTRODUCTION

This chapter explains the meaning of the term ‘delocalisation’ in international commercial arbitration. Delocalisation is fundamentally an aspect of applicable law. The next subsection (2.2) therefore gives a brief overview of applicable law in international commercial arbitration. More specifically, ‘delocalisation’ of international commercial arbitration is an aspect of the law applicable to the arbitration procedure (as opposed to the substantive law of

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<sup>2</sup> E.g. Collier, John and Lowe, Vaughan, *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford University Press, Oxford 1999, p. 235.

<sup>3</sup> A similar definition is used in Helmersen, Sondre Torp, *The Use of Scholarship by the WTO Appellate Body*, Goettingen Journal of International Law, forthcoming 2016.

the dispute, the law governing the arbitration agreement). This is discussed further in subsection 2.3. As a more general idea, ‘delocalisation’ can be said to be about removing the arbitration from the control of the national law of a State. This general idea can also be applied to other categories of applicable law, besides the law governing the arbitration procedure. This is examined further in Subsection 2.4.

## 2.2 APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

The applicable law in international commercial arbitration can be divided into distinct parts. These include, at least, the following three categories:<sup>4</sup>

1. The substantive dispute, for example whether a contract between two companies has been breached and what consequences this is to have.
2. The agreement to arbitrate, whose validity or interpretation may be challenged.
3. The procedure of the arbitration, including matters such as the composition of the tribunal, how hearings are to be conducted, the examination of witnesses, etc.

It is also possible to add law governing the status and enforcement of the arbitral award,<sup>5</sup> and/or private international law (choice of law) rules<sup>6</sup> as distinct categories.

Various terms may be used in this connection.

‘Lex arbitri’<sup>7</sup> or ‘curial law’,<sup>8</sup> is used about arbitration are used about the law of the arbitration procedure, which is governed by the law of the ‘seat’,<sup>9</sup> ‘place’,<sup>10</sup> ‘venue’<sup>11</sup> or ‘siège’<sup>12</sup> of the arbitration. The 1996 English Arbitration Act Section 3 uses ‘juridical seat’. The 2012 ICC Rules of Arbitration Article 18 and the 2013 UNCITRAL Rules Article 18 use ‘place’. ‘Seat’ and ‘place’ are not to be confused with the physical location where the arbitration proceedings are conducted.<sup>13</sup>

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<sup>4</sup> E.g. Rana, Rashda and Sanson, Michelle, *International Commercial Arbitration*, Thomson Reuters, Sydney 2011, p. 59; Savage, John and Gaillard, Emmanuel (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague 1999, para. 1173 (which does not include the agreement to arbitrate); Moses, *supra* note 1, p. 67-78 (which also adds “The Law Governing Arbitrability”); Petrochilos, *supra* note 1, p. 8, who also cites a case that calls the division ‘artificial’ (*XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, 541, *per* Toulson J).

<sup>5</sup> Kreindler, Richard H and Kopp, Thomas, *Commercial Arbitration, International*, in Max Planck Encyclopedia of Public International Law, para. 18.

<sup>6</sup> Born, Gary, *International Arbitration: Law and Practice*, Kluwer Law International, The Hague 2012, p. 38.

<sup>7</sup> Born, *supra* note 6, p. 38; Kreindler and Kopp, *supra* note 5, para. 22; Moses, *supra* note 1, p. 68.

<sup>8</sup> Rana and Sanson, *supra* note 4, p. 71-72; Born, *supra* note 6, p. 38; Moses, *supra* note 1, p. 68.

<sup>9</sup> Born, *supra* note 6, p. 104; UNCITRAL Model Law on International Commercial Arbitration Article 20(1); Caron, David D. and Caplan, Lee M. (eds), *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, Oxford 2013, p. 78.

<sup>10</sup> Born, *supra* note 6, p. 104; UNCITRAL Model Law on International Commercial Arbitration Article 20(1); Caron and Caplan, *supra* note 9, p. 78. Although Lew, Julian D. M., *Foreword*, in *Choice of Venue in International Arbitration*, Oxford University Press, Oxford 2014, p. vii uses ‘place’ about physical location, as distinct from ‘seat’ and ‘venue’.

<sup>11</sup> Lew, *supra* note 10, p. v-vii, Cordero-Moss, Giuditta, *Limitations on Party Autonomy In International Commercial Arbitration*, Recueil des cours 2015, p. 151 and Cordero-Moss, Giuditta, *International Commercial Contracts*, Cambridge University Press, Cambridge 2014, p. 220 use ‘venue’ in the same sense as ‘seat’ and ‘place’, but Rana and Sanson, *supra* note 4, p. 71 uses ‘venue’ about physical location.

<sup>12</sup> Born, *supra* note 6, p. 104.

<sup>13</sup> Born, *supra* note 6, p. 105; Caron and Caplan, *supra* note 9, p. 78

‘Jurisdiction’ or ‘forum’ usually denote the form of arbitration that their parties stipulate in the agreement to arbitrate,<sup>14</sup> for example arbitration in specific country, under the auspices of a specific institution, or *ad hoc* arbitration.

The law applicable to the substantive dispute can be called ‘governing law’, ‘proper law’ or even ‘applicable law’.<sup>15</sup>

The distinct parts of the applicable law in international commercial arbitration can be governed by different kinds of law.<sup>16</sup> For example the agreement to arbitrate may be made under the law of one State, the substantive dispute can be governed by the law of another State, the procedure of the arbitration by the law of a third, enforcement of the award by the law of a fourth, while the parties and the arbitrators may be nationals of none of those States, and the arbitration proceedings may take place in yet another State, in multiple States, or across State borders (e.g. through the mail).

## 2.3 DELOCALISATION AS AN ASPECT OF THE LAW OF THE ARBITRATION PROCEDURE

‘Delocalisation’ of international commercial arbitration is generally discussed as an aspect of the law applicable to the arbitration procedure.<sup>17</sup>

The discussion concerns whether it is possible ‘to detach an international arbitration from control by the law of the place in which it is held’,<sup>18</sup> to make it ‘detached from the law of the seat’,<sup>19</sup> to make it ‘[un]fettered by the local law of the place where the arbitration occurs’,<sup>20</sup> or release it ‘from the legal requirements of the State in which the arbitration happened to be conducted’.<sup>21</sup>

The consequences of this would be that arbitral awards would be ‘binding at the time they were made’, that it ‘could not be affected by any action to set aside or annul the award at the seat’, and that ‘the conflict of law rules’ of the seat would not decide the law applicable to the procedure or the merits of the arbitration.<sup>22</sup>

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<sup>14</sup> Rana and Sanson, *supra* note 4, p. 60-62.

