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THE PROCEDURAL LAW APPLICABLE TO ARBITRATION

THE SEAT THEORY & THE DELOCALISATION THEORY

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Introduction

Economic globalization has fuelled explosive growth and increased demand for international arbitration. Increasingly, nations compete with each other for selection as the forum for international arbitration.¹ This competition is reflected, in part, in the development of national arbitration laws which are often a significant determinant of a nation's ranking among the leading world arbitration centres.² The main reason for the conflicts of law or the use of different theories is the autonomy of the contracting parties and the mechanisms they agree to use to control the international contract especially in relation to development contracts. These contracts are designed and controlled by new methods and traditions illustrating the reasons why it has been used in this way, away from the local jurisdiction and national courts.³

Therefore in this essay we will highlight the effect of the expansions of the global economy and how it can affect arbitration theories. At first, we will examine the characteristics of the international arbitration procedures then, in the second part we will examine the seat theory from an efficiency perspective and we will try to see whether it is still effective or not. At the third part we will introduce our analysis, and we will focus on the delocalisation theory and how it has started to become the leading theory within the new development of globalisation trend and we will conclude by looking at the idea of the universal aspect of the delocalisation theory.

¹ See, Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Tex. Int'l L.J.* 1 at p. 2. For statistics, see Najjar, 'The inside View: Companies in Need of Arbitration' (1996) 12 *Arbitration International* 3 p. 359.

² See, Wetter, 'The Internalization of International Arbitration: Looking Ahead to the Next Ten Years' (1995) 11 *Arbitration International* 2 at p. 117

³ See Maniruzzaman (1999)

1- Characteristic of the international arbitration procedures

It seems that both theories (the seat theory and delocalisation) share similar characteristics and elements as regards the seat theory, it is arguably becoming ineffective and is no longer really applied, because of new developments in international commercial contracts. Arbitration is becoming the new language of international commercial society (which cannot be successful without the arbitration clause or separate arbitration agreements). However the main pattern which, characterise the international arbitration theories are created and governed by the applicable law, which is the creation of the contracting parties' determination. Therefore the contracts are mainly characterised by:

(A) Speed/Flexibility

In theory, international arbitration is generally considered to be quicker, more flexible, and less formal than litigation. There is far greater freedom for both the tribunal and the parties: subject to the arbitration agreement provisions, the panel may control the procedures to be employed, the rules pertaining to taking testimony, and evidential matters. The parties usually choose the arbitrators, the language to be used, the use of interim measures, the substantive law, and as a practical matter, the degree of procedural formality. Effectively, national arbitration laws regulate intervention by local courts so that the parties have greater flexibility to conduct the arbitration. Many of these factors are of critical concern in the context of the seat of the arbitration changes rapidly, due to the different legal systems: some products are often considered dated within months of release; as a result, of the speed of the business transactions in the new economic order. Flexibility is respected and its opportunity for

conciliation is a paramount. Dispute resolution procedures conducted in an informal manner providing the greatest opportunity for the continuity of business relationships.⁴

(B) Neutrality

In any international commercial disputes, the driving force in the development of international commercial dispute resolution has been forum escaping one of the greatest concerns for both sides in any international dispute is the substantive and procedural fairness of the foreign court system. Parties in general prefer to accept a neutral environment over the uncertainties of minefields in foreign laws and the risk of bias by foreign courts.⁵ International arbitration provides this alternative effectively, it is often chosen by default, not because the parties perceive it to be naturally superior but because they are not willing to litigate in their counterpart's jurisdiction. These international contracts, often involve transactions between developed Western countries and developing countries, and cultural as well as legal clashes⁶: e.g. the public policy arbitration is an encouraging alternative for both sides.⁷

(C) Confidentiality

Confidentiality protections are required in the resolution of many kinds of business disputes. Not only because that the parties wish to maintain the confidentiality of the trade computation (prices), technology or the chemical formula, and this is accountable in the market for the other competitors but there may also be financial data, new product information, and marketing strategies or the state secrets in some cases which are extremely sensitive.

