Theoretical Perspectives on International Commercial Arbitration
-A Comparative Analysis and Strategic Pathways for Global Practice-

وجهات نظر نظرية حول التحكيم التجاري الدولي
ـتحليل مقارن ومسارات استراتيجية للممارسة العالميةـ

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الملخص

يتعمق هذا البحث في الأسس النظرية للتحكيم التجاري الدولي (ICA)، مُستعرضًا النقاشات والمنظورات المعقدة التي تُحدد هذا المجال الحاسم في حل النزاعات الدولية. من خلال تحليل شامل، يتنقل البحث في تضاريس النظريات الأربع الرئيسية في ICA: النظرية القضائية، والنظرية التعاقدية، والنظرية الهجينة، والنظرية المستقلة. تقدم كل نظرية عدسة مميزة تُفسر من خلالها طبيعة ICA وديناميكياتها التشغيلية والتحديات التي تواجهها، مُلقية الضوء على العلاقة المتعددة الجوانب بين ممارسات التحكيم والأطر القانونية التي تعمل ضمنها.

تُبرز النتائج الرئيسية من هذا الاستكشاف تنوع الأفكار المحيطة بـICA، مؤكدة على الدور الحيوي لاستقلالية الأطراف، وتأثير قانون الدولة، والخصائص الفريدة التي تُحدد التحكيم ككيان مستقل ضمن النظام القانوني العالمي. تم تحديد التحديات العملية، بما في ذلك قابلية تنفيذ الأحكام التحكيمية والتفاعل بين القوانين الوطنية واتفاقيات التحكيم، مُشددة على الترابطات المعقدة التي تشكل تطبيق ICA في سيناريوهات العالم الواقعي.

يختتم البحث بست توصيات استراتيجية تهدف إلى تعزيز الأطر القانونية التي تحكم ICA، وتعزيز التوحيد في تنفيذ الأحكام التحكيمية، وتشجيع مجتمع تحكيم عالمي أكثر إطلاعًا وتعاونًا. من خلال الدعوة إلى نهج متناغم يحتضن رؤى النظريات النظرية المختلفة، يقترح البحث مسارات لتقدم فعالية ICA وعدالتها وقبولها العالمي كآلية أساسية لحل النزاعات التجارية الدولية.

الكلمات المفتاحية: التحكيم التجاري، القانون، استراتيجية.

Abstract:

This paper delves into the theoretical foundations of International Commercial Arbitration (ICA), examining the nuanced debates and perspectives that define this pivotal area of international dispute resolution. Through a comprehensive analysis, the paper navigates the terrain of the four predominant theories in ICA: the Jurisdictional Theory, the Contractual Theory, the Hybrid Theory, and the Autonomous Theory. Each theory offers a distinct lens through which the nature, operational dynamics, and challenges of ICA are interpreted, shedding light on the multifaceted relationship between arbitration practices and the legal frameworks within which they operate.

Key findings from this exploration highlight the diversity of thought surrounding ICA, emphasizing the critical role of party autonomy, the influence of state law, and the unique characteristics that define arbitration as an autonomous entity within the global legal order. Practical challenges, including the enforceability of arbitral awards and the interplay between national laws and arbitration agreements, are identified, underscoring the complex interdependencies that shape ICA's application in real-world scenarios.

The paper concludes with six strategic recommendations aimed at enhancing the legal frameworks governing ICA, promoting uniformity in the enforcement of arbitral awards, and fostering a more informed and collaborative global arbitration community. By advocating for a harmonized approach that embraces the insights of various theoretical perspectives, the paper proposes pathways for advancing the efficacy, fairness, and global acceptance of ICA as an essential mechanism for resolving international commercial disputes.

Keywords: commercial arbitration, law, strategy.

Introduction:

The evolving landscape of International Commercial Arbitration (ICA) has been the subject of extensive scholarly debate, leading to the development of several theories that aim to elucidate its nature and operational dynamics. This discourse has primarily centered around three distinct perspectives: the Jurisdictional Theory, the Contractual Theory, and more nuanced views like the Hybrid and Autonomous Theories. Each theory attempts to anchor ICA within a conceptual framework that reflects its practical realities, legal foundations, and the international commercial community's needs.