<sup>15</sup> Rana and Sanson, *supra* note 4, p. 64.

<sup>16</sup> E.g. *Union of India v McDonnell Douglas Corp* [1993] Lloyd’s Rep 48, at 50.

<sup>17</sup> See e.g. Petrochilos, *supra* note 1, p. 19-46, Craig, W. Laurence, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, Texas International Law Journal 1995, p. 16-18 or Moses, *supra* note 1, p. 60-64 for overviews of the debate. See also the exchange between Nakamura, Rubins, and Pinsolle: Nakamura, Tetsuya *The Place of Arbitration: Its Fictitious Nature and Lex Arbitri*, Mealey’s International Arbitration Report 2000; Rubins, Noah, *The Arbitral Seat Is No Fiction: A Brief Reply to Tatsuya Nakamura’s Commentary*, *The Place of Arbitration: Its Fictitious Nature and Lex Arbitri*, Mealey’s International Arbitration Report 2001; Pinsolle, Philippe, *Parties to an International Arbitration with the Seat In France Are at Full Liberty to Organise the Procedure as They See Fit: A Reply to the Article by Noah Rubins*, Mealey’s International Arbitration Report 2001; Nakamura, Tetsuya *The Fictitious Nature of the Place of Arbitration May Not Be Denied*, Mealey’s International Arbitration Report 2001.

<sup>18</sup> Blackaby, Nigel, Partasides, Constantine, Redfern, Alan and Hunter, Martin, Redfern and Hunter on International Arbitration, Oxford University Press, Oxford 2015, para. 3.76.

<sup>19</sup> Moses, *supra* note 1, p. 60.

<sup>20</sup> Moses, *supra* note 1, p. 60.

<sup>21</sup> Collier and Lowe, *supra* note 2, p. 232.

<sup>22</sup> Tweeddale, Andrew and Tweeddale, Keren, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press, Oxford 2007, p. 247.

One view is that ‘every arbitration must have a forum or seat which has subjected its procedural rules to ‘the municipal law’ in force there’.<sup>23</sup> Thus the parties must first choose a State in which the arbitration is to be ‘deemed to have been made’,<sup>24</sup> i.e. that is the ‘seat’ of the arbitration. The parties are then free to choose some alternative, non-State arbitration rules, to the extent that the law of the seat permits this (which popular seat States generally do<sup>25</sup>). As stated by Redfern and Hunter, ‘the reality is that the delocalisation of arbitrations [...] is possible only if the local law (the *lex arbitri*) permits it’.<sup>26</sup>

An alternative view is that arbitration ‘is not necessarily anchored to any particular legal order, except to the extent so provided by the parties or is absolutely necessary for the enforcement of an award’.<sup>27</sup> If the parties do not choose a seat, either intentionally (by agreement) or unintentionally (e.g. due to error), the arbitration can still be valid and binding, under ‘a “truly international” law of arbitration’ rather than any national law.<sup>28</sup> Thus ‘the parties [...] are not a priori subject to any law’,<sup>29</sup> the arbitral award ‘does not belong to any state legal system’,<sup>30</sup> and the ‘tribunal owes no prior allegiance to the legal norms of particular states’.<sup>31</sup>

## 2.4 OTHER CATEGORIES OF APPLICABLE LAW

The other categories of applicable law in international law arbitration, besides the law governing the arbitration procedure, may also to varying degrees be removed the control of the national law of State.

For example delocalisation could mean that ‘the only pertinent law should be the law applied by the court at the place of enforcement of the award’.<sup>32</sup> This would at least mean that the law of the agreement to arbitrate and the substantive law would not be the national law of any State. Those who ‘propose [...] delocalisation’ may ‘also advocate the freedom of the parties to select’ a substantive law ‘other than the municipal law of any country.’<sup>33</sup> Changes in the views on applicable substantive may be called ‘a significant side-effect’ of the ‘movement for delocalization’.<sup>34</sup>

Regarding the agreement to arbitrate, this is ultimately dependent on ‘the will of the parties alone’.<sup>35</sup> However its ‘efficacy’ will ‘in practice’ depend ‘in large part upon its validity and

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<sup>23</sup> Rana and Sanson, *supra* note 4, p. 71.

<sup>24</sup> UNCITRAL Arbitration Rules Article 18(1).

<sup>25</sup> See e.g. the examination in Petrochilos, *supra* note 1, p. 47-91.

<sup>26</sup> Blackaby, Partasides, Redfern, and Hunter, *supra* note 18, para. 3.82.

<sup>27</sup> Petrochilos, *supra* note 1, p. 20-21.

<sup>28</sup> Petrochilos, *supra* note 1, p. 21.

<sup>29</sup> Petrochilos, *supra* note 1, p. 43.

<sup>30</sup> French Cour de Cassation, *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnutogia Est Epices* [2007] Rev Arb 507, at 514.

<sup>31</sup> Justice Blackmun in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985) at 636.

<sup>32</sup> Moses, *supra* note 1, p. 60.

<sup>33</sup> Collier and Lowe, *supra* note 2, p. 232.

<sup>34</sup> Tweeddale and Tweeddale, *supra* note 22, p. 247.

<sup>35</sup> *Dell Computer Corp v. Union des consommateurs*, 2007 SCC 34, ¶51 (Canadian S.Ct.); similarly Mistelis, Loukas A., Kröll, Stefan Michael, Lew, Julian D. M., *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague 2003, p. 98-99; Paulsson, Jan, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, International and Comparative Law Quarterly 1981, p. 381; Institute de Droit International, *Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises* (1989), Article 1.

enforceability in national courts, applying rules of national and international law'.<sup>36</sup> Thus in principle the agreement to arbitrate can be seen as divorced from any State's national law, even though it will usually be in the parties to subject the agreement to such law.

The substantive law of a dispute will often be national law of a State. For contracts, the laws of England and Wales and of Switzerland are particularly popular.<sup>37</sup> Some States base their national law on the sale of goods on the United Nations Convention on Contracts for the International Sale of Goods (CISG), which is a treaty that seeks to harmonise such law, but this does not change the fact that such law is the national law of a State. The UNIDROIT is an organisation that has similar aims. However its *Principles of International Commercial Contracts* are not tied to any State's national law, and can be adopted as the substantive law governing a dispute. Parties can also choose the so-called *lex mercatoria*, which is substantive law that is similarly detached from any specific national legal system.<sup>38</sup> Contracts can moreover be supplemented by the ICC's *INCOTERMS*,<sup>39</sup> which are also not part of the law of any specific State. Thus the opportunity for 'delocalisation' of the substantive law of a dispute exists, yet in practice most parties consider it in their interest to choose some State's national law.

