The trend of delocalization in arbitration

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Abstract: Contrary to the traditional theory of the territoriality, new currents advocate arbitration procedures less subject to the control of the authorities and the laws of the seat, and propose a delocalized, floating or non-national arbitration. This is a controversial trend that has gained supporters and detractors in the doctrinal, legal and jurisprudential fields. Its development is noted in cases of international commercial content, which deserves a detailed study. Hence, this writing begins to expose the academic and jurisprudential debate that we are witnessing with respect to international arbitration, on the urgency of having a more autonomous arbitration system from the seat where the award has been issued.

Keywords: Arbitration, delocalization, case studies.

La tendencia de la deslocalización en el arbitraje

***Resumen**: En contraposición la teoría tradicional de la territorialidad, nuevas corrientes abogan por procedimientos arbitrales menos sujetos al control de las autoridades y las leyes de la sede, y proponen un arbitraje deslocalizado, flotante o anacional. Esta es una tendencia controvertida que ha ganado adeptos y detractores en el campo doctrinal, legal y jurisprudencial. Se advierte su desarrollo en casos de contenido comercial internacional, lo que merece un estudio pormenorizado. De ahí que este escrito comience a exponer el debate académico y jurisprudencial que estamos presenciando con respecto al arbitraje internacional, sobre la urgencia de contar con un sistema arbitral más autónomo de la sede donde se ha dictado el laudo.*

***Palabras clave**: Arbitraje, deslocalización, estudio de casos.*

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SUMMARY:

1. Generalities. 2. The Delocalization Theory in Arbitration. 3. Case Studies. 4. Final Considerations. BIBLIOGRAPHIC REFERENCES.

1. Generalities

There has always been a tense relationship between arbitration and judicial jurisdiction since, on the one hand, the first seems to inevitably require the second for its effective materialization, but at the same time, it has become its nemesis, precisely for being the main source of the most serious obstructions to its operation.

Indeed, despite the highly defended and praised independence of arbitration, its anchoring to certain territory and its legal system has been seen as necessary for the fulfilment of a double function: support and control.

The arbitral seat serves as the formal place in which it is understood that the arbitration has been carried out and the arbitral award has been issued, thus marking the nationality of the procedure and the decision.

This is of paramount relevance because it is conceived that it has been the product of a procedure followed in accordance with the legal framework offered by the seat, it means, the law of the seat, also known as *lex loci arbitri* or *lex arbitrii*, and at the same time the authorities of that country will be the ones called to intervene to support the correct prosecution of the arbitration[1].

Given that the seat of the arbitration can be chosen by the parties, it is implied that it is another expression of the autonomy of their will, through which they not only choose the arbitration courts that will settle the controversies that arise but, also, coupled with that choice, the possible intervention of the judicial courts of that state is accepted, as well as the application and interpretation that they have on the arbitration law, and on other legal, social, cultural and economic aspects. Thus, each nation offers a sphere of

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[1] María Fernanda Vásquez Palma. *Relevancia de la Sede Arbitral y Criterios que Determinan su Elección*. (Revista Chilena de Derecho Privado, N°16, 2011). Online version available on: https://n9.cl/plwle.

different possibilities that may be more or less attractive to the actors, understanding that this system will also provide the applicable legislative context in the face of hypothetical gaps in the contractual stipulations, or even overlap them in certain occasions[2].

Indeed, the fact that an international arbitration is based in a specific territory becomes relevant to determinate the legal system that will serve to check the legality of the arbitration process and the adherence to the law of its result, as well as the faculties of the judges in relation to the support and control functions that must be exercised and the procedural guidelines. At the same time, the determination of the nationality of the award depends on its classification as national or international and, consequently, on the clarification of the treatment that will be given to it as outcome[3].