The Jurisdictional Theory posits that arbitration derives its legitimacy and operational framework from the laws of the state in which it is seated, emphasizing the role of national legal systems in governing arbitration procedures and the

enforcement of awards. This perspective underscores the sovereignty of states and their legal systems in the arbitration process, situating the practice within a clearly defined legalistic context.

Contrastingly, the Contractual Theory views arbitration primarily through the lens of the agreements made between the disputing parties, highlighting the private and consensual nature of arbitration. This theory champions the principle of party autonomy, allowing parties the freedom to define the terms and conditions of their arbitration process, including the selection of governing laws and arbitration panels.

Seeking a middle ground, the Hybrid Theory acknowledges elements of both jurisdictional and contractual underpinnings in ICA, proposing a composite framework that recognizes the interplay between state laws and party agreements. This approach aims to reconcile the procedural rigor imposed by legal systems with the flexibility afforded by private contracts, offering a more adaptable and comprehensive understanding of arbitration.

Further expanding the conceptual boundaries, the Autonomous Theory emerges as a critique of the existing frameworks, advocating for the recognition of ICA as an independent and self-contained system. This theory emphasizes the unique characteristics of arbitration that transcend national laws and contractual agreements, advocating for a supranational understanding of arbitration that aligns with the global nature of international commerce.

This discussion provides an overview of these theories, exploring their foundations, implications, and the debates surrounding them. Through this examination, we aim to illuminate the complex nature of ICA and the diverse theoretical lenses through which it can be understood, reflecting its evolving role in the international legal and commercial arenas.

Exploring the Nature of International Commercial Arbitration

To comprehend the essence of International Commercial Arbitration (ICA), it is imperative to delve into the fundamental theories that delineate its nature. Professor Julian Lew posits that understanding the legal framework of arbitration is instrumental in recognizing the array of legal and non-legal standards accessible to arbitrators engaged in ICA [1]. This insight suggests that the theoretical foundations of ICA significantly influence the legal status of international arbitrators, as well as their ability to exercise discretion within any domestic legal environment in which they are operating. The theories pertaining to ICA, which will be elaborated upon in the subsequent section, hold the key to unraveling these complexities[2].

Contractual Theory in International Commercial Arbitration

The Contractual Theory presents a stark contrast to the Jurisdictional Theory by diminishing the significance of the law of the seat in arbitration. Advocates of this theory assert that arbitration fundamentally derives from the agreement between the parties, essentially disregarding the substantial relevance of the seat's law to arbitral proceedings[3]. They argue that parties possess the autonomy to determine pertinent aspects of their arbitration process, contending that such autonomy should not be constrained by the coercive power of the state.[4]

Diverging from the jurisdictional perspective, the Contractual Theory views arbitration through a lens that emphasizes its contractual essence. While it recognizes that national laws might affect arbitration proceedings and agreements, proponents maintain that arbitration's identity is intrinsically contractual, originating from the mutual consent of the parties involved. Thus, the arbitration agreement signifies a contract that expressly manifests the parties' intention to settle disputes through ICA. Such agreements are entered into voluntarily, empowering parties to dictate the specifics of the arbitration, including timing, location, selection of arbitrators, and the applicable laws for both procedural and substantive matters.[5]

Proponents of the Contractual Theory advocate for a dispute resolution mechanism through arbitration that remains independent of state influence, adhering to the principle of pacta sunt servanda. This principle mandates that parties should honor the arbitration proceedings they have agreed upon, free from state coercion. This viewpoint was highlighted by Kellor, who underscored the voluntary nature of arbitration, noting that no legal mandate compels parties to engage in arbitration, nor can one party coerce another into such proceedings. Once an arbitration agreement is reached, parties relinquish any alternative rights, believing arbitration offers them more significant benefits [6]. Consequently, the law of the seat is perceived to exert minimal impact on the arbitration's outcomes or processes, except concerning arbitrability and public policy. Klein further concludes that national arbitration laws primarily serve to supplement and fill gaps in the parties' agreement regarding arbitration proceedings, providing a framework to regulate the conduct of arbitration[7].