The enforcement of an arbitral award necessarily has to be done through the legal system of a national State, since only these have the police forces and other officials that are necessary for enforcement against an unwilling party. The New York Convention<sup>40</sup> is an important instrument in this respect. It enables the enforcement of an award rendered 'in the territory' of another State (Article 1). Thus an arbitration that has chosen State A as seat State can have its award enforced in State B (which can be convenient, for example if the losing party has more assets in State B). An interesting question under the Convention is whether an arbitral award that does not have a valid seat State must nonetheless be enforced. Judicial practice on this question is (unsurprisingly) scarce, but also inconsistent.<sup>41</sup> Petrochilos concludes that such awards should be enforced, but only to the extent that the enforcing State generally allows enforcement of 'non-domestic awards'.<sup>42</sup> However Tweeddale and Tweeddale and Paulsson are undecided,<sup>43</sup> van den Berg disagrees.<sup>44</sup> Collier and Lowe argue that States may generally be 'reluctant to [...] enforce' delocalised arbitrations,<sup>45</sup> while Cordero-Moss gives examples of enforcement of awards that have been annulled in their State of origin.<sup>46</sup> Thus the enforcement of a 'delocalised' arbitral award is possible, but it will, at best, be more difficult than the enforcement of a regular award.

An arbitral tribunal may apply choice of laws rules in order to find the law that is to be applied to some aspect of an arbitration. Arbitral practice shows that various different

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<sup>36</sup> Born, *supra* note 6, p. 229.

<sup>37</sup> E.g. Cuniberti, Gilles, *The International Market for Contracts: The Most Attractive Contract Laws*, Northwestern Journal of International Law & Business 2014, p. 472.

<sup>38</sup> Moses, *supra* note 1, p. 74; Tweeddale and Tweeddale, *supra* note 22, p. 247-248.

<sup>39</sup> International Chamber of Commerce, *Incoterms 2010* (International Chamber of Commerce, Paris 2010).

<sup>40</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 330 UNTS 38.

<sup>41</sup> Petrochilos, *supra* note 1, p. 374-380.

<sup>42</sup> Petrochilos, *supra* note 1, p. 378.

<sup>43</sup> Tweeddale and Tweeddale, *supra* note 22, p. 252-253; Paulsson, *supra* note 35, p. 376.

<sup>44</sup> Van Den Berg, Albert Jan *The New York Convention of 1958*, Kluwer Law International, The Hague 1981, p. 37.

<sup>45</sup> Collier and Lowe, *supra* note 2, p. 233.

<sup>46</sup> Cordero-Moss, *Contracts*, *supra* note 11, p. 223; Cordero-Moss, *Limitations*, *supra* 11, p. 155-156.

approaches to choice of laws rules are used.<sup>47</sup> This includes the rules of the Seat State and the 'rules of all interested states',<sup>48</sup> which are both taken from national legal systems. Two further alternatives are "'international" conflict of laws rules', and simply applying some substantive law 'without any express conflicts analysis'.<sup>49</sup> These latter two approaches do not (by contrast) rely on any specific national legal system.

## 2.5 CONCLUSION

In conclusion, a delocalised arbitration is one whose procedure is not in any way controlled by the national law of a 'seat' State.

# 3. DEBATES ABOUT 'DELOCALISATION'

## 3.1 INTRODUCTION

The previous section outlined the meaning of 'delocalisation' in international arbitration. This section will present some debates over such 'delocalisation', on two levels: first by presenting scholarly arguments about whether arbitration is possible, practicable, and/or desirable (section 3.2), and then some practical outcomes that reflect the scholarly debates (section 3.3). Section 3.4 concludes that there is a distinct ambiguity in how delocalisation is approached.

## 3.2 ARGUMENTS

A possible argument against delocalisation is that the possibility of arbitration may be seen as a 'concession' by State, from its 'monopoly [...] in the administration of justice'.<sup>50</sup> Similarly it may be argued that 'the very principle that the parties have the right to make a binding election of an arbitral forum [...] must derive from [...] a national legal system'.<sup>51</sup> In this sense 'every activity occurring on the territory of a State' may be considered 'necessarily subject to its jurisdiction'.<sup>52</sup> Arbitrations may also 'wish to have the assistance of the local courts',<sup>53</sup> and 'arbitrators may generally prefer that their powers be buttressed by a specific national legal order in addition to the authority created sui generis by the parties' agreement to arbitrate'.<sup>54</sup> In fact the 'constitution and functioning' of an arbitration may be 'most effectively defined and controlled by the judges and the law of the place of arbitration'.<sup>55</sup> Moreover if the only possibility to challenge an arbitration in court is during enforcement, the challenger cannot choose where to mount the challenge,<sup>56</sup> 'significant time and money could

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<sup>47</sup> Born, *supra* note 6, p. 38.

<sup>48</sup> Born, *supra* note 6, p. 38.

<sup>49</sup> Born, *supra* note 6, p. 38.

<sup>50</sup> Collier and Lowe, *supra* note 2, p. 233; similarly Mann, Francis A., *Lex Facit Arbitrum*, in *International Arbitration: Liber Amicorum for Martin Domke*, Martinus Nijhoff, The Hague 1967, p. 161; Moses, *supra* note 1, p. 61.

<sup>51</sup> Paulsson, *supra* note 35, p. 361.

<sup>52</sup> Mann, *supra* note 50, p. 162.

<sup>53</sup> Collier and Lowe, *supra* note 2, p. 233; similarly Tweeddale and Tweeddale, *supra* note 22, p. 250; Paulsson, *supra* note 35, p. 375; Moses, *supra* note 1, p. 61.

<sup>54</sup> Paulsson, *supra* note 35, p. 375.

<sup>55</sup> Paulsson, *supra* note 35, p. 361.