Being that the designation of the arbitral seat in many legal systems and international instruments is usually optional for the contracting parties, and that choice often has little or nothing to do with the factual elements of the cause to be resolved, it could be affirmed that it constitutes a kind of legal fiction, given that the matter to be resolved has no connection whatsoever with the jurisdiction chosen to hold the arbitration, and it could even be thought of as a forum shopping.

The character of authentic legal fiction that is evident above all in those cases where the dispersion of arbitration elements between different countries becomes evident, invites us to think about the relevance of these processes not being anchored to a single national system, but rather completely disassociated from all national law, and makes us believe that in these situations a supreme value have to be given to the autonomist or contractual freedom principle, which, basically, is the main foundation of all arbitration proceedings[4].

Based on that, many currents have emerged challenging the figure of the arbitration seat, trying to minimize its importance or limiting its implications with respect to the arbitration process and the decision derived from it. In this sense, J. Paulsson affirms that in international commercial arbitrations the influence of the seat with respect to the award should be restricted, especially if it is taken into account that many times this does not even obey the will of the actors but rather an institution, and still in the cases in which it is left to the choice of the interested parties, it usually represents the imposition of the will of the stronger contracting party over the weaker one, undermining the principle of contractual autonomy. By virtue of the foregoing, it is stated that the

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2 María Fernanda Vásquez Palma. *Relevancia de la Sede Arbitral y Criterios que Determinan su Elección*. (Revista Chilena de Derecho Privado, N°16, 2011). Online version available on: https://n9.cl/plwle.

3 María Fernanda Vásquez Palma. *Relevancia de la Sede Arbitral y Criterios que Determinan su Elección*. (Revista Chilena de Derecho Privado, N°16, 2011). Online version available on: https://n9.cl/plwle.

4 Guillermo Palao Moreno. *El Lugar de Arbitraje y la 'Deslocalización' del Arbitraje Comercial Internacional*, (Boletín Mexicano de Derecho Comparado, N° 130, 2011).

jurisdiction of the seat of arbitration should not have the power to apply local provisions of all kinds, including those adverse to the international order, to achieve the annulment of the arbitral award[5].

In fact, jurisprudential practice demonstrates the negative impact that this can cause in international arbitrations, arousing serious complications, inaccuracies[6] and disrupting the legal certainty.

A corollary of this is the clear weakening that the territorialism theory of arbitration has suffered in contemporary practice, as opposed to the strengthening of the tendencies towards the consecration of an increasingly free and autonomous international commercial arbitration, which we appreciate both in legal instruments national and international, as in awards and in the submission agreements to this alternative method of dispute resolution[7].

2. The Delocalization Theory in Arbitration

The Delocalization theory is inserted in this line of thought, according to which international commercial arbitration is self-sufficient, with the parties enjoying the power to design the arbitration process independently of the imperative procedural rules that govern the country where it is being followed the arbitration[8].

This theoretical construction is based on the premise that the arbitration process is self-regulated, and although the parties may abide by certain procedural rules as a result of *ad hoc* arbitration or provided under institutional arbitration, its nature refers to the fact that disputes are resolved through mutual understanding and cooperation between the parties, since arbitration is a private matter in which the interested parties have agreed to embark sovereignly to settle their disputes, for which judicial intervention would not be justified[9].

Starting from this premise, both, the arbitration and the ruling resulting from it, would be simple extended manifestations of the autonomy of the contracting parties, for which reason they should be abstracted from the control of the courts of the country

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[5] Guillermo Palao Moreno. *El Lugar de Arbitraje y la 'Deslocalización' del Arbitraje Comercial Internacional*, (Boletín Mexicano de Derecho Comparado, N° 130, 2011).

[6] Katarzyna Piątkowska. *'The concept of "denationalization" (or the equivalent "delocalization") in the context of the US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009].* (Acta Erasmiana, Varia, 2013). Online version available on: https://n9.cl/4yshm.

[7] José Carlos Fernández Rozas. *El Arbitraje Comercial Internacional entre la Autonomía, la Anacionalidad y la Deslocalización.* (Revista Española de Derecho Internacional, N° 58, 2005).