The implementation mechanism of International Commercial Arbitration (ICA) in numerous jurisdictions is predominantly aligned with the principles of the Contractual Theory. This orientation towards the contractual model is driven by the commercial sector's preference for a flexible and informal approach to dispute resolution. Consequently, courts within these jurisdictions perceive the relationship between parties and arbitrators through the contractual lens, essentially framing their interaction as a contractual agreement[8].

Illustrating this contractual perspective, many jurisdictions have endorsed the view that the relationship between parties and arbitrators is fundamentally contractual. A notable example of this approach can be seen in the case of "Cie Europeene de Cereals SA v. Tradax Export SA, [1986] 2 Lloyd's Rep. 301," where the English court recognized a contractual bond between parties and arbitrators. It was established that upon accepting their roles, arbitrators effectively become parties to the arbitration agreement, obligating them to adhere to the terms of the arbitration contract from a contractual standpoint[9].

Despite this inclination towards a contractual viewpoint, it is important to note that English law, in particular, shows a stronger affinity for the jurisdictional perspective over others. This preference for the jurisdictional approach is exemplified by Lord Mustill's remarks in the case of Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd (1993) Adj.L.R 01/21. Here, Lord Mustill highlighted the inherent powers of the court to stay proceedings, notwithstanding the presence of an arbitration clause, thereby demonstrating a judicial predilection towards the jurisdictional theory even in the context of a contractual framework. This instance underscores the nuanced balance between contractual autonomy and jurisdictional oversight in the context of ICA within English law, reflecting a complex interplay between different theoretical perspectives[10].

Moreover, international commercial contracts often contain a clause specifying the law that will govern any disputes related to the contract's content. The challenge arises when determining whether the chosen law for the main contract also applies to the arbitration agreement[11]. Following the implementation of the Arbitration Act 1996, UK authorities highlighted the importance of the arbitration's venue. In the case of Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others [2013] 1 WLR 102, the Court of Appeal was tasked with deciding the applicable law for an arbitration clause set under the ARIAS Rules in the UK, which was part of an insurance policy governed by Brazilian law. Therefore, assessing the validity of the arbitration clause was crucial to determine whether to uphold or dismiss an anti-suit injunction[12]. The insured party contended that, under Brazilian law, the arbitration clause was only enforceable with their consent. There was no explicit mutual agreement on the applicable law for the arbitration agreement. Consequently, the judge needed to assess whether the parties had implicitly chosen the governing law by selecting Brazilian law as the governing law of the original contract, or whether English law, as the law of the arbitration's venue, applied to the arbitration agreement through an implied choice by the parties or simply because it had the closest connection to the arbitration process, assuming no implied choice could be established (ibid).

Moore-Bick LJ, with whom Hallett LJ agreed, said:

"In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract ....(ibid, para 26)."

However, this was only an initial assumption that could be overturned by specific factors: (1) the selection of England as the law of the seat; (2) the consequences of applying Brazilian law to the arbitration clause[13]. The second factor was particularly decisive, as the arbitration clause was clearly intended to bind all parties, whereas under Brazilian law, it would only bind the insured party. Consequently, the presumption that the applicable law of the main contract extends to the arbitration clause was rejected. It was considered that an implied choice of governing law by the parties could not be ascertained; therefore, the "closest connection test" was applied, which determined that the arbitration agreement was most closely connected with the law of the seat (London)[14].