<sup>56</sup> Collier and Lowe, *supra* note 2, p. 233; Paulsson, *supra* note 35, p. 375.

be wasted’,<sup>57</sup> and multiple enforcement courts may take inconsistent approaches to the award.<sup>58</sup> Moreover ‘[i]t is wholly unrealistic to suppose that the parties or the arbitral tribunal can pick and choose laws to apply to the procedure’.<sup>59</sup> Finally States may ‘want to exercise a supervisory function to ensure that the private system of dispute resolution in their territory is not’ abused.<sup>60</sup>

On other hand, in favour of delocalisation, it has been proposed that international arbitrators themselves have a ‘strong perception that they do not administer justice on behalf of any given State, but that they nonetheless play a judicial role for the benefit of the international community’.<sup>61</sup> This is also connected with a broader debate over the existence of a separate ‘arbitral legal order’ separate from national legal systems.<sup>62</sup> There may be ‘no reason why an international commercial arbitration ha[s] to be anchored to a country’s national law’,<sup>63</sup> and it may even be ‘difficult to consider the international arbitrators a manifestation of the power of a State’.<sup>64</sup> Moreover ‘the connection with the place where arbitration is conducted’ may be ‘too tenuous to constitute the exclusive foundation of international arbitration’.<sup>65</sup> In fact, ‘the enforcing State’ may have ‘a stronger “title” than the seat State to regulate the arbitration’.<sup>66</sup> In addition ‘[p]arties frequently choose a seat of arbitration in a country where neither party’s business interests are located’, possibly ‘because it is convenient to both parties’.<sup>67</sup> Local system ‘might impede the effectiveness of the arbitration proceedings’,<sup>68</sup> and local courts invalidating arbitral awards may ‘waste [...] time and resources’.<sup>69</sup> National courts may engage in ‘incessant interference’ with international arbitrations,<sup>70</sup> even though they ‘should be wary of interjecting where they have been intentionally and expressly excluded’.<sup>71</sup>

### 3.3 OUTCOMES

Delocalisation is not just debated in theory; the concept has been taken up in various forms of arbitral practice.

The ICC Rules 2012 Art 19 says that ‘proceedings [...] shall be governed by’ the Rules themselves and what rules the parties or tribunal may choose, ‘whether or not reference is thereby made to the rules of procedure of a national law’. This seems to support the possibility of ‘delocalised’ arbitration.<sup>72</sup> However the possibility of choosing a non-national law procedural may be allowed by the law of the seat State, in which an arbitration is not truly delocalised even though the parties are able to choose non-national procedural law.

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<sup>57</sup> Tweeddale and Tweeddale, *supra* note 22, p. 252.

<sup>58</sup> Tweeddale and Tweeddale, *supra* note 22, p. 253; Paulsson, *supra* note 35, p. 384.

<sup>59</sup> Tweeddale and Tweeddale, *supra* note 22, p. 250; similarly Varady, Tibor, Barcelo III, John J. Von Mehren, Arthur T., *International Commercial Arbitration: A Transnational Perspective*, West, St. Paul 2012, p. 69.

<sup>60</sup> Moses, *supra* note 1, p. 61.

<sup>61</sup> Gaillard, Emmanuel, *Legal Theory of International Arbitration*, Martinus Nijhoff, The Hague 2010, p. 35.

<sup>62</sup> Gaillard, *supra* note 61, p. 40-66; similarly e.g. Lew, Julian D. M., *Achieving the Dream: Autonomous Arbitration*, Arbitration International 2006, p. 181.

<sup>63</sup> Tweeddale and Tweeddale, *supra* note 22, p. 247.

<sup>64</sup> Paulsson, *supra* note 35, p. 362.

<sup>65</sup> Gaillard, *supra* note 61, p. 36; similarly Moses, *supra* note 1, p. 60.

<sup>66</sup> Gaillard, *supra* note 61, p. 32.

<sup>67</sup> Moses, *supra* note 1, p. 60.

<sup>68</sup> Moses, *supra* note 1, p. 60.

<sup>69</sup> Moses, *supra* note 1, p. 60.

<sup>70</sup> Tweeddale and Tweeddale, *supra* note 22, p. 247.

<sup>71</sup> Lew, *supra* note 62, p. 181.

<sup>72</sup> Collier and Lowe, *supra* note 2, p. 232, regarding the 1998 edition of the same rules.

The *Götaverken Arendal*<sup>73</sup> case in the Paris Court of Appeal and the Swedish Supreme Court was in effect treated as delocalised,<sup>74</sup> since the Paris court considered it '[detached] from municipal law' and the Swedish court treated the award as enforceable without testing 'whether the was binding under French law'.<sup>75</sup>

The *Hilmarton*<sup>76</sup> case an arbitral award with Geneva as its seat had been set aside by the Swiss Supreme Court. The French Court de cassation held that the arbitral award could still be enforced in France, in effect detaching the award from the law of its seat.<sup>77</sup>

One may also mention the World War One Peace Treaties mixed arbitral tribunals, which 'were apparently not subject to any *lex loci arbitri*'.<sup>78</sup>

Before it came to be generally recognised that State immunity does not apply to commercial matters, the *Aramco* arbitration used State immunity as a basis for not applying the procedural law of the seat State to an arbitration involving another State.<sup>79</sup>

English courts have rejected the possibility of delocalisation for arbitrations that are subject to English law. In *Bank Mellat v Helliniki Techniki SA* the court held that '[d]espite suggestions to the contrary by some learned writers under other systems, [English] jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law'.<sup>80</sup> This was cited in *Naviera Amazonica Peruana SA v. Campania Internacional de Seguros de Peru*, which added that 'English law does not recognize the concept of a "de-localised" arbitration'.<sup>81</sup> Similarly in *Union of India v McDonnell Douglas Corp* the court noted that 'English law has at least turned its face against the notion that it is possible to have arbitral procedures that are wholly unconnected with any national system of law at all'.<sup>82</sup>

Some national law, including the French Civil Code of Civil Procedure (reformed in 2011), the Swiss Statute on International Arbitration of 1987, and the UK Arbitration Act of 1996 have gone some way towards reducing the authority of local law and local courts over arbitrations.<sup>83</sup> The same can be said about the UNCITRAL Model Law.<sup>84</sup> However this is not delocalisation in a strict sense, since the application of these laws presuppose that arbitrations are bound by them in the first place.

Belgium is a particularly interesting example. Before it was amended on 19 May 1998, the Belgian Judicial Code allowed parties to challenge arbitral awards before Belgian courts only

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<sup>73</sup> *Götaverken Arendal AB v Libyan General Maritime Transport Co* (1980) JDI 660

<sup>74</sup> Paulsson, *supra* note 35, p. 359 and 364-375; Collier and Lowe, *supra* note 2, p. 232-233; Tweeddale and Tweeddale, *supra* note 22, p. 248-249; Lew, *supra* note 62, p. 198.

<sup>75</sup> Collier and Lowe, *supra* note 2, p. 232-233.

<sup>76</sup> *Yearbook Commercial Arbitration*, 1997, Volume 22, p. 696 (Cour de cassation, 10 June 1997).

<sup>77</sup> Tweeddale and Tweeddale, *supra* note 22, p. 249.

<sup>78</sup> Collier and Lowe, *supra* note 2, p. 233.

<sup>79</sup> Collier and Lowe, *supra* note 2, p. 233.

<sup>80</sup> [1984] QB 291, at 301 (Kerr LJ).