⁴ See, *The Arbitration between the Arabic legislations and international treaties, studies and documentations: Arab lawyer's union 1998. Arab lawyer's union press. Cairo*

⁵ See Sanders and Ragan, *Concerns of American Lawyers with Foreign Arbitration Jurisdictions* (1994). A survey asked arbitration lawyers what are their greatest concerns when approaching foreign jurisdictions in arbitration matters. Results showed that US counsels' greatest concern was fairness substantively and procedurally. All other concerns were secondary.

⁶ See, *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 ILR (1951),p.144. and *Ruler of Qatar v. International Marine Oil Company Ltd.*, 20 ILR (1953),p. 534.

⁷ See, Maniruzzaman (1998) *Ruler of Qatar v. International Marine Oil Company Ltd.*, 20 ILR (1953),p. 534.

Therefore, hearings which remain closed and procedures which protect the confidentiality of evidence and awards are favoured in this arena. While confidentiality is often cited as an advantage of international arbitration, recently the scope of confidentiality protections in arbitration has come under scrutiny.⁸The UNCITRAL Model Law makes no provision for the privacy of proceedings or the confidentiality of awards. In fact, the newly created World Intellectual Property Organization rules are the only institutional rules which provide significant confidentiality protections.⁹

(D) Expertise

The option to choose arbitrators is often cited as an advantage of arbitration over litigation, since arbitration allows the parties or the arbitral institution to select arbitrators with technical experience. While not always effective, this option provides an opportunity to enhance the quality of decision-making in cases.

(E) Enforcement

International arbitration would be subjected to judicial control, and accordingly to national procedural laws, only when the assistance of a court was to be requested to ensure the recognition and enforcement of the award, whether at the seat of arbitration or elsewhere. The treatment reserved for international arbitration under these regimes; UNCITRAL, ICC, and ICSID could be termed one of relaxation. Indeed, article 54 of the ICSID Convention provides:

⁸ See, Paulsson and Rawding 'The Trouble with Confidentiality' (1995) 11 *Arbitration International* at p.303.

⁹ See, *The Arbitration between the Arabic legislations and international treaties, studies and documentations: Arab lawyer's union 1998. Arab lawyer's union press. Cairo.* Also see, WIPO Arbitration Rules, Arts 52, 73--76; cf. AAA International Arbitration Rules, Art. 35. See also, See Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths 1989, 2nd ed.) at pp. 432--434; Neill, 'Confidentiality in

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories, as if it were a final judgment of a court in that State.

We believe that if all institutions law models in their conventions it will provide the solution for both arbitrability and enforcement difficulties. Some countries limit the scope of arbitrability, particularly with regard to validity issues.¹⁰ Review of awards is, of course, under the control of the courts of the place of arbitration: however, even if the seat of the arbitration authorizes arbitrability, still there are a risk regarding enforcement.¹¹ Under Article V(2) of the New York Convention, enforcement may be refused by the country where enforcement is sought if the subject matter of the arbitration is not capable of settlement by arbitration under the laws of that country or if the award would be opposing to public policy.¹² No national law can cure the risk that another nation will not enforce the award but parties seeking enforcement under the New York Convention or other international treaties are better positioned than others.

Arbitration' (1996) 12 *Arbitration International* 3 at p. 287.also see, *See* WIPO Arbitration Rules, Arts 52, 73--76; *cf.* AAA International Arbitration Rules, Art. 35.

¹⁰ See, El-Ahdab (1999) E.g. the Saudi legal system requires for the arbitrators to be Muslims and they don't enforce ant award which include "Interest" which is mean "Reba" in the Islamic law. we can argue tat the Saudi legal system adopted this restrictions due to the national security and to guarantee the stability of the jurisdiction, because if they allowed a no Muslim and foreign arbitrators to give awards with in the Saudi territory this can lead to public cry and will create a contradictions between the Islamic laws and the state public policy. However the Saudi system can avoid these criticisms from the international society by accepting the no Muslim, and foreign arbitrators to work with in the Gulf Co-operation Council Arbitration Agreement. GCC Arbitration Centre in Bahrain and it can give the power to the award that will issue as it is issued within the Saudi territory even in the Reba issue.