Jurisdictional Theory in Arbitration

The Jurisdictional Theory underscores the critical role of state oversight, particularly emphasizing the laws of the location where arbitration occurs. This theory acknowledges that while the genesis of arbitration is rooted in the agreement between disputing parties, it contends that both the agreements themselves and the validity of the arbitration process should be subject to the jurisdictional laws of states. Therefore, the enforceability of an arbitration award hinges on the laws of the seat, where recognition or enforcement of the award is sought [15]. It is normally understood that the law of the seat governs the arbitration proceedings. However, it has been argued that its scope should also encompass the substantive validity of the arbitration agreement, especially when the agreement pertains more to legal jurisdiction than to the substantive rights and obligations of the parties[16].

Post the enactment of the UK's Arbitration Act 1996, there has been a discernible shift towards prioritizing the application of the seat's law [17]. This shift was clearly illustrated in the case of XL Insurance vs. Owen Corning (2001), where the parties had an insurance policy featuring an arbitration clause stating: "[a]ny dispute, controversy or claim arising out of or relating to [the] Policy or the breach,

termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act 1996"[18]. The policy's applicable law mandated that the insurance document should be interpreted in accordance with the domestic laws of the State of New York, except in cases of conflict with any policy provision.

A lawsuit was initiated by Owens in the US against XL, who in turn sought a restraining order from an English court to prevent Owens from pursuing claims outside the agreed arbitration process in the UK. The enforceability of the arbitration clause was brought into question (ibid). Justice Toulson directly addressed the parties' likely intentions, interpreting the clause's reference to the 1996 Arbitration Act as a clear indication of the parties' reliance on the seat's law as the applicable law for their dispute. Consequently, it was determined that the seat's law should govern the parties' agreement[19].

A parallel judgment was similarly concluded by English courts in cases such as C v D (No2) [2007] APP.L.R. 12/05, which dealt with a dispute regarding a Bermudan insurance contract form. In this instance, Longmore LJ raised the question of whether, in the absence of an express governing law for the parties' dispute, the law with the closest and most substantial connection to the agreement should be the underlying contract's law or the law of the seat. After reviewing relevant cases, his determination favored the application of the seat's law[20].

Furthermore, in the case of Habas Sinai Ve v VSC Steel Company Ltd (2013) EWHC 4071, Hamblen J ruled that in scenarios where the governing law of the parties' contract is not explicitly indicated, choosing the law of the seat becomes overwhelmingly significant. This is because the law of the seat will generally be the nearest and most connected law to the parties' agreement. Consequently, the law governing the arbitration agreement was deemed to be English law despite the original contract being governed by Turkish law [21].

Additionally, in the FirstLink Investments Corp Ltd v GT Payment Pte Ltd [2014] SGHCR 12, the Singapore High Court ruled that when there is no clear provision determining the law governing the matrix contract and a choice of the arbitration seat has been made, then the law of the seat is likely to govern the arbitration clause, even if it does not govern the matrix contract. A three-stage inquiry similar to that in the Sulamerica case was followed by the judge, leading to the conclusion that selecting the seat reflects an implied selection of the applicable law to the parties' arbitration clause. This conclusion was supported by several factors; it cannot be inferred that the parties wanted their arbitration clause to apply the exact law governing their dispute's substance because the two could differ. Also, the logical deduction when such association breaks down

would suggest that the parties' desire for neutrality would be recognized, and thus the selected procedural law would apply, not the substantive one. Finally, the arbitration seat is considered one of the most significant factors influencing the arbitration agreement and ensuring its effectiveness and validity [22].

Proponents of jurisdictional theory assert that all arbitration procedures must be governed by the parties' selected law and the rule of law of the arbitration's place[23]. These proponents also believe that arbitrators are akin to judges of national courts in terms of their powers, which originate from national states through the rule of law processes. Just as judges rely on a state's national law to settle disputes before them, so must arbitrators[24]. Additionally, awards reached by arbitration tribunals are as effective as judges' judgments reached in national courts. Consequently, they believe that, similar to court judgments, arbitral awards are enforceable by courts in states where the enforcing party seeks recognition and enforcement[25]. Advocates of this theory particularly emphasize the importance of the arbitration seat. For instance, Dr. Mann highlighted how crucial the state's law is to arbitration, particularly the law of the seat. Dr. Mann posits that every sovereign country has the right to accept or reject any legal actions conducted within its territorial limits[26]. Furthermore, arbitrators are obligated to conduct the arbitration proceedings in accordance with the parties' choice as far as the seat law allows[27]. However, if their actions conflict with the relevant territory's public policy or mandatory laws, then these actions will be judicially unjustified[28].