<sup>81</sup> [1988] 1 Lloyd's Rep. 116, at 199.

<sup>82</sup> [1993] Lloyd's Rep 48, at 50.

<sup>83</sup> Collier and Lowe, *supra* note 2, p. 234; Cordero-Moss, *Contracts*, *supra* note 11, p. 22; Lew, *supra* note 62, p. 192-193, who also mentions the Swedish Arbitration Act of 1999.

<sup>84</sup> Tweeddale and Tweeddale, *supra* note 22, p. 247 and 250; Lew, *supra* note 62, p. 190-191.

if they had a sufficient connection with Belgium (Article 1717(4)).<sup>85</sup> This meant that foreign individuals and companies can conduct arbitrations that cannot be challenged unless an attempt is made to enforce them in another State. Since the amendment, this restriction does not apply by default, but can be agreed by the parties.<sup>86</sup> Similar agreements are permitted under France's Code of Civil Procedure Article 1522 and Switzerland's Private International Law Act Article 192.<sup>87</sup>

Moses mentions 'sports arbitration and online arbitration' as further embodiments of a 'delocalisation' trend,<sup>88</sup> even though such arbitrations are generally subject to a seat State.

However most commentators agree that delocalised arbitration in its pure form is not a viable alternative in practice. The possibility under Belgian, French, and Swiss law to exclude judicial review is little used in practice, which 'strongly suggests most parties do not wish to take themselves wholly outside a legal framework in settling their disputes through arbitration'.<sup>89</sup> The previously mandatory exclusion in Belgian law even seems to have 'discouraged parties from choosing Belgium as the seat of the arbitration'.<sup>90</sup> Thus '[p]arties to an international commercial do not want complete freedom from national courts',<sup>91</sup> since the 'full effectiveness of the award' should matter more.<sup>92</sup> As Paulsson puts it, '[t]o seek completely to avoid national jurisdictions would be misguided'.<sup>93</sup>

Arbitrations lacking a valid seat State is thus a 'marginal' phenomena in practice.<sup>94</sup> Petrochilos gives some examples of cases that may be seen as being without a valid seat State, but his discussions make it clear that these are rare and exceptional.<sup>95</sup> Similarly the possibility of detaching 'arbitral proceedings from the law of the situs' is 'immaterial in the vast majority of cases'<sup>96</sup> and does not seem to have 'much of an impact in practice'.<sup>97</sup>

### 3.4 CONCLUSION

Most commentators in the debate over delocalisation seem to agree that there is a fundamental ambiguity in how the concept is approached. It has been said to be 'racked with both success and failure',<sup>98</sup> with 'inherent conflicts between [...] theory [...] and [...]

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<sup>85</sup> Tweeddale and Tweeddale, *supra* note 22, p. 246; Moses, *supra* note 1, p. 61; Blackaby, Partasides, Redfern, and Hunter, *supra* note 18, para. 3.83.

<sup>86</sup> Tweeddale and Tweeddale, *supra* note 22, p. 246-247; Moses, *supra* note 1, p. 61.

<sup>87</sup> Cordero-Moss, *Contracts*, *supra* note 11, p. 222; Cordero-Moss, *Limitations*, *supra* 11, p. 154.

<sup>88</sup> Moses, *supra* note 1, p. 61-64.

<sup>89</sup> Goode, Roy, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, Arbitration International 2001, p. 30.

<sup>90</sup> Blackaby, Partasides, Redfern, and Hunter, *supra* note 18, para. 3.83.

<sup>91</sup> Tweeddale and Tweeddale, *supra* note 22, p. 251; similarly Wallace, Ian Duncan, *Control by the Courts: A Plea for More, Not Less*, Arbitration International 1990, p. 253 and Mayer, Pierre, *Seeking the Middle Ground of Court Control: A Reply to I N Duncan Wallace*, Arbitration International 1991, p. 311; Petrochilos, *supra* note 1, p. 45.

<sup>92</sup> Cordero-Moss, Giuditta, *International Arbitration and the Quest for the Applicable Law*, Global Jurist 2008, p. 3.

<sup>93</sup> Paulsson, Jan, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, British Institute of International and Comparative Law 1983, p. 53.

<sup>94</sup> Petrochilos, *supra* note 1, p. 373.

<sup>95</sup> Petrochilos, *supra* note 1, p. 374-380.

<sup>96</sup> Paulsson, *supra* note 93, p. 53.

<sup>97</sup> Paulsson, *supra* note 93, p. 57.

<sup>98</sup> Tweeddale and Tweeddale, *supra* note 22, p. 248.

application’.<sup>99</sup> On the one hand the concept in its pure form hardly exists in practice, as noted above. On the other, the principle as such can be said to be ‘widely accepted’<sup>100</sup> and ‘[remain] important’,<sup>101</sup> and to have ‘shaped arbitral practice and the laws of states’.<sup>102</sup>

This can be seen in that ‘the relevance and influence of national arbitration laws and of national court supervision and revision is greatly reduced’<sup>103</sup>, that ‘[mandatory] provisions [of national law] are steadily diminishing in their scope’.<sup>104</sup> Varady sums up the ambiguity by stating that ‘[i]nternational commercial arbitration has become essentially a self-contained and self-reliant decision-making structure, yet it has not entirely escaped from the control—albeit very limited—of national arbitration law’.<sup>105</sup>

## 4. ‘DELOCALISATION’ SCHOLARSHIP IN ICC AWARDS

### 4.1 INTRODUCTION

The result of the examination of ICC awards (whose methodology was outlined in subsection 1.2) reveals that in the 203 arbitral awards that have been published in the *Yearbook of Commercial Arbitration* (and thus in *ICC Arbitral Awards*) between 1976 and 2014, there have been 719 references to scholarship. Thus the average number of references per awards is 3.5. Of these 203 awards 103 have made no reference to scholarship at all, which means that 49 % of the awards contain all the references.

Among these references, only a few can be said to touch upon the subject of ‘delocalisation’. As explained in Section 2.3 above, delocalisation is about detaching the arbitration from the control of the national law of any State. Cases that cite scholarship directly connected with this are discussed in Section 4.2. Section 4.3 discusses certain other references to scholarship that are more indirectly connected to the delocalisation debate, by seeming to align with the ideas underlying delocalisation yet without engaging with the debate as such.

### 4.2 SCHOLARSHIP AND AMBIGUOUS ATTITUDES TO ‘DELOCALISATION’

Certain ICC awards refer to scholarship while engaging with fundamental aspects of the delocalisation debate. The overall impression they give is ambiguous. They seem to largely accept and adopt important ideas that underlie the concept of delocalisation, but at the same time they do not accept the possibility of complete detachment from the national law of a seat State.