¹¹ See, Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (Oceana 1990, 2nd ed.) at p. 441. As a general rule, international arbitration decisions are subject to limited appellate scrutiny by domestic courts. See Craig, *The Uses and Abuses of Appeal from International Arbitration Awards* (proceedings of the South-Western Legal Foundation) (1988). Various calls have been made for increased appellate supervision. See Morgan, 'The English Arbitration Act 1996 and Reform of Arbitration Law in Hong Kong and Singapore', [1996] 11 *Int. Arb. Rept.* 12 at pp. 20, 27 (Mealey Publications Inc); Klitgaard, 'The Transnational Arbitration of High-Tech Disputes' presented at the Institute for Transnational Arbitration, Dallas (June 1996).

2- Seat Theory

Definition of the seat theory:

The seat of arbitration is governed by the law of the place in which it is held: that this is the “seat” or “forum” or “*locus arbitri*” of the arbitration well established in both the theory and the framework of international arbitration.¹³ Moreover, it can be defined as “the juridical seat of the arbitration” which is shaped by the contract parties or the arbitrators, by the institution;¹⁴ when drafting arbitration agreements, parties are strongly recommended to specify the place or seat of arbitration. (Article 20(1))¹⁵ The choice of seat is not a physical choice, but a legal choice which allocates the arbitration law applicable to the procedure of the arbitration. Hearings may not necessarily take place at the seat. In other words, this is the place where the arbitration begins and ends.

Do we need the seat theory in international arbitration?

Only the contracting parties can answer the mentioned question, due to the freedom of the contract which is based on their will. They can choose the suitable principals which can govern their contracts by the expression of their free will, in a particular contract. Therefore,

¹² See Geoffrey (2000) also see El-Ahdab (1999), the Saudi legal system examples Reba and the requirements of the Islamic religion of the arbitrators, which represent public policy and how it effect the arbitration and the award.

¹³ See Mann “state contracts and international arbitration” 1967 .also see, Redfern & Hunter 1999.

¹⁴ see Redfern & Hunter (1999)

the free will needs a special law which can govern such agreement. This law can be controlled, finally, by the local court or state sovereignty.

The seat of the arbitration is almost always set out in the arbitral agreement between the parties. The fundamental importance of the selection of the seat theory is that it is acknowledged to be determinative of the *lex arbitri*. This approach to the *lex arbitri* holds that for example, if the seat preferred for the arbitration is England, the arbitration process will be subject to the national arbitration law of England regardless of the substantive law governing the arbitration contract, the substantive law governing the subject matter of the dispute, or the procedural rules adopted.¹⁶

Certainly, the efficiency and effectiveness of the arbitration itself will be influenced strongly by the terms of the arbitral agreement, the choice of arbitral institutions, the rules of substantive law, and the members involved¹⁷, and the law of the seat. Even with, the responsibility of public policy and value of the forum as the most likely seat, the national law will reflect national interests concerning the protection of public welfare and justice to the parties to be an attractive discussion for international arbitration.¹⁸ Nations must properly balance these interests with the demand for procedural independence.¹⁹

¹⁵ see Petar Sarcevic (1989) .also see the UNCITRAL model law 1984

¹⁶ See Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Tex. Int'l L.J.* 1 at p. 2. For statistics, see Najar, 'The inside View: Companies in Need of Arbitration' (1996) 12 *Arbitration International* 3 at p. 359. The national law will determine the validity of the arbitration agreement, arbitrability of the subject matter, court supervision including interim assistance and judicial review, and other procedures governing the arbitration which is not agreed upon otherwise. Additionally, the national law will dictate domestic enforcement procedures as well as impact on foreign enforcement efforts.

¹⁷ We can argue that the good communication between the contracting parties and the arbitrators can help to make the arbitration tribunal effective and will speed the process to reach the right award. Indeed we have to consider the institutions which have fixed prices and the characteristics of the arbitration.

¹⁸The public policy has never been defined in proper way in any international documents, but we can argue that it is an element which guarantees the protection of the national interest where the award had to be enforce and this is the duty of the national courts, for example the Saudi courts will not enforce the Interest (Profit) aspect if it is mentioned in the arbitration award, due to the Islamic law which rejects (Reba). *lex arbitri* necessarily includes both legislative and judicial directives. For purposes of national policy-making, the focus here is on legislative efforts.