Moreover, this theory empowers national courts with a strong basis for exercising supervision over disputes taking place within the state by relying on the seat law of the state where enforcement is sought[29]. These powers of supervising disputes are also enshrined in the NYC 1958, which stipulates that if one party breaches one of the grounds mentioned in Article V of the convention, then the competent authority could reject the award's enforcement at the request of the party against whom such an award is invoked[30]. Such refusal could be based on several grounds involving the parties' agreement validity, arbitration proceedings, the arbitrator's power, and the arbitral awards' submission and enforceability scope. This is to be done following the request of the party against whom it is invoked [31].

The state courts' supervision powers over arbitration based on the application of the seat law are predicated on several arguments. Firstly, the state's delegation of its exclusive powers forms the basis of the arbitrator's authority to create enforceable settlements. Secondly, all acts are bound by the state law where they occurred, and finally, applying the seat law and relying on

its courts tends to be the most effective way of resolving disputes[32]. However, in practice, the law can confer these powers of supervising disputes. For example, Scottish law grants the Scottish court exclusive jurisdiction in all disputes seeking arbitration in Scotland except those related to consumers. The Scottish law further provides that someone could be sued: "In proceedings concerning an arbitration which is conducted in Scotland or in which the procedure is governed by Scots law (Rule 2(13) in Schedule 8 of the 1982 Act)."

The issue of jurisdiction over arbitral proceedings and awards is well illustrated in the concept of arbitrability. Since the supervisory powers over the arbitral proceedings compel arbitrators to consider a dispute insofar as the parties' chosen law permits; nevertheless, this chosen law cannot override the seat's mandatory rules[33]. Moreover, where there is an expressed choice of law, then the seat's law where the arbitration takes place will govern the arbitrability issue. This means that a national court would hear any challenge request for any issued award if a dispute exceeding the scope of arbitrability under the governing law is considered by an arbitrator [34].

Moreover, proponents of jurisdictional theory assert that in the state where the recognition or enforcement of awards is sought, courts possess the authority to supervise issues of arbitrability at the enforcement stage. This empowerment is granted by Article V(2) of the New York Convention, which allows courts to deny recognition or enforcement of an arbitral award if "The subject matter of the difference is not capable of settlement by arbitration under the law of that country," or if "recognition or enforcement of the award would be contrary to the public policy of that country"[35]. This supervisory stance is mirrored by the seat courts' authority over the issue of arbitrability, as demonstrated by the U.S. Supreme Court in Mitsubishi Motors v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985). In this case, concerning an antitrust dispute traditionally excluded from arbitration in domestic contexts, the Supreme Court enforced the parties' arbitration agreement, noting that domestically, a different outcome might have been anticipated. Justice Blackmun highlighted that at the award enforcement stage, U.S. courts are prepared to "ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed" (at 629, 638). The New York Convention authorizes each signatory nation to refuse enforcement of an award if it contradicts the country's public policy (Samuel, 1989, p. 55). This perspective suggests a supervisory dynamic between courts and arbitral tribunals from the viewpoint of jurisdictional theory.