[8] Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?.* (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

[9] Zaherah Saghir and Chrispas Nyombi, *Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application*, (International Company and Commercial Law Review, 27 (8) 2016).

where they have been generated, and be understood rather that they are unnational, since, as explained above, they do not have a true link with the legal system of the place where the arbitration was carried out[10].

Certainly, among the multiple elements that make arbitration a more attractive option compared to the judicial jurisdiction, are precisely the freedom and flexibility it offers, for which many argue that it should not be subject to the mandatory laws of the arbitral seat[11].

However, the supporters of this theory explain that this does not mean that the award escapes all types of control, since it would be tied to the review by the jurisdiction where it is presented for its execution[12], with which the respect for the rights and guarantees of the parties and the legality of the proceedings would be guaranteed.

In other words, what it is proposed is to eliminate the possibility of filing an annulment appeal in the country where the arbitration is held against international arbitral awards, limiting its control only by the courts of the country where its recognition and enforcement is raised, thus moving away from the traditional conception that gives paramount importance to the seat of arbitration[13].

Definitely, it is a notion that, in contrast to the traditional tendency to concentrate the elements and actions of the arbitration procedure in a single venue, focuses on its international real character, since it is connected with various national systems. And although this is not something new, without a doubt it has been favoured by realities such as the virtualization of contracts, the digitization of processes and the increasingly massive use of information and communication technologies[14].

It is estimated that the first ideas that pointed to Delocalization in arbitration arose at the time of drafting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the New York Convention of 1958, thus moving away from the current of localization that was popular in the 1940s and early '50s[15]. The Article VII of the aforementioned international legal instrument reads as follows:

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[10] Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

[11] Katarzyna Piątkowska. *'The concept of "denationalization" (or the equivalent "delocalization") in the context of the US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009].* (Acta Erasmiana, Varia, 2013). Online version available on: https://n9.cl/4yshm.

[12] Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

[13] José Carlos Fernández Rozas. *El Arbitraje Comercial Internacional entre la Autonomía, la Anacionalidad y la Deslocalización.* (Revista Española de Derecho Internacional, N° 58, 2005).

[14] Guillermo Palao Moreno. *El Lugar de Arbitraje y la 'Deslocalización' del Arbitraje Comercial Internacional*, (Boletín Mexicano de Derecho Comparado, N° 130, 2011).

[15] Sadaff Habib. *Delocalized Arbitration myth or reality? Analyzing the interplay of the delocalization theory in different legal systems*. (The British University in Dubai, Dissertation submitted in partial fulfilment of the requirements for the degree of MSc Construction Law and Dispute Resolution, 2013).

- The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon[16].

  Concomitantly, in its article V it provides:

- Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ...".

As can be seen, the first transcribed norm establishes the acceptance of the recognition and execution of the foreign arbitral award, when the jurisdiction within which it is desired to assert stablishes dispositions about recognition and execution of the arbitral award, which are more favourable to its provenance than the treatment provided for the New York Convention. At the same time, the article V.1., highlights the discretionary power that the courts must have to determine the recognition and execution of a foreign award that is presented to them, despite the fact that grounds for denial are established, including their annulment by of the courts of the arbitral seat[17].

Experts in the area, such as R. Goode in his article *The Role of the Lex Loci Arbitri in International Commercial Arbitration* (2001), have not hesitated to interpret these international norms as a mechanism by the supranational legislator to try to free the international arbitration process from the domain of the law of the place of arbitration, thereby entailing a position in favour of the Delocalization[18].

Consistently, Jan Paulsson explains that when an award has been annulled by the courts of the jurisdiction where the arbitration process was conducted, due to violations of the national system, for example if the award was rendered in a language that is not the official one of the host country , configuring a ground for nullity according to that legislation, the judge of the other country to whom the recognition and execution is requested, can ignore that sentence that annuls the award and decide to give it execution as long as it verifies that the award complies with international standards, as the ones contained in the Article 36.1. of the UNCITRAL Model Law and reproduced in Article V.1. of the New York Convention[19].