¹⁹ See Craig, Park and Paulsson, *op. cit.* at p. 463. here we can argue about the new theory delocalisation and how it is avoid this problems and how it is a solution to any cross border contract.

Within the context, we can conclude the argument by adding that the best legal framework which can be provided for international arbitration, is the one which provides assurances of neutrality, respects the intentions and needs of the parties, allows enough autonomy for the dispute to remain within the tribunal, provides the tribunal with sufficient power to carry out its functions, and maintains a suitable level of court supervision. One of the factors that affect the seat theory is that it is not able to provide a neutral environment, arbitrability of international commercial contracts, such as speed and flexible procedures, adequate confidentiality protection, the opportunity to appoint expert arbitrators, and ready access to injunctive relief.²⁰ Nonetheless, we can argue that because of the development in this particular field, which lead to increase the party autonomy in the contract formation, the contracting parties could refuse to be tied by the local court. So in this case, why do we not firstly support these methods, rather than choose the international arbitration and involve the national court? To conclude our argument, we believe that because of these reasons, the seat theory will become weaker and unable to cope with the new trends in international business transactions. But the question that arises is whether the seat theory is still applicable.

Is the seat theory still alive or has it been substituted by the delocalisation theory?

No doubt there is the seat theory is one of the principals in international arbitration and it is one of the theories which represent the development of the arbitration in the long run, but it not as attractive as delocalisation theory. However one of the surprising effects of the legislative reform movement has been to reinforce the concept of the territorial application of

²⁰See, Goode (1982) Obviously, the selection of the appropriate forum cannot occur in a vacuum: determination of the appropriate forum in any given transaction will be case specific and will be dependent on numerous considerations beyond national law alone

arbitration law and the importance of the concept of the seat of arbitration.²¹ The insistence on the application of the arbitration law of the location of the arbitration procedure has not been harmful to international arbitration, because the contents of the law have been designed to attract international arbitration, to be used friendly, and to specifically empower the parties to contractually specify arbitral procedures. The effect of the insistence on the territoriality of a country's arbitration law is to ensure that mandatory provisions of that law are applicable to arbitrations whose seat is in that country, even though the parties might seek to exclude them or adopt another procedural law. It would appear to be a better view rather that when the law of the place of arbitration permits a party to refer to another state's arbitration law for the establishment of arbitration procedures, this reference should be interpreted as a contractual incorporation of procedural rules, and not as the adoption of another *lex arbitri*.

To conclude this argument we can argue that the seat theory is no longer effective in the international arena leading to new trends and international developments or to the so called 'new economic order', which calls for the speed of globalization, can arguably lead to a universal law (code).²² The issues of sovereignty, and the conflicts between public and private law, loom larger in these idiosyncratic cases, which may lead to the delocalisation of arbitral procedures by necessity, and without regard to the eventual outcome of the award in subsequent recognition and enforcement proceedings. Since the traditional theories did not

²¹ See, Toope (1990). Dr. Mann argument about maintaining the state control to the international arbitration as mater to public policy. Due to the different legal systems and the new trend in the modern societies which lead detach the arbitration from the state control. Redfern & Hunter (1999)

²² See, Weiler (2000). Moreover, we can give a better explanation noting that Globalisation has cast the institutions created in the aftermath of the Second World War, to oversee global economic and political governance into stark relief. Ameliorated economic integration has increased the vulnerability of countries towards economic events taking place beyond their borders. Some governments, however, have failed to develop the global institutions needed to oversee and regulate global markets in the public good. As a result, the tendency to produce outcomes 'inimical' to the public good has been left unchecked. These outcomes include increasing levels of inequality and instability. It follows that any attempt to develop a model of globalisation capable of meeting the human development challenges of nowadays, must include an agenda for institutional reform in order to cope with political regimes, other institutions and new economic trends in the international arena.

completely satisfy the international trade society as universal theories,²³ especially when a state represents one of the contracting parties,²⁴ the other parties, within the international contract will consequently emphasize the delocalisation procedures in order of limiting the state power within its territory.²⁵ The idea of detaching the arbitration from the state control comes from the contracting parties will, in order of the expansion of their freedom.