While these seat tests can be instructive, as seen in FirstLink Investments Corp Ltd v GT Payment Pte Ltd [2014] SGHCR 12, there remain scenarios where

applying the seat law might be inappropriate[36]. For instance, the validity of the arbitration agreement may need judicial assessment when the seat has not yet been determined, or if the seat is changed during the arbitration process after the tribunal has made a decision on the validity of the arbitration agreement. Furthermore, the idea that selecting a seat implies a choice of law for the arbitration agreement is often viewed skeptically, especially if such selection is made by an arbitral tribunal or institution [37]. It is argued that this selection by an institution or tribunal is not entirely detached from the parties' will, as the delegation of this choice was intentionally made by the parties[38]. However, from a practical standpoint, it is difficult to argue in the absence of an express seat choice that the parties intended for the seat's law to apply to their dispute, whether because the seat was already agreed upon or simply due to a lack of consensus on it[39]. This stance suggests that the parties have agreed to arbitrate without grounding their agreement in any applicable laws, thus leaving their dispute resolution model uncertain[40]. Consequently, when the parties' chosen law is explicitly stated, it becomes challenging, perhaps even impossible, to presume the seat's location, as arbitrators might select any jurisdiction as the seat. This scenario indicates that the arbitration agreement's applicable law cannot be determined by the seat choice when the selection of the seat is delegated[41]. In such cases, the underlying contract's law may apply, either due to being the closest to the arbitration agreement or reflecting the parties' embedded intention[42].

a) Hybrid Theory

Both the contractual and jurisdictional theories receive substantial support within the arbitration community, yet some jurists argue that neither theory adequately explains the contemporary structure of International Commercial Arbitration (ICA). On this basis, Dr. Lew highlighted the emergence of a hybrid theory, characterized by a blend of both jurisdictional and contractual elements[43]. This hybrid theory, originally conceptualized by Professor Surville and later refined by Professor Sauser-Hall, integrates both contractual and jurisdictional aspects, making it a compromise between the two traditional theories[44].

Professor Surville initially proposed this theory, which was further developed by Professor Sauser-Hall to encompass a mixed-character method for ICA. Sauser-Hall posited that arbitration incorporates a contractual element derived from private agreements, empowering parties to select both the arbitration tribunal and the laws governing the procedural and substantive aspects of arbitration[45]. He also acknowledged that arbitration must operate under a state's domestic laws to determine the extent of parties' powers, the

validity of arbitration agreements, and the enforceability of awards[46]. Thus, he described arbitration as "a mixed juridical institution, sui generis, originating from the parties' agreement and deriving its jurisdictional effects from civil law[47]." This indicates that while arbitration is jurisdictional concerning procedural rule application, the parties' agreement fundamentally underpins its effectiveness and existence.

This view is supported by practicing scholars like Redfern and Hunter, who argue that ICA possesses a hybrid nature beginning with a mutual agreement among the arbitration parties. This agreement is expected to culminate in a legally binding award recognized and enforced by most states under certain conditions [48].

Proponents of the hybrid theory contend that the parties' ability to freely enter into arbitration agreements, appoint tribunals, and choose applicable laws stems from the contractual origins of arbitration[49]. Nonetheless, issues surrounding the validity of arbitration proceedings and agreements fall under the jurisdiction of the enforcing state's mandatory laws and public policy, reflecting the jurisdictional aspect of arbitration agreements (Onyema, 2010). Moreover, the validity of arbitral awards and their recognition or enforcement must be evaluated against the enforcing state's mandatory rules and public policy (ibid). According to Hunter, it is incorrect to dismiss the dual nature of arbitration, noting that arbitrators issue an 'award' or 'decree arbitral' to resolve disputes presented before them, ensuring they do not contravene any laws [50].

This dual nature of arbitration is further emphasized by Ancel, who asserts that arbitration is both contractual, originating from the parties' agreement, and jurisdictional, as it involves states' jurisdictions, particularly at the stage of recognizing or enforcing awards[51].

Professor Sander also supports this hybrid theory, arguing that it more comprehensively addresses arbitration-related issues than either the purely contractual or jurisdictional perspectives. He suggests that focusing solely on either the contractual or jurisdictional aspects is insufficient. Arbitration must acknowledge that all concerned parties have consented to arbitrate; without this agreement, arbitration cannot proceed. If this concept is emphasized and extended to cover procedures and award issuance, then arbitration inherently becomes contractual. Alternatively, if the quasi-judicial aspect of arbitration is emphasized, recognizing that arbitration is a form of judicial process where arbitrators, akin to judges, render decisions on disputes before them, then arbitration also assumes a judicial character. "The dualistic character of

arbitration has led to the intermediary view adopted by those who support what may be termed the mixed arbitration theory"[52]. This view highlights arbitration's dual nature, shaped by its contractual origins and the involved judicial processing.