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[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

[17] Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

[18] Sadaff Habib, *Delocalized Arbitration myth or reality? Analyzing the interplay of the delocalization theory in different legal systems*. (The British University in Dubai, Dissertation submitted in partial fulfilment of the requirements for the degree of MSc Construction Law and Dispute Resolution, 2013).

[19] Dyalá Jiménez Figueres. *La madurez del arbitraje comercial internacional: de laudos extranjeros y laudos internacionales*. (Revista Brasileira de Arbitragem Privado, N° 5, 2005). Online versión on: https://n9.cl/ihr4z.

However, not only in the New York Convention we find guidelines of this nature, the Institute of International Law in 1989 adopted a resolution on arbitration between states, companies or state entities, and foreign companies, in which all reasoning is categorically objected to legal and philosophical against anational or denationalized arbitration[20].

At the same time, renowned academics have shown their support for the Delocalization theory. Von Mehren, rapporteur of the recently referenced resolution of the Institute of International Law, stresses the primacy of the arbitration agreement as the true statute of arbitration; concomitantly, on this point, Goldman concludes that the only way to avoid an irrational and unjustifiable system is to consider the arbitration as autonomous, non-national and independent of its seat[21].

To this list is added J. Lew who, supported by Emmanuel Gaillard, considered that even a hybrid position on the autonomy of international arbitration did not reflect its true *sui generis* nature[22].

At present there is no agreed definition of what should be understood by delocalized, floating, anational or supranational arbitration, as it has wanted to be identified, however, in order to understand this theory, we could try to systematize its content in four aspects.

A first current focused on the delocalization of the execution, with which, the local annulment decisions would not have international effects, being able the courts of another country to accede to the recognition and the execution of an annulled award in another jurisdiction. Simultaneously, some other authors speak of a possible delocalization of the nullity itself, which would imply the possibility of excluding any appeal for annulment regardless of the constituency in question[23].

Then, we would have a third proposal that suggests the delocalization of the arbitration procedure, which basically states the non-application of arbitration law and limits judicial assistance to arbitration; and finally, a fourth sub-theory that proposes the delocalization of the applicable law, through the reduction of the relevance or interference of the role of the law of the seats in the arbitration procedures[24].

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[20] Hege Elisabeth Kjos. *Applicable Law in Investor–State Arbitration,* (OXFORD, 1a ed., 2013).

[21] Hege Elisabeth Kjos. *Applicable Law in Investor–State Arbitration,* (OXFORD, 1a ed., 2013).

[22] Sadaff Habib. *Delocalized Arbitration myth or reality? Analyzing the interplay of the delocalization theory in different legal systems*. (The British University in Dubai, Dissertation submitted in partial fulfilment of the requirements for the degree of MSc Construction Law and Dispute Resolution, 2013).

[23] Francisco González de Cossío, *El arbitraje al derecho y al revés* (Palestra editores, 2020).

[24] Francisco González de Cossío, *El arbitraje al derecho y al revés* (Palestra editores, 2020).

In this way, the theory of delocalized arbitration has been gaining strength, even reaching application in practice. Certainly, a jurisprudential review will reveal how the judges have used arguments that support the delocalization of arbitration to validate awards previously annulled at their seats.

It is pertinent to mention the impulse that this current has had, especially in the Dutch and French systems, where the courts have followed a trend that seems to favour of the delocalization of arbitration through the recognition and execution of awards regardless of whether they have been annulled in the jurisdictions of the country where the arbitration has taken place.

Focusing on the French case, possibly the most advanced system in the adoption of this theory, 'international arbitration is generally seen as a completely "delocalized" mechanism, that is, it is not linked to or dependent on any national legal system including that of the seat of the arbitration itself'[25].