3- The Delocalisation Theory

Definition of the delocalization theory

The idea of detaching the international arbitration from the state control lead to the recreation of new methods in the international arbitration (internationalization) or delocalisation theory, which answered the new idea which unifies the arbitration procedures under one action, preferred to the old system within the seat theory which takes two main actions: the *lex arbitri*

²³ See Maniruzzaman (1998), also we can argue that this kind of clash between basic issues such as the national interest or stability can be the firewall against the universal arbitration e.g. the Islamic law and the communist rules. But the contracting parties can avoid this from the first step in their contract when is one of the parties is coming from a different ideology, therefore they can design their arbitration agreement according to this understanding within the international law perspectives.

²⁴ See, Maniruzzaman(1998) Also see, Aramco case.

²⁵ See, Toope(1990) also see, C.T.Cutis (1988). The arbitration can be seen as the stabilization clause when the state is one of the contracting parties. Since the host state enter itself in this type of contractual agreements and or international treaties, so the state agree to 'shrink' or 'sacrifice' part of its sovereignty in favour of the economic development, or national interest and this can come through the **BITS** and **MIT** terms and conditions. Moreover these treaties are governed by the international law and the state sovereignty has not been abused but it is modified by this contract by obligations to protect the other party.

and the national court (place of enforcement).²⁶ Yet, the arguments still have a place for national laws to take some control in delocalisation procedures.

The Demoralisation Theory is one of the outcomes of the seat theory, in particular when it becomes impossible to cope with new trends within the international commercial arena; the state loose the overall control over international commercial arbitration conducted on its territory. On the other hand, the delocalisation theory can be considered as a new mechanism which detached the international arbitration from the state control and gave more space and priority to the contracting party freedom. However, in this part we cannot highlight all international arbitration institutions and we will try to focus on the idea of universal arbitration rules through the *International Centre for Settlement of Investment Disputes* (ICSID)²⁷. Nevertheless, we will stress attention on the state and private entities, especially when the state is involve in the Oil expropriations.²⁸ Indeed, arbitral tribunals threw attention on the fact that the state part to the arbitration had not intended to subject itself to the procedural law of another sovereign state, the arbitration site, and accordingly found that the arbitral procedure must be governed by international law. It may be dangerous to infer any general lessons from arbitrations between government entities and private parties, such as the *Aramco and Topco* cases.²⁹ Indeed, when it is regarded to states are representing one of the contracting parties,³⁰ we have to think wisely how to use the right approach of the other party to emphasis the delocalisation procedures, in order to limit the state power within its

²⁶ See Maniruzzaman (2001) what we can understand by internationalisation is the concept of the delocalisation or it is the other face of the coin. Moreover this “cocktail theory” can be seeing as the safe guard to the individual and the international companies from the state hegemony.

²⁷ See Fouchard (1990), this body set by the Washington convention of march 18 1965 article 28 to 35 of which deal specifically with conciliation; in 1967, ICSID adopted rules of procedure for conciliation proceedings, which were revised on September 26, 1984.

²⁸ See Toope (1990), also See, *Aminoil 1984*

²⁹ See Maniruzzaman (1998). The international treaties and convention can be seen the right mechanisms to create universal laws which can govern the relation between the different ideologies or legal systems. TOPCO, 53 I.L.R. at 474, 482, quoting Saudi Arabia v. Arabian American Oil Company (Aramco), 27 I.L.R. 117, 168 (1958).

³⁰ See Maniruzzaman (1998).

territory.³¹ However, whatever the approach to loosen a state's control from the international arbitration, contracting parties, within any status or position, cannot ignore the “inexorably conferred by or derived from a system of municipal law which may be convenient and in accordance with tradition, be it called the *lex fori*”

Delocalisation can be seen as the *ad hoc* arbitration when a state breaches its contracts.³² Whilst UNCITRAL rules can be seen as the right apparatus for delocalisation procedures, because it gives higher freedom to search for any other particular alternatives to solve any given conflict between the parties,³³ With respect for national laws, we believe that the idea of transnational law coordinates a far better solution in accordance to problems of the strict local system (Localisation), of international commercial contracts and arbitration. Nevertheless, we cannot cover all institutions,[UNCITRAL, ICC, and ICSID] due to special limitations, but will try to draw particular attention to the ICSID, which represents the main institution based on the idea of delocalisation arbitration. We will then focus on the