The interim award in *Parties from Brazil, Panama and U.S.A. v Party from Brazil* used two articles by F. A. Mann and F. E. Klein respectively<sup>106</sup> as a basis for claiming that ‘[t]he fact

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<sup>99</sup> Tweeddale and Tweeddale, *supra* note 22, p. 251-252.

<sup>100</sup> Savage and Gaillard, *supra* note 2, para. 1178.

<sup>101</sup> Paulsson, *supra* note 93, p. 53.

<sup>102</sup> Petrochilos, *supra* note 1, p. 19.

<sup>103</sup> Lew, *supra* note 62, p. 181; similarly Tweeddale and Tweeddale, *supra* note 22, p. 248.

<sup>104</sup> Collier and Lowe, *supra* note 2, p. 234.

<sup>105</sup> Varady, *supra* note 59, p. 71.

<sup>106</sup> Mann, *supra* note 50, p. 165; Klein, Frédéric-Édouard, *Considérations sur l'arbitrage en droit international privé*, Helbing & Lichtenhahn, Basel 1955, p. 210.

that the ICC Rules are not officially issued by a public authority is irrelevant, since their source of validity lies in both cases in the choice of the parties'.<sup>107</sup> This is significant in the context of the delocalisation debate, since the tribunal recognises that the procedure of the arbitration can be governed by rules that are in no way derived from or controlled by the national law of a State. However the award does not say anything final about the underlying issue of whether an arbitration must always have a seat State. When there is a seat State its law controls the arbitration and is merely permitting the parties' choice of ICC Rules.

In *Principal Distributor* the tribunal wrote that '[i]n international arbitration, an Arbitral Tribunal is not an institution under the legal system of a State'.<sup>108</sup> It backed up this up by referring to scholarship. It cited Bogdan's statement that '[a]n arbitral tribunal is not an instrumentality of any particular State'.<sup>109</sup> Moreover it cited Lew's statement<sup>110</sup> that '... an international arbitration tribunal is a non-national institution; it owes no allegiance to any sovereign State; it has no *lex fori* in the conventional sense'.<sup>111</sup> That an arbitral award 'is not an institution under the legal system of a State' is interesting, and can be read in different ways. It cannot be taken to mean that international commercial arbitration is necessarily outside the control of State law, since in the vast majority of arbitrations the parties choose a seat State or have one chosen for them. However the award seems to display a generally positive attitude to the insulation of arbitration from national law, even if this insulation cannot be complete in practice.

In *Trust C (Isle of Sark), US Corporation (US) and others v Latvian Group (Latvia), Latvian Finance Company (Latvia) and others*, Philippe Ouakrat's book 'L'arbitrage commercial international et les mesures provisoires: Etude générale' was used as a reference when the tribunal wrote that 'Art.15 of the ICC Rules presently in force authorizes the parties and the arbitrators to conduct the arbitral proceedings outside any specific national procedural law. However, any mandatory provision of such law is applicable'.<sup>112</sup> This statement is twofold: first it holds that arbitral proceedings can be 'outside any specific national procedural law', which is an aspect of delocalisation. On the other the tribunal assumes that 'mandatory provisions' of some 'national law' will necessary apply to an international arbitration, which means that the proceedings cannot be fully delocalised.

The award in *Assignee of buyer (Republic of Korea) Respondent: Seller (Australia) v Seller (Australia)* referred to Jan Paulsson<sup>113</sup> as a basis for stating that "[a]ccording to the prevailing view in international arbitration, arbitration proceedings are generally submitted to the law of the place of arbitration [...]. Though an arbitrator, unlike a state court, is not part of the judicial system of any country, it is widely recognized that he should apply the rules of the

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<sup>107</sup> Parties from Brazil, Panama and U.S.A. v Party from Brazil, Interim Award, ICC Case No. 4695, November 1984 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1986, Volume 11 pp. 149-158, at fn1.

<sup>108</sup> *Principal Distributor*, Final Award, ICC Case No. 6379, 1990 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1992, Volume 17 pp. 212-220, at para 21.

<sup>109</sup> Bogdan, Michael, *Some Arbitration-Related Problems of Swedish Private International Law*, Swedish and International Arbitration 1990, p. 76.

<sup>110</sup> Lew, Julian D. M., *Applicable Law in International Commercial Arbitration*, Oceana Publications, New York 1978.

<sup>111</sup> *Principal Distributor*, Final Award, ICC Case No. 6379, 1990, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1992 Volume 17 pp. 212-220, at para 21.

<sup>112</sup> *Trust C (Isle of Sark), US Corporation (US) and others v Latvian Group (Latvia), Latvian Finance Company (Latvia) and others*, Interim Award, ICC Case No. 10973, 2001 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2005, Volume 30 pp. 77-84, at para 9 (footnotes omitted).

<sup>113</sup> Paulsson, Jan, *International Commercial Arbitration*, in *Handbook of Arbitration Practice*, Sweet & Maxwell, London 1998.

place of arbitration, in particular its mandatory rules'.<sup>114</sup> This statement is also twofold. That 'an arbitrator [...] is not part of the judicial system of any country' can be said to reflect a 'delocalised' view of international arbitration. On the other hand the 'prevailing view' that 'arbitration proceedings are generally submitted to the law of the place of arbitration', whose 'mandatory' and other 'rules' should be applied, would exclude the possibility of fully delocalised arbitration.

Moreover the final award in *Seller (Italy) v. (1) Buyer (US) & (2) Consignee and guarantor (Ukraine)* referred to Poudret and Besson<sup>115</sup> when stating that '[a]ccording to the prevailing 'territorialist' conception, the applicable lex arbitri is always the arbitration law of the state (or jurisdiction) in which the arbitration has its locus, i.e. where the arbitration has its seat'.<sup>116</sup> The mention of a 'territorialist' conception as 'prevailing' can be read as an implicit of an 'alternative' delocalised conception of international arbitration. Thus the statement can be said both to recognise the possibility of delocalisation, but also to reject it as being the opposite of a (currently) 'prevailing conception'. In the specific case the tribunal found that Switzerland was the seat State, and in the process stated that '[t]he parties to an arbitration are free to agree on the place (or seat) of arbitration. Failing such agreement, it is settled law that the place of arbitration shall be determined by the arbitral institution or the arbitral tribunal'.<sup>117</sup> What it did not comment on was the (far more peripheral) question of what would happen if the parties deliberately agree not to have a seat State, or if the choice of seat State were to be accidentally invalid.

In *Manufacturer (Egypt) v. (1) Buyer (Spain) and (2) End buyer (Spain)*, the arbitral tribunal explicitly stated that international arbitration shows a trend towards "delocalization", but also that 'the choice of the place of arbitration implies important legal consequences'.<sup>118</sup> It then went on to list these consequences. This statement has the same ambiguity as those cited above, in that it recognises 'a trend towards "delocalization"' while at the same time underlining the importance of having a seat State. However the tribunal did not refer to scholarship in this connection, even though scholarship has thoroughly debated the concept of delocalisation. It only referred to scholarship in later paragraphs (31 rather than 29), for the far less controversial statement that 'in international arbitration the parties are free to choose the law or rules governing the arbitral procedure as well as the place of arbitration'.<sup>119</sup> It also referred to scholarship in paragraph 35, when stating that 'when the parties do not expressly

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<sup>114</sup> Assignee of buyer (Republic of Korea) Respondent: Seller (Australia) v Seller (Australia), Award, ICC Case No. 11869 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2011, Volume 36 pp. 47-69, at para 8.

<sup>115</sup> Poudret, Jean-François and Besson, Sébastien, *Comparative Law of International Arbitration*, Sweet & Maxwell, London 2007.

<sup>116</sup> *Seller (Italy) v. (1) Buyer (US) & (2) Consignee and guarantor (Ukraine)*, Final Award, ICC Case No. 14792 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2012, Volume 37 pp. 110-125, at, at para 1.

<sup>117</sup> *Seller (Italy) v. (1) Buyer (US) & (2) Consignee and guarantor (Ukraine)*, Final Award, ICC Case No. 14792 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2012, Volume 37 pp. 110-125, at, at para 2.

<sup>118</sup> *Manufacturer (Egypt) v. (1) Buyer (Spain) and (2) End buyer (Spain)*, Partial Award, ICC Case No. 13774, 2006 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2014, Volume 39 pp. 141-158, at para 29.

<sup>119</sup> *Manufacturer (Egypt) v. (1) Buyer (Spain) and (2) End buyer (Spain)*, Partial Award, ICC Case No. 13774, 2006 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2014, Volume 39 pp. 141-158, at para 31 (referring to Nygh, Peter, *Choice of Forum and Laws in International Commercial Arbitration*, in *Forum Internationale* 1997).

choose the place of arbitration’ the ‘ICC Court of Arbitration’ will do so on the basis of ‘factors which suggest an implicit choice of the place of arbitration’.<sup>120</sup>

### 4.3 SCHOLARSHIP AND THE BROADER INFLUENCE OF ‘DELOCALISATION’

Other references to scholarship in ICC awards have not been concerned with the core issue of delocalisation (the potential absence of a seat State whose law will control the arbitration procedure), but rather with other, related matters. What these references have in common is that they seem to share certain assumptions and attitudes that are central to the delocalisation debate. They are therefore discussed, in the context of showing what may be part of a broader influence of the delocalisation debate.

Certain references to scholarship have emphasised the lack of a ‘forum’ in international arbitration, which has been used as a basis for rejecting the application of national conflict of laws rules. The notion of ‘forum’ used in these cases is distinct from that of ‘seat’, since both cases had seat States. Yet the cases do indicate a willingness to insulate at least one aspect of international arbitration from the control of national law.

In *Principal Distributor* the tribunal wrote that a Belgian law ‘does not compel the distributor to bring his dispute before a Belgian court’.<sup>121</sup> It cited ‘Belgian doctrine and case law’ that ‘support this conclusion’. It referred to R. Prioux, who in wrote that ‘[c]ontrary to courts, international arbitrators are in principle not bound to follow the conflict-of-laws rules of a certain State rather than those of another State’, that ‘in international arbitration there is neither *lex fori*, nor foreign law’, and that ‘[c]ertain authors go so far as to say that no foreign mandatory law provisions bind arbitrators’.<sup>122</sup> Thus the tribunal used the absence of ‘*lex fori*’ as a basis for rejecting the potential imposition of national conflict of laws rules.

Similarly in *Insurer (US) v Manufacturer (Italy)*, the tribunal referred to [scholarship] when it said that ‘an arbitrator, unlike a national judge, has no forum’, and that ‘[i]t follows from this premise that arbitrators are not bound by the conflict of laws rules of a forum to choose the law applicable to the substance of the dispute’.<sup>123</sup> Again the absence of a ‘forum’ was used to reject the application of conflict of laws rules.

Scholarship has also been cited when arbitral tribunals have asserted the existence of ‘general principles of arbitration’. An assumption underlying such statements is that international arbitration is a distinct sphere of law, capable of generating its own principles. This dovetails with the ‘delocalisation’ view that international arbitration can be removed the control of national legal system.

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<sup>120</sup> *Manufacturer (Egypt) v. (1) Buyer (Spain) and (2) End buyer (Spain)*, Partial Award, ICC Case No. 13774, 2006 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2014, Volume 39 pp. 141-158, at para 35, (referring to Craig, Laurence W., Park, William and Paulsson, Jan, *International Chamber of Commerce Arbitration*, Oceana Publications, New York 2000).

<sup>121</sup> *Principal Distributor*, Final Award, ICC Case No. 6379, 1990, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1992 Volume 17 pp. 212-220, at para 23.

<sup>122</sup> Prioux, R., *Le juge et l'arbitre face aux lois étrangères d'application immédiate ... possibilités offertes par la loi du 14 juillet 1987*, RDCB 1988.

<sup>123</sup> *Insurer (US) v Manufacturer (Italy)*, Interim Award, ICC Case No. 11333, 2002 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2006, Volume 31 pp. 117-126, at para 6.

Such principles have included ‘an automatic transfer of the arbitration agreement’,<sup>124</sup> that ‘the claimant may at any stage in the proceedings totally or partially withdraw its claim’,<sup>125</sup> that ‘the costs of the arbitration must be borne by the party which loses the arbitration’,<sup>126</sup> that ‘the behaviour of the parties during the proceedings’ may affect the ‘decision on costs’,<sup>127</sup> the ‘compétence-compétence’ of arbitral tribunals,<sup>128</sup> that ‘the interpretation of an arbitration clause [...] depends primarily upon the wording of that clause’,<sup>129</sup> “‘new for” old [as] a special kind of the free assessment of damages’,<sup>130</sup> that ‘arbitration agreements should be interpreted in a way that leads to their validity’ and ‘ambiguities in a draft are generally interpreted against the person who submitted the draft’.<sup>131</sup>

Finally some ICC awards have used to scholarship to find or discuss ‘lex mercatoria’<sup>132</sup> or similar concepts. When such law is used it is generally as the substantive law of a dispute. ‘Lex mercatoria’ is not part of the national law of any State, and therefore has something in common with ‘delocalisation’.<sup>133</sup>

The award in *Manufacturer v Licensor* used scholarship as a basis for recognising the possibility of applying ‘lex mercatoria’ (which ‘takes its source in the trade usages and in the principles generally applicable in international trade’), albeit without applying it in the specific case.<sup>134</sup>

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<sup>124</sup> Assignee of buyer (Republic of Korea) Respondent: Seller (Australia) v Seller (Australia), Award, ICC Case No. 11869 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2011, Volume 36 pp. 47-69, at para 44, referring to Liebscher, Christoph and Schmid, Andreas, *Country Report: Austria*, in Practitioner's Handbook on International Arbitration, Verlag C.H. Beck, Munich 2002.