3. Case Studies

In this sense, it is exemplifying to name a few cases that have historically been of great interest to the academic community in this topic.

3.1. Yukos Capital SARL v OAO Rosneft [2009], case number: 200.005.269/01, 28 April 2009.

In this case, the Amsterdam Court of Appeal approved the enforcement of four arbitration awards that had previously been set aside in the country of origin, Russia, by virtue of the content of the New York Convention of 1958.

Basically, the Amsterdam Court of Appeal decided to reverse the decision of the first instance court that granted exequatur to the ruling of the Russian Civil Court that annulled those awards after the appeal filed by Yukos Capital.

The motives of the court are based on the questioning of the body that issued the declaration of nullity. Indeed, the court based its decision on the closeness of the Rosneft oil company and the Russian State, as well as multiple international indicators that highlighted the lack of independence of the Russian judiciary system, since it is under the influence of the Executive Power, and due the first was used as a mere political instrument by the second. This is why the Amsterdam Court of Appeal concluded that it was very possible that the annulment sentence of the Russian Civil Court, where the awards were annulled, was simply a manifestation of that reality, where the judicial

[25] Manuel A. Gómez. *La Difícil Relación entre la Anulación y el Reconocimiento y Ejecución del Laudo Arbitral Internacional.* (OEA/Ser.D/XIX.15).

process followed was stifled and lacking in independence, for which reason the results of a case followed under these circumstances do not deserve to be recognized in the Netherlands[26].

According to what was reasoned by the Court of Appeal, the question of whether the Dutch courts should recognize the decisions of the Russian courts to annul the awards is something that escapes from what is established in the New York Convention, and this issue must be reviewed in the light of Dutch Private International Law[27].

> The Court then reasoned that, if the decisions to set aside were not recognised, they had to be ignored for the purposes of Article V(1)(e) of the New York Convention. The Court of Appeal then held: Since it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgments cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of that decision by the Russian court must be disregarded[28].

This is how the Court of Appeals, rescuing that the 1958 New York Convention leaves room to enforce an arbitral award that has been annulled, affirms that it is not obliged to deny the enforcement of an annulled arbitral awards when the foreign judgment of annulment cannot be recognized by the national system, especially if, as in this case, said sentence does not satisfy the principles of due process and its recognition would entail the infringement of state public order[29].

3.2. Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corporation v. Arab Republic of Egypt, US District Court in Columbia, District of Columbia, 31 de julio de 1996 (939 F.Supp. 907).

In this case the US District Court in Columbia ordered the execution of an arbitral award, even though it had been declared null and void by the Egyptian Court of Appeals.

Summarizing the facts of the case, we have that Chromalloy Aeroservices, a United States company signed with the Air Force of the Arab Republic of Egypt, a contract for the supply of spare parts, technical assistance and maintenance of helicopters for its

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[26] Francisco González de Cossío. *Ejecución de Laudos Anulados: Hacia un Estándar Analítico Uniforme*. (*Arbitraje PUCP*, Núm. 4, 2014). Online versión on: https://n9.cl/r7me8

[27] Katarzyna Piątkowska. *The concept of "denationalization" (or the equivalent "delocalization") in the context of the US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009]. (Acta Erasmiana, Varia, 2013).* Online version available on: https://n9.cl/4yshm.

[28] Katarzyna Piątkowska. *The concept of "denationalization" (or the equivalent "delocalization") in the context of the US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009].* (Acta Erasmiana, Varia, 2013). Online version available on: https://n9.cl/4yshm.

[29] Francisco González de Cossío. *Ejecución de Laudos Anulados: Hacia un Estándar Analítico Uniforme*. (*Arbitraje PUCP*, Núm. 4, 2014). Online versión on: https://n9.cl/r7me8

national air force. An arbitration clause was included in the contract according to which Cairo was chosen as the venue for possible arbitrations, and it was established that the decision of this process would be final and binding[30].