³¹ See, Toope (1990) for example how we can enforce an award which include interest (Reba) ,in this case we have to respect the public policy of the state which we are going to process the awards in. and it is possible that we can process all the award in Saudi Arabia except the interest part. Yet we can do it in another state and I think that through the new regulations in the Gulf Co-operation Council (GCC) that any award can be valid in any state members therefore the Reba part which is can not apply in the Saudi court can process in any court in GCC. Moreover I believe that the Saudi authorities can adjust some of their laws in a way it can make the others understand the flexibility of the system to achieve more support and trust from the international business society especially through GCC arbitration enforcement procedures. The conditions for the enforcement of foreign arbitration awards in the GCC are as follows: 1-Awards passed in a foreign country may be executed and implemented within the GCC states under the same conditions provided for in the law of the foreign state for the execution of judgments and arbitration awards. 2-A petition for an execution order shall be filed with the Court of First Instance following the standard procedures for filing lawsuits. Execution of the awards however may not be ordered unless the following are verified: A-That the GCC Courts have no jurisdiction over the dispute on which the award or the order has been passed and the foreign court has such jurisdiction, according to its own law. B-That a competent court according to the law of the country in which was passed the award order. C-That adversaries to the lawsuit in which the award has been passed were summoned and duly represented. D-That the award order is final according to the law of the country in which the award order was passed. E-That the award order does not conflict with or contradict a judgment or order previously passed by another court in the GCC and does not include any violation of morals or of public order. See the charter on the GCC dispute settlement procedures. <http://www.gccarbitration.com/english/index.asp>

³² See, Saudi Arabia v. Arabian American Oil Company (Aramco), 27 I.L.R. 117, 168 (1958).

³³ See Toope (1990) p.18

international contracts. Indeed, we will reduce the difficulties so far encountered in attempt to delocalise the legal system when dealing with cross-border transaction.³⁴

The ICSID has a major role in creating its Centre; this is a tremendously important international institutional dispute settlement mechanism. This can give the non-governmental party or the individuals the capacity to cope with the hegemony of the state within its territory.³⁵ However, Delocalization appears in many aspects of the institution mechanism. Delocalisation can emerge in articles 26 and 27(1)

"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to arbitration to the exclusion of any other remedy."

Article 27(1), as a substitute, expressly excludes the availability of diplomatic protection and of any other international remedy to the foreign investor's national Contracting State, in respect of a dispute submitted to ICSID arbitration.³⁶ Moreover, article 54 draws attention to the enforcement aspect, which is supported by the international law through the International Court of Justice (ICJ); awards are fully respected by the states members of the ICSID treaty, as well as the model law of the states responsibility (2001).³⁷

³⁴ See J.Lookofsky, in M.J.Bonell(ed), A New Approach to international commercial contracts(kluwer,1999),71 et seq. at 77.

³⁵ See, Maniruzzaman (1998).it is obvious that any contract that the state is part of will include some clauses which will limit the state control in order to protect the other party, also to avoid the traditional conflicts rule of the *lex fori*. And this was clear in *ARAMCO* case.

³⁶ Article 27(1) provide :no contracting state shall give diplomatic protection, or bring an international claim in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall submitted to arbitration under this convention, unless such other contracting state shall have failed to abide by and comply with the award rendered in such a dispute,"

³⁷See, Convention on Responsibility of States for Internationally Wrongful Acts UN General Assembly A/CN.4/L.602/Rev.126 July 2001.

However, the general problem of the relationship between the ICSID jurisdiction and national courts is ultimately the dependence on the willingness of the latter to refrain from interfering with the former and accept its superiority. The delocalization of ICSID proceedings may be negatively affected by the rules on the governing law of the qualities of the dispute. The material provision is contained in the article 42(1) of the Convention:³⁸

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules of the Conflict of Laws) and such rules of international law as may be applicable.