<sup>125</sup> *Manufacturer v Buyer*, Final Award, ICC Case No. 8486, 1996 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1999, Volume 24 pp. 162-173, at para 24, referring to Reiner, Andreas, *ICC Schiedsgerichtsbarkeit*, Manz Verlag, Wien 1989.

<sup>126</sup> *Manufacturer v Buyer*, Final Award, ICC Case No. 8486, 1996 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1999, Volume 24 pp. 162-173, at para 25, referring to Berger, Klaus Peter, *International Economic Arbitration*, Kluwer Law International, The Hague 1993.

<sup>127</sup> *Manufacturer v Buyer*, Final Award, ICC Case No. 8486, 1996 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1999, Volume 24 pp. 162-173, at para 26, referring to Reiner, *supra* note 125 and Berger, *supra* note 126.

<sup>128</sup> *Manufacturer v Buyer*, Final Award, ICC Case No. 8486, 1996 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1999, Volume 24 pp. 162-173, at para 2, referring to Craig, Laurence W., Park, William and Paulsson, Jan, *International Chamber of Commerce Arbitration*, Oceana Publications, New York 1990.

<sup>129</sup> *Manufacturer Subsidiary v Building supplier*, Interim Award, ICC Case No. 7929, 1995 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2000, Volume 25 pp. 11-432, at para 15, referring to Jarvin, Sigvard, *The Sources and Limits of the Arbitrator's Powers*, in Contemporary Problems in International Arbitration, Centre for Commercial Law Studies Queen Mary College, London 1986.

<sup>130</sup> *Buyer (Italy) v Seller (Germany)*, Final Award, ICC Case No. 10377, 2002 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2006, Volume 31 pp. 72-94 and *Buyer (Italy) v Seller (Germany)*, Final Award, ICC Case No. 11440, 2003 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2006, Volume 31 pp. 127-147, at para 52, referring to Rüede, Thomas, Hadenfeldt, Reimer, *Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG*, Schulthess Verlag, Zürich 1993.

<sup>131</sup> Assignee of buyer (Republic of Korea) Respondent: Seller (Australia) v Seller (Australia), Award, ICC Case No. 11869 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 2011, Volume 36 pp. 47-69, at para 34, referring to Mustill, Michael J., Boyd, Stewart C., *Commercial Arbitration*, Butterworths, London 1989 and Savage and Gaillard, *supra* note 2.

<sup>132</sup> See e.g. Mistelis, Kröll and Lew, *supra* note 35, para. 18-46 to 18-48 or Moses, *supra* note 1, p. 64-67 for further discussion of the concept.

<sup>133</sup> Moses, *supra* note 1, p. 64 calls the two debates ‘similar’, while Goode, *supra* note 89, p. 21 says that they are ‘paralleled’.

<sup>134</sup> *Manufacturer v Licensor*, Interim Award, ICC Case No. 5314, 1988 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1995, Volume 20 pp. 35-40, at para 17, referring to Craig, Laurence W.,

The tribunal that decided *French Enterprise v Yugoslav Subcontractor* went further, and applied ‘lex mercatoria’ as the substantive law in the dispute.<sup>135</sup> It referred to scholarship as one justification for this approach.

In *Manufacturer v Distributor*, the approach was more reserved. The tribunal held that ‘the failure of the parties to agree on the law governing’ their contract could not ‘be interpreted as an implied reference to some vague international legal or trade principles’ (or ‘anational law or international trade principles’), since ‘[s]uch reference must be made expressly and, if not expressly, then in an implied manner which gives reasonable certainty [...]’.<sup>136</sup> It rather applied ‘both the Irish and the French’ conflict of laws rules, in order to arrive at the substantive law applicable in the case.<sup>137</sup> This alternative approach was supported by reference to scholarship.<sup>138</sup>

## 5. CONCLUSION

The debate over ‘delocalisation’ of international arbitration concerns whether the law governing an arbitral procedure must ultimately rely on the law of a seat State. The debate is informed by underlying views on the source of validity of international arbitrations, and whether or not this comes from the authority of States. Therefore this ‘delocalisation’ is very much a matter of ‘law without State’.

In a narrow sense the debate is not important in international arbitration, since arbitrations generally select, and benefit from having, a seat State. At the same time the debate has been long-running and heated, and has been said to influence the practice of international commercial arbitration more generally.

This contrast, between minimal practical importance to specific disputes on the hand and a notable influence on the field as a whole, seems to be reflected in the results of my examination of the use of scholarship. This use seems to display the same marked ambiguity towards ‘delocalisation’ as the broader debate: The awards seem to accept at least part of the underlying ideas, but no tribunal has openly accepted the possibility of complete separation from national law. These underlying ideas may also have influenced other aspects of the applicable law in the arbitrations. These other aspects have (to varying extents) been separated from national law, with reference to and justified by scholarship.

This contrast (or duality, or ambiguity) is likely to persist, which means that international arbitration cannot and will not become a ‘law without State’ in the foreseeable future.

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Park, William and Paulsson, Jan, *International Chamber of Commerce Arbitration*, Oceana Publications, New York 1985.

<sup>135</sup> *French Enterprise v Yugoslav Subcontractor*, Award, ICC Case No. 3540, 3 October 1980, in Pieter Sanders (ed), *Yearbook Commercial Arbitration* 1982, Volume 7 pp. 124-133, at p. 128, referring to Goldman, Berthold, *La lex mercatoria dans les contrats et l'arbitrage internationaux*, Clunet 1979.

<sup>136</sup> *Manufacturer v Distributor*, Partial Award, ICC Case No. 7319, 1992 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1999, Volume 24 pp. 141-148, at para 13-14.

<sup>137</sup> *Manufacturer v Distributor*, Partial Award, ICC Case No. 7319, 1992 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* 1999, Volume 24 pp. 141-148, at para 14.

<sup>138</sup> More specifically to Craig, Park and Paulsson, *supra* note 134; Derains, Yves, *L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige*, *Revue de l'arbitrage* 1972.