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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]

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Introduction

Though, over the last fifty years, there has been a massive movement towards harmonization of the law and practise of international commercial arbitration through few international instruments, such as: The Geneva Treaties[1], New York Convention on the Recognition and Enforcement

1 The Geneva Treaties (1923 and 1927) were the first modern and truly international conventions that meant steps towards international recognition and enforcement of arbitral agreements and awards.

of Foreign Arbitral Awards[2], Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[3] and UNCITRAL Model Law on International Commercial Arbitration[4], there are two sets of national laws that still play a significant role: the national laws of the place of arbitration and the national laws of the country where enforcement of the award is sought[5].

History has shown that such practise and the impact of nationals laws on international arbitration, may lead to serious complications, inaccuracies and misunderstandings.

In Yukos case[6], by a decision dated April 28, 2009, the Court of Appeal in Amsterdam granted enforcement of four arbitral awards annulled by the Russian courts[7] under the New York Convention of 1958.

Similarly, in Chromalloy case[8] the U.S. District Court for the District of Columbia warranted the enforcement of an award previously set aside by the Egyptian Court of Appeal, in the United States.

These and other cases gave rise to a serious discussion on the impact of national courts in the international arbitration.

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2 Also known as The New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on June 7, 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states.

3 1965, established the International Centre for the Settlement of Investment Disputes (ICSID).

4 Prepared by The United Nations Commission on International Trade Law (UNCITRAL) and adopted by the United Nations Commission on International Trade Law on June,21, 1985. In 2006 the model law was amended and now includes more detailed provisions on interim measures. The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration

5 As Renata Brazil-David argues in her article 'Harmonization and Delocalization of International Commercial Arbitration' (Journal of International Arbitration, Kluwer Law International 2011 Volume 28 Issue 5, pp. 445–466).

6 See: the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft [2009], case number: 200.005.269/01, 28 April 2009.

7 The arbitration clause stated that all disputes arising from the agreement were subject to arbitration by International Court of Commercial Arbitration at the Chamber of Trade and Industry of the Russian Federation.

8 See: US Federal Court decision in Chromalloy Aeroservices Inc. V Arab Republic of Egypt 939 F. Supp. 907 (DDC 1996).

Does national courts involvement undermine the International Arbitration processes? Power to set aside an award by the national courts

In many jurisdictions which have adopted the *UNCITRAL Model Law*, Article 34 provides for 'Application for setting aside as exclusive recourse against arbitral award' and applies when such jurisdiction is relating to the place of the arbitration.

Article 34 encloses an exhaustive list of six grounds on which a court may set an award aside. The first group of four grounds appears in Article 34(2)(a) and must be raised and proved by the applicant. The second group of two grounds appears in Article 34(2)(b) and may be raised by the court on its own motion. Those grounds are: the incapacity of a party or invalidity of the arbitration agreement; a failure to notify an arbitrator appointment or initiation of proceedings; the award was beyond the scope of the arbitration agreement; invalid constitution of the arbitral tribunal; the subject matter was not arbitrable (not capable of resolution by arbitration); and violation of public policy. It is clear that only the courts of the place of arbitration should have jurisdiction to hear any challenge of an award or action to set aside[9].

The Delocalization Theory

Due to the mentioned difficulties associated with the impact of national courts in international arbitration, a delocalization theory was developed. Although, the concept of "delocalized arbitration" has not been precisely articulated[10], it may be defined as "… a species of international arbitration not derived or based on a municipal legal order"[11]. It is it is based on parties'

9 See article by Ariel Ye and James Rowland from May, 25, 2012 on http://www.mondaq.com/ [accessed 22.05.2013].

10 Redfern, A. & Hunter, M. – The Law and Practice of International Commercial Arbitration (1991), pp. 81–90; Rubino-Sammartano, M. – International Arbitration Law (1990), pp. 24–25; Reismann, W. & Ors, International Commercial Arbitration – Cases, Materials and Notes on the Resolution of International Business Disputes (1997), p. 1089; Gaillard, E. – Transnational law: A Legal System or a Method of Decision Making?, The Practice of Transnational Law, (2001), p. 53.

11 Olatawura, O. – Delocalized Arbitration under the English Arbitration Act 1996: an evolution or a revolution, 30 Syracuse J. Int'l L & Com, (2003), p. 49.

agreement – otherwise the award could not be eligible for enforcement[12] and is detached from the procedural rules of the place of arbitration, the procedural rules of any specific national law, the substantive law of the place of arbitration, and the national substantive law of any specific jurisdiction.

It is usually emphasized that arbitration is chosen because of freedom and flexibility of this method of dispute resolution and that is why the parties should not be bound to the peculiarities of mandatory laws of the place of arbitration.

Moreover, delocalization of arbitration could be attractive since the parties would avoid facing the risk of having unenforceable award due to unforeseen non-compliance with local procedural law.

It should be noted that "delocalized" arbitration may also mean enforcing awards that had been previously annulled or set aside at the place of arbitration[13]. This happened in above-mentioned cases of Yukos v Capital SARL v OAO Rosneft and Chromalloy Aeroservices Inc. V Arab Republic of Egypt.