The above article makes the mechanism of ICSID arbitration unattractive to foreign investors; in the absence of an arbitration clause it would be necessary for the application of national laws to arbitration procedures. Finally, if the host state can retain control over such an important aspect of the dispute, it is clear that the foreign investor may not see any rationale in preferring ICSID.³⁹ The conflict of laws give contracting parties “autonomy” to bind themselves by their applicable law, whilst the contract is given the validity and the enforcement through the International Commercial Arbitration (ICA) institutions. Contracting parties demarcates the path to loosen the blaze of the Seat theory, in particular under the new

³⁸ "Article 42(1) refers to the application of host state law and international law. If there are no relevant host states laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host state laws, they must be checked against international law, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference."

³⁹ See Maniruzzaman (1999). Also see, Amin Rasheed shipping corp. v. Kuwait insurance co. [1984] AC 50.

liberal projects, which are based on the idea of liberalisation of the world economy through the process of globalisation; yet, there is still the long term analysis to be made.⁴⁰

In which direction is the delocalisation theory going and to what extent will it remain the dominant theory in the international arbitration?

The delocalised international arbitration is characterised by the universal nature. and it can be seen as a “basic legal order” (*Grundlegung*)⁴¹. Indeed, contracting parties need no further interference from the national courts, which depend on the choice of the place of arbitration and the national law applicable there; nor do they think about the *procedures* within the arbitral *process*, or the *results* to be obtained, which may be variable because of the mentioned choice. It is a reaction of the business community response and as a promoter of a *universal arbitral remedy*, that international arbitration institutions have provided arbitration rules designed to be *self-contained*, and of general applicability, to prevent any indication as to the local arbitration practices, resulting from national courts or laws (which vary from place to place). If we analyse the following elements:

1- *Procedures*

2- *Remedy*

3- *Process*

4- *Results universal arbitral*

5- *Self-containment*⁴²

⁴⁰ See Maniruzzaman (1999). Also see, Fukuyama (1992)

⁴¹ See, Maniruzzaman (1999), also see Ray, “law governing contracts between states and foreign nationals”, *in selected readings on protection of private foreign investment*(1964) pp.453-522.

⁴² Because it has a special legal character of the international trade we can argue that the: [Transactional procedural law] is founded on the premise that it is contrary to the interests of the trading community to tolerate a regime in which international arbitrations have to be submitted to the differing arbitration laws of different countries, according to where the arbitrations happen to be conducted.

These elements are in fact the basic elements of *Grundlegung*. The contracting parties need them for their autonomy, in order to solve the conflict among themselves or between particular laws. Indeed, institutions⁴³ shall guarantee the enforcement of the awards through attracting more states to enter into membership. *Grundlegung* can represent a *Universal Solution* which can solve any particular dispute, under delocalised arbitration, however to some extent.

The delocalisation theory seems to grant the only solution to new trends in the international law development; in particular within the international commercial contracts', which is mainly related to sovereign power⁴⁴, and which includes a greater amount of money. Moreover, in the long term this relationship can be subject to future reform. The particular feature of reforming power, within the contracts, represents the whole characteristic of international contracts;⁴⁵

⁴³ One of the principal examples of such an attempt to delocalize the arbitration practice is found in the 1975 modification by the ICC of its Arbitration Rules, specifically article 11, "Rules governing the proceedings," to provide that: *The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.*

⁴⁴ See, [Geoffrey \(2000\)](#)

⁴⁵ See [Maniruzzaman \(1999\)](#) also see, [Clive M. Schmitthoff \(1974-75\)](#), [DE Lupis \(1987\)](#) this can be seen as a solution to avoid any conflict in the future since we are arguing about long term investment projects. At the time when many energy agreements exceed a period of five years, the investment agreement could include a renegotiation clause, stipulating that the agreement will be opened to renegotiation in order to adapt it to the new policies. Such a mechanism seems to a realistic way to development integration and FDI security and stability.

The delocalisation theory and the universal aspect

Since ICSID award enjoys recognition and enforcement in all Contracting States. Therefore the contracting parties can decide from the beginning the outline of their dispute through their choice of the institution which will govern the arbitration. The argument submits that the award must comply with international law to be consistent with these provisions of the Convention, because only an award that complies with rules and principles of international law is entitled to enjoy full recognition and enforcement and to restrict the diplomatic protection. In conclusion, any kind of courts which is result of a treaty or convention signed by state members can apply a strong and applicable law to any kind of contractual obligations. It may also be said that the centrality and primacy of international law greatly restrict the host state's control over the (merits of the) dispute, and allow UNCITRAL, ICC, or ICSID to recover on what is missed in its domestic jurisdiction, however not after the breach of any international law or agreement.