Egypt unilaterally terminated the contract and Chromalloy initiated an arbitration proceeding that ended with the ordering to the nation to pay a compensation due to early and unfair termination of the contract. The Egyptian government turns to the country's Courts of Appeal, who decided to annul that arbitration decision, alleging that the arbitration court had applied the private law rules of Egypt when they should have used the provisions of national administrative law[31].

To decide this controversy, the US district judge's line of reasoning followed two directions, the first of which was to determine whether, according to US law, the award could be enforced, and the second to analyse whether the impossibility of enforcement was due to the existence of an annulment decision[32].

As we observed in the previous case, here the District Court upholds its decision based on the content of the New York Convention. Indeed, the judgment concludes that, although in accordance with Article V of the Convention, the recognition and enforcement of an award may be rejected if it has been annulled under the *lex arbitri*, the same instrument in its Article VII provides that no party shall be deprived of the rights that would have corresponded to it if the law of the country in which it is intended to enforce the award were applied[33].

This is how the judge concludes that, in accordance with the Convention, the petitioner maintains all rights to the execution of this arbitral award that he would have in the absence of the Convention, and therefore, if the Convention did not exist, they should go to the content of the Federal Arbitration Law, which would provide Chromalloy with the legitimate possibility of filing a request for enforcement of the annulled arbitral award[34].

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30 Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

31 Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

32 Francisco González de Cossío. *Ejecución de Laudos Anulados: Hacia un Estándar Analítico Uniforme*. (*Arbitraje PUCP*, Núm. 4, 2014). Online versión on: https://n9.cl/r7me8.

33 Katarzyna Piątkowska. *The concept of "denationalization" (or the equivalent "delocalization") in the context of the US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009].* (Acta Erasmiana, Varia, 2013). Online version available on: https://n9.cl/4yshm.

34 Katarzyna Piątkowska. *The concept of "denationalization" (or the equivalent "delocalization") in the context of the US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009].* (Acta Erasmiana, Varia, 2013). Online version available on: https://n9.cl/4yshm.

Certainly, the Court of the District of Columbia determined that the spirit of the Federal Arbitration Act consists of preserving the final and binding character of the arbitral awards, hence the annulment of the award was against the public order of the United States and that if it had been duly interpreted arbitration clause inserted in the contract it would not have been possible to act against the award since the referred clause made it impossible[35].

3.3. Société Hilmarton Ltd. v. Société Omnium de Traitement et de Valorisation (OTV), Court of Cassation, France, March 23, 1994 (Arrêt n° 484 P) ("Hilmarton").

This dispute originated from an intermediation contract between Omnium de Traitement et de Valorisation (OTV) and the English company Hilmarton Ltd, the breach of which gave rise to an arbitration procedure in Geneva.

Specifically, the British company that OTV complied with the agreement according to which Hilmarton would act as an intermediary before the competent authorities of Saudi Arabia in order to obtain the award of a contract for OTV. This breach gave rise to arbitration which resulted in the annulment of the contract as it was considered contrary to international public order[36].

Hilmarton filed an appeal for annulment against the arbitral ruling in the courts of the arbitral seat and the Swiss judge invalidated that decision, alleging that although the contract could be considered contrary to public order in a third State, it was not contrary to public order Swiss international. This gave rise to the initiation of a second arbitration procedure, but at the same time OTV presented the exequatur of the first award in France, which dismissed the annulment based on Article VII of the New York Convention[37].

The central arguments of the French *Cour de Cassation* to proceed with the execution of the annulled award were that the arbitral award was not a verdict integrated into the Swiss legal order, coupled with the fact that the Article VII of the New York Convention allows disregarding of the annulment of an award (under Article V(1)(e)) provided that the law of the country where enforcement is sought so allows, and certainly French public order was not affected by its content[38].

[35] Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

[36] Santiago Talero Rueda. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

[37] Andrea Jiménez and Yamila Reinides. *¿Existe la vida después de la muerte?: Reconocimiento y ejecución de laudos anulados en sede extranjera* (Forseti. Revista De Derecho, 2(2), 2019).

[38] Francisco González de Cossío. *Ejecución de Laudos Anulados: Hacia un Estándar Analítico Uniforme*. (*Arbitraje PUCP*, Núm. 4, 2014). Online versión on: https://n9.cl/r7me8.

The sentencing judge understands that the Swiss judgment was an international instrument that formed part of the legal order of said State, which did not change even if it had been annulled, and maintaining its existence and its recognition in France was not contrary to the international public order. Thus, they used the content of article V(1)(e) of the Convention, to affirm that the annulment of the judgment issued in Geneva does not constitute, in accordance with the article 1502 of the New Code of Civil Procedures, a valid ground for denying in France the enforcement of an international commercial award annulled abroad in accordance with the local law, as it is not contrary to the international public order[39].

Similarly, and following this same criterion, in the Bechtel case, the *Cour d'appel* of Paris in 2005 recognized the exequatur in France of an award resulting from a process conducted in Dubai, despite the fact that it had previously been annulled by the judicial system of the host State due to the violation of a formality of the local law, thus the award acquired full effect in the place of execution, being absolutely disconnected from the legal order of the country where it was pronounced[40].

Along the same lines, other cases can be mentioned, such as the one given in 1984 between Société Pablak Ticaret Limited Sirketi against Norsolor S.A., where the French Court of Cassation regarding the declaration of annulment of the award previously issued by the Court of Appeal of Vienna, due to the lack of certainty that, in his opinion, the award generated by being based on the lex mercatoria, decided to give the award enforceability by sustaining that the annulment violated the rights of the petitioner under the French law. Or, more recently, the case of the Société PT Putrabali Adyamulia against the Société Rena Holding et Société Moguntia Est Epices, where the French Court of Cassation also decided to enforce an award annulled abroad, but this time on the grounds that it was an instrument of international justice and the annulment decision emanating from another State, is not justification to reject its execution on French territory[41].

4. Final Considerations

As can be seen, this doctrine has not remained in academic theorizing, but it has also seen its application in practice, especially in cases of international commercial arbitration, where we realize that arbitral awards, once buried by an annulment decision, have brought back to life thanks to a favourable pronouncement that has given them full effects.

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[39] Francisco González de Cossío. *Ejecución de Laudos Anulados: Hacia un Estándar Analítico Uniforme*. (*Arbitraje PUCP*, Núm. 4, 2014). Online versión on: https://n9.cl/r7me8.

[40] Andrea Jiménez and Yamila Reinides. *¿Existe la vida después de la muerte?: Reconocimiento y ejecución de laudos anulados en sede extranjera* (Forseti. Revista De Derecho, 2(2), 2019).

[41] Francisco González de Cossío. *Ejecución de Laudos Anulados: Hacia un Estándar Analítico Uniforme*. (*Arbitraje PUCP*, Núm. 4, 2014). Online versión on: https://n9.cl/r7me8.

Certainly, within the framework of commercial arbitration we find, at one extreme, the defenders of the territorialism conception who tell us that international commercial arbitration must be understood as a concession by the State, so that the action of the arbitrators is a derivation of the sovereign authority of the latter, understanding that the procedure is a matter of public order and therefore the State must exercise control over them and their results[42].

On the other is the delocalization, which personifies a innovative proposal and, contrary to the one just mentioned, which, as we have explained in more detail lines above, assumes that the interference of the State in the control of arbitration exposes the dispositive principle to a possible undermining, since an intrusive activity of the national judicial scheme could go against what the parties have chosen when designing their arbitration process by virtue of the autonomy of the will.