The Delocalization Theory in practise

It is first important to examine whether the New York Convention itself offers the possibility of recognizing and enforcing an arbitral award that has been set aside in another country. There are two significant questions need to be asked: where can an award be set aside and if it has been set aside in the "country of origin", will it still be enforceable somewhere else?

To answer the first one, application of Article V(1)(e) of the New York Convention would be essential. It states that the award can be set aside by the competent authority of the country (i) in which the award was made, which means the place of arbitration, or (ii) under the law of which that award was made, which refers to the applicable arbitration law.

To answer the second question, advocates of the delocalization theory would recommend reading Article V with Article VII of the New York Convention, which states that: *The provisions of the present Convention shall not…*

12 Beaufort Developments (NI) Ltd. v. Gilbert-Ash N.I. Ltd., (1998) 2 W.L.R. 860 (Eng.).

13 Renata Brazil-David in her article 'Harmonization and Delocalization of International Commercial Arbitration' (Journal of International Arbitration, Kluwer Law International 2011 Volume 28 Issue 5, pp. 445–466).

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. It follows that one who has an award set aside may seek enforcement in another country, as long as this country is a party to the New York Convention. Article VII allows parties to rely on other more favourable instruments under which enforcement of an award would be possible in the absence of the Convention[14].

Chromalloy case

In this case, as Nadia Darwazeh argues in her article[15], the court found a very controversial basis for enforcing the award.

The District Court found that recognition and enforcement of an award may be refused if it has been set aside under the lex arbitri[16] under Article V of the New York Convention, while article VII of the New York Convention states that *no party shall be deprived of the rights it would have to avail itself of an arbitral award in the manner and to the extent allowed by the law …of the country where such award is sought to be relied upon*.

In other words, under the Convention, Chromalloy maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention. Accordingly, the Court finds that, if the Convention did not exist, the Federal Arbitration Act would provide Chromalloy with a legitimate claim to enforcement of this arbitral award.

The District Court also stated that the requirements for enforcing foreign judgments in the United States were (a) that there had been proper service and (b) that the initial claim did not violate U.S. public policy. The Chromalloy decision was built on the following basis:

1 Article VII of the Convention gives a party the right to obtain enforcement of a foreign award under the more favourable rule of domestic arbitration law.

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14 Paulsson, "Enforcing Arbitral Awards".

15 Nadia Darwazeh, Article V(1)(e) in Herbert Kronke, Patricia Nacimiento, *et al.* (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, (Kluwer Law International 2010), pp. 301–344.

16 The law of the place of arbitration, often considered to be the law governing the arbitration proceedings.

2) A foreign court's annulment decision would be recognized in the United States providing that the foreign award can be vacated under section 10 of the FAA.
3) The "public policy in favour of arbitration" may have the power to override considerations of "comity" when deciding not to grant res judicata effect to the foreign annulment decision[17].

Yukos case

In this case against Rosneft, Yukos Capital appealed from the decision of the exequatur court in first instance, and on April, 28, 2009 the Amsterdam Court of Appeal overturned that decision and granted the requested leave to enforce. The Court of Appeal held that the New York Convention did not cover the question of whether Dutch courts should recognise the decisions by the Russian courts to set aside the awards and that this question had to be answered under Dutch private international law. 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*.

This decision was widely commented and criticized. For instance, as Albert Jan van den Berg declares in his article[18], the Court of Appeal's reasoning is at odds with the New York Convention. In author's opinion, the New York Convention itself does not offer a legal basis for enforcement of an arbitral award that has been set aside in the country of origin. Moreover, van den Berg argues that within determining by themselves

17 See: Christopher Koch: "The Enforcement of Awards Annulled in their Place of Origin. *The French and U.S. Experience"*, Journal of International Arbitration 26(2): 267–292, 2009.

18 See: Albert Jan van den Berg: "Enforcement of Arbitral Awards Annulled in Russia", Journal of International Arbitration, (Kluwer Law International 2010 Volume 27 Issue 2) pp. 179–198.

which foreign annulment of an arbitral award is acceptable and which is not, courts not only breach the provisions of the New York Conventions but they could also find themselves in a "political minefield".

The Delocalization Practise

The effect of an annulled or set aside award on its enforcement varies from country to country. There have been cases that supported the idea of delocalization, particularly in France and in the United States, where Chromalloy is not the only example.

French courts are well known as liberal in their approach towards arbitration and have detached the arbitral proceedings from French law on a couple of occasions.

As far as United States are concerned, courts have a less liberal approach towards delocalization of arbitration. Chromalloy should be treated more as the exception rather than the rule, while the U.S. courts would consider the delocalization of arbitration only in the most exceptional of circumstances. Interesting cases to consider are Baker Marine (Nig.) Ltd. V. Chevron Ltd.[19] and Spier v. Calzaturificio Tecnica S.p.A.[20], in which the U.S. District Court denied a request to enforce a foreign award that had been set aside in the countries of origin, Nigeria and Italy, resepectively. These two post-Chromalloy decisions emphasized that Chromalloy was a "special case" and clearly showed that an annulled award could not be enforced in the United States when the arbitration agreement makes no reference to the U.S. law.