The self-contained and delocalized character of ICSID has clearly emerged from the above discussion, as a unique model in international law, and a landmark in the development of international law towards a full recognition of the individual as a subject of international law, on both the substantive and procedural levels. ICSID is not completely insulated from a certain interaction with national legal systems, due to the possibility of a more or less significant interference by national courts, to a certain degree of control over the dispute retained by the parties, and to the applicability of national law as the governing law of the merits of the dispute. In other words, it has succeeded in delocalising disputes which mainly affect private commercial interests, but also affect the public policy goals of private parties.

The translational model is attractive when the arbitration is one which will not eventually be integrated into a national legal order. To this extent the model owes something to arbitrations between states and private investors such as the *Aramco*.⁴⁶ We can argue that the universality in international arbitration it can be seen as procedures which could compromise between the different legal systems in favour of:

Autonomy of the parties, the contracting parties determination

Avoiding the law clash (conflict of laws)⁴⁷

Guaranteeing the award enforcement

The universal aspect in the delocalised arbitration can reflect our conclusion; the local arbitration laws (national courts) are by definition unsuitable to international arbitrations, which are visualised as occupying a juristic universe of their own, detached altogether from the everyday concern. To conclude the delocalisation can be characterised as stateless legal system.⁴⁸

⁴⁶ See *Saudi Arabia v. Arabian American oil co. (Aramco) (1958)*, 27 ILR, pp.117&153 et seq.

⁴⁷ Maniruzzaman (1999), Redfern & Hunter (1999)

⁴⁸ Some states are willing to change their legal system in favour the economic development in the long run and I can use the example of Saudi Arabia In 2000, Saudi Arabia implemented the Foreign Investment Act by *The Royal Decree Number (M/1)* , which “liberalizes” the foreign investment laws in the Kingdom. The Saudi Arabian General Investment Authority was created under the Act, which has responsibility for licensing all new foreign investment in Saudi Arabia. Royal Decree in Foreign Investment Code Royal Decree, no M/1 10 April 2000. Also see, Royal Decree dated 2/2/1399 H, and will also cancel all matters that contradict with the rules. Foreign Capital Investment Act promulgated under Royal Decree No. M/4 dated 2 Safar 1399 H. (January 1, 1979) Under Article.2 of this Act. In Taxation and tariff the Saudi government give special treatment to the FDI and it implemented new law in this regards 3/3170 IN 2.12.1413H, In this law the state gives free tax holidays to the new projects and any expansions to existing projects which have foreign investors. Nonetheless this will lead to more changes in the legal system to cope with the development in order to create the right atmospheres for the legal effects of this action in the future.

Conclusion

It is obvious that modern arbitration laws must respect the procedures to be followed in arbitration and the standards for judicial recourse. The common denominator is the specific recognition, by the law of the place of arbitration, of a wide degree of party autonomy for agreeing to rules of arbitral procedure. This degree of union may be explained by the fact that laws have been designed to accommodate themselves within international arbitral practices, and not vice versa. Moreover, we can understand that the rejection of the delocalisation theory is mainly based on the idea of the state sovereignty. However, we can argue that the international institutions manage to fulfil the administrative requirements and the contracting parties' autonomy.⁴⁹ These arbitral practices have been developed under both institutional rules, such as the ICC Rules, and non institutional rules, such as the UNCITRAL Rules, and have been designed to accommodate the specific needs of international business transactions.

The transnational efficacy of the award would depend on its validity and the institution which adopt the tribunal in front of the national courts within the specific country taken into account. Parties seeking to rely on the award in other countries may be delayed or hindered by challenges before courts such as public policy. I think that the delocalisation is the right formula to achieve a universal code which can be acceptable in any country and it can open the future to other field in the international arena not only in the international trade but it can be the example to any other universal conflicts.

⁴⁹ See Toope (1990) p. 25, also see Mann "private arbitration and public policy"(1985) 4 C.J.Q. 257-267.

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