Jean Robert further supports the dual character of arbitration, noting the close relationship between arbitration procedures and forums. He states that the structure of arbitration and the powers of the arbitration tribunal originate from the parties' agreement, while the agreement's validity and the enforcement of awards are addressed according to the relevant state's public policy and mandatory laws [53].

b) Autonomous Theory:

Instead of constraining arbitration within the traditional frameworks outlined by the first two theories, Rubellin-Devichi turned her focus towards the practical applications of arbitration, leading to the development of the autonomous theory. She believed that the true strengths of International Commercial Arbitration (ICA) lie in its speed and procedural flexibility, thus advocating for a theory that aligns with the practical utilization and objectives of arbitration[54]. Aiming to cultivate a supportive environment for arbitration within the international business community, she posited that the inherent autonomy of ICA must be recognized. She critiqued the first two theories for not truly reflecting practical applications and for their inherent contradictions. Furthermore, she dismissed the third theory due to its vague applicability, highlighting the challenge in determining when arbitrators should adhere to the parties' contractual agreements versus when they should follow state regulations [55].

Rubellin-Devichi perceived the essence of arbitration in its functionality and purpose, thus positioning it at a supranational level and recognizing its autonomous nature. After examining the societal and economic needs served by ICA, she suggested that "to properly foster the growth of arbitration, while maintaining its boundaries, one must accept that its nature is autonomous, not contractual, jurisdictional, or hybrid"[56].

Additionally, while not denying the dual nature of arbitration, Rubellin-Devichi refuted the attempts to distinguish between its contractual and jurisdictional elements due to the challenges in clearly delineating these aspects. She contended that trying to separate these elements would distort ICA's development. She chose not to categorize arbitration under any existing theory because she believed the contractual and jurisdictional elements are "so deeply interwoven that they have become inseparable"[57]. She argued against applying contract law to arbitration agreements and judicial principles to arbitral awards,

noting that arbitral awards do not mirror judicial decisions and that private contracts differ significantly from arbitration agreements.

The autonomous theory was developed under the premise that the existence and continual evolution of ICA align with the needs of the global trading community[58]. Stakeholders in international commerce have recognized that ICA meets their needs for a manageable and adaptable dispute resolution method. To support the growth and development of the arbitration sector, the autonomous theory asserts that parties to an arbitration agreement should enjoy complete autonomy[59]. This entails introducing modifications to national laws and institutional guidelines to better serve the needs of the international commercial community, highlighting the critical importance of the principle of party autonomy in ICA. This principle suggests that the users of this mechanism should be the ones to drive its development, not sovereign states[60]. Consequently, this leads to the practical obsolescence of the seat law, as parties are free to select independent procedural rules from non-national regimes to govern their disputes. An example is the adoption of arbitration institute rules to govern the substantive aspects of the parties' disputes. These rules are disconnected from any domestic laws and remain unaffected by the laws of the state where the arbitration institution is based (ibid).

The justification for the autonomous theory stems from the parties' preference for resolving their disputes through arbitration without judicial interference. However, this ideal is often not realized as courts frequently intervene, especially during the enforcement of awards. This dynamic was notably observed in the case of COMMISA v. Pemex (2013), where an award issued in Mexico and enforced under the Panama Convention of 1975 was contested despite the seat's decision to annul it. Mexican courts applied a law not enforceable at the time the contract was made, leading to the annulment of the award because Pemex was deemed a state entity[61]. The U.S. district court, while acknowledging the award, emphasized that it did not review Mexican law but rather rejected the Mexican court’s decision due to its violation of fundamental justice principles. This was because the law applied was not enforceable when the contract was agreed upon, leaving COMMISA unable to pursue its claims [62]. In 2016, the U.S. Court of Appeals upheld the district court’s decision to enforce the award despite its annulment by the seat’s court, citing violations of fundamental decency and justice. While such decisions are notable, the enforcement of annulled awards remains controversial globally, with only a few exceptions [63].