A NON-Delocalization Theory and practise

Though the delocalization theory has gained a great support of many commentators over time, was initially rejected for several reasons. One of the arguments against the theory is that it completely excludes the role of

19 See case summary at: http://www.swlearning.com/blaw/cases/us_courts.html [accessed 22.05.2013].

20 See: Martin I. Spier v. Calzaturificio Technica, S.p.A., United States District Court, Southern District of New York, 22 October 1999, ASA Bulletin, (Association Suisse de l'Arbitrage 2000 Volume 18 Issue 1) pp. 144–158.

the place of arbitration and the complete lack of judicial control could be problematic during the process.

Another argument is that the theory excludes the role of the very important for the arbitration process, lex arbitri. For example, it might be needed for filling the gaps in the arbitral tribunal and giving forces for the tribunal that reach beyond the parties.

As long as the enforcing an award that has been annulled in one country is concerned, opponents of the delocalization theory claim that the parties, according to this theory, would not be able to rely on the judicial control of the stare where the arbitration takes place, since an annulled awards could always be recognized and enforced somewhere elsewhere.

Traditionally known for placing a very strong emphasis on the role of the law of the place of arbitration are English judges. For instance, in Naviera Amazonica Peruano S.A. v. Compania Internacional de Seguros del Peru[21], the court highlighted that: *English law does not recognize the concept of a "delocalized" arbitration… Accordingly, every arbitration must have a "seat" or locus arbitri of forum which subjects its procedural rules to the municipal law which is there in force.*

In Bank Mellat v. Helliniki Techniki S.A.[22] it was pointed that: (…)*, our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.*

Not only English courts have a negative attitude towards delocalization in arbitration. Similarly, an award that has been set aside in a foreign jurisdiction will not be enforced by the Chinese and Swiss courts.

Conclusion

To summarise, most jurisdictions around the world are likely to refuse enforcement of an award that has been set aside in another country. However, this is not the universal position: courts in certain countries are receptive to enforcing awards set aside elsewhere based on local annulment standards, as it has been shown in Chromalloy and Yukos cases example. Moreover, this trend may grow, as international arbitration around the

21 The Peruvian Insurance case.

22 See also case comment at: http://www.allens.com.au/pubs/arb/foarb17may04.htm [accessed 22.05.2013].

world becomes more transnational, and could strengthen the international efficacy of commercial arbitral awards within the framework of the New York Convention and not on the basis of domestic arbitration law.

One of the most famous opponents of delocalization in arbitration, Albert Jan van der Berg, argues that an annulled award cannot be enforce, as there is nothing left to enforce. On the other hand, he adds, that all of the Article V defences are subject to the discretion of the courts. Thus, if the enforcing court is convinced that the enforcement in a particular case would be proper, it is not required to refuse it.

The French Man Jan Paulsson, one of the most proponents of delocalization, states that international commercial arbitration should not be restricted by procedural law of the place of arbitration, the power of arbitration is not provided by law of the place of arbitration, before the award being enforced in should not be supervised by any judicial system.

The advantages of delocalized arbitration are: warranty of neutrality of forum with respect to substance and procedure and limited role of national courts in the process. Delocalization also overcomes limitations of the lex fori[23] and enables parties to create procedural rules, which best fit the specific features of the transaction and parties' interests.

In practice, delocalized arbitration is a gaining on significance and, in the world of globalization, seems like a very attractive solution.

Streszczenie

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Koncepcja „denacjonalizacji" („delokalizacji")
w kontekście decyzji Sądu Federalnego Stanów Zjednoczonych w sprawie Chromalloy Aeroservices przeciwko Arabska Republika Egiptu (DDC 1996) oraz wyroku Sądu Apelacyjnego w Amsterdamie z 2009 roku w sprawie Yukos Capital SARL przeciwko OAO Rosneft

Przez ostatnie pięćdziesiąt lat w sferze praktyki orzeczniczej międzynarodowego arbitrażu handlowego nastąpił ogromny zwrot w kierunku harmonizacji i ujednolicenia.

23 The law at the seat of arbitration; sometimes: the substantive law at the seat of arbitration; also: the law of the forum or court in which a case is being tried.

Obecnie jednym z ważniejszych pytań, jakie w tej kwestii jest stawiane to, czy wyrok, który został uchylony w kraju miejsca procesu arbitrażowego, może zostać uznany i wykonany w innym. Artykuł opisuje koncepcję „delokalizacji" takich wyroków w świetle dwóch znanych spraw: *Chromalloy* i *Yukos*. Autorka stara się też odpowiedzieć na pytanie, czy sama Konwencja Nowojorska oferuje możliwość uznawania i wykonania wyroków sądu arbitrażowego, które zostały uchylone w innym kraju.