And although as admirers of the Law we are seduced by the desire for new trends and currents to emerge that will lead it to evolve and to its very unattainable perfection, we must be aware that there may be serious dangers that are hidden under a façade of modernization that would end up challenging fundamental pillars of this science such as legal certainty, the protection of the rights of the weakest legal part, and the fortification of the international system against the fraud to the law, which have been issues that have demanded a lot of work in the field of Private International Law since past centuries.

That is why taking a position against the delocalization of arbitration should not be taken lightly, not even by legal scholars, much less by justice workers, even less if we take into account that our legal systems are becoming more and more porous and influenced by what happens in the international sphere.

Any position against or in favour of a more or less flexible acceptance of the enforceability of previously annulled awards on foreign country must necessarily be accompanied by a thoughtful disquisition where not only the factual results of the specific case are analysed, but also the level of adherence of those outcomes to the fundamental principles of Private International Law, based on the recognition and respect of the legal and judicial systems of other States.

[42] Kristhy Marian Herrera Bonilla. *Aspectos Actuales del Arbitraje Comercial Internacional.* (Cuadernos de la Maestría en Derecho, N° 6, 2017).

BIBLIOGRAPHIC REFERENCES

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

Fernández Rozas, José Carlos. *El Arbitraje Comercial Internacional entre la Autonomía, la Anacionalidad y la Deslocalización*. (Revista Española de Derecho Internacional, N° 58, 2005).

Gómez, Manuel A. *La Difícil Relación entre la Anulación y el Reconocimiento y Ejecución del Laudo Arbitral Internacional*. (OEA/Ser.D/XIX.15).

González de Cossío, Francisco. *Ejecución de Laudos Anulados: Hacia un Estándar Analítico Uniforme*. (*Arbitraje PUCP*, Núm. 4, 2014). Online versión on: https://n9.cl/r7me8.

Habib, Sadaff. *Delocalized Arbitration myth or reality? Analyzing the interplay of the delocalization theory in different legal systems*. (The British University in Dubai, Dissertation submitted in partial fulfilment of the requirements for the degree of MSc Construction Law and Dispute Resolution, 2013).

Herrera Bonilla, Kristhy Marian. *Aspectos Actuales del Arbitraje Comercial Internacional*. (Cuadernos de la Maestría en Derecho, N° 6, 2017).

Jiménez, Andrea and Reinides, Yamila. *¿Existe la vida después de la muerte?: Reconocimiento y ejecución de laudos anulados en sede extranjera* (Forseti. Revista De Derecho, 2(2), 2019).

Jiménez Figueres, Dyalá. *La madurez del arbitraje comercial internacional: de laudos extranjeros y laudos internacionales*. (Revista Brasileira de Arbitragem Privado, N° 5, 2005). Online version on: https://n9.cl/ihr4z.

Kjos, Hege Elisabeth. *Applicable Law in Investor–State Arbitration,* (OXFORD, 1a ed., 2013).

Palao Moreno, Guillermo. *El Lugar de Arbitraje y la 'Deslocalización' del Arbitraje Comercial Internacional*, (Boletín Mexicano de Derecho Comparado, N° 130, 2011).

Hege Elisabeth Kjos, *Applicable Law in Investor–State Arbitration,* (OXFORD, 1a ed., 2013).

Piątkowska, Katarzyna. *The concept of "denationalization" (or the equivalent "delocalization") in the context of the US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009]*. (Acta Erasmiana, Varia, 2013). Online version available on: https://n9.cl/4yshm.

Saghir, Zaherah and Nyombi, Chrispas. *Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application*, (International Company and Commercial Law Review, 27 (8) 2016).

Talero Rueda, Santiago. *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*. (Revista de Derecho Privado, N° 28, 2002). Online version available on: https://n9.cl/abfh1.

Vásquez Palma, María Fernanda. *Relevancia de la Sede Arbitral y Criterios que Determinan su Elección*. (Revista Chilena de Derecho Privado, N°16, 2011). Online version available on: https://n9.cl/plwle.