One significant exception is the French approach to enforcing awards annulled by seat courts, notably demonstrated in the case of Société Hilmarton v. Société O.T.V (1994), where the French courts chose to enforce a Swiss award that had been set aside by Swiss courts. The Cour de cassation ruled that the award, being international, was not integrated into the Swiss legal order and thus retained its validity despite annulment. This stance was further justified in Société PT Putrabali Adyamulia c/ SA Rena Holdings (1994), emphasizing that a seat court's decision to annul an award should be confined to its jurisdiction and not influence the enforcing court's perspective [64]. These cases illustrate how judicial conflicts can impact the outcomes of international commercial arbitration (ICA) and support the autonomous theory's advocacy for removing such judicial interventions in favor of a more delocalized ICA framework.

The push for delocalization of the arbitration seat to apply universal public policy principles to international arbitration is influenced by the autonomous theory[65]. Proponents of delocalization base their arguments on the principle of party autonomy, asserting that the parties' agreement to arbitrate initiates the process, and that international arbitration has adequate self-regulating rules either adopted by the parties or established by arbitrators. This approach advocates for exclusive supervision by the enforcing state, emphasizing the need for a single control point, contrary to the traditional dual system of seat and enforcing state courts[66].

While the autonomous and delocalization theories share similarities, they differ significantly regarding court intervention. The autonomous theory seeks to completely eliminate the role of courts, which can lead to challenges given the significant and extensive role national courts play in overseeing arbitration. In contrast, the delocalization theory promotes complete detachment from seat court supervision, advocating for sole reliance on the enforcement state, thus simplifying control and potentially reducing conflicts arising from dual supervision[67].

It is widely accepted within the arbitration community that parties can choose international rules to govern the substance of their disputes. Sir John Donaldson highlighted this in the case of Deutsche Schachtbau-und Tiefbohrgesellschaft v Ras al Khaimah National Oil Co (1987), where he noted:

"By opting to arbitrate under the rules of the ICC, specifically article 13.3, the parties have left the choice of applicable law to the arbitrators, not limiting it to any national legal system. I find no reason to believe that the arbitrators' choice of proper law, which is based on principles common across various national laws governing contractual relations, falls outside the scope of the choice delegated to the arbitrators[68] ".

Thus, if parties can select international principles to govern their substantive contracts, they should also be able to apply these principles to their arbitration agreements, which are contracts focused on the method and choice of dispute resolution rather than substantive rights and obligations[69]. Common law generally does not differentiate between the conflict of laws rules applicable to substantive contracts and those applicable to arbitration agreements (Sulamerica v Enesa Engenharia, 2013). However, it remains somewhat unclear whether the absence of an explicit or implied choice by the parties allows courts to use international principles to determine the validity of an arbitration agreement [70].

When it is not possible to determine the parties' choice explicitly or implicitly, courts in England and Wales continue to resist applying non-state rules to arbitration agreements. This approach was demonstrated in Halpern v Halpern (2007), where the court evaluated whether to apply Jewish, English, or Swiss law to the arbitration agreement. The parties' implied intent suggested applying Jewish law, which was initially chosen as the law governing their compromise. However, English courts determined that common law principles require the choice of a state legal system for the agreement's governing law, thus excluding the applicability of Jewish law[71]. The Court of Appeal countered this conclusion, stating that arbitration tribunals could refer to non-state rules or party considerations if they reflect the parties' choice, and such awards would be enforceable in English courts (Halpern v Halpern (2007) EWCA Civ 291). This enforceability is predicated on the existence of an arbitration clause that explicitly expresses the parties' intentions. In this instance, the Court of Appeal decided that English conflict of laws principles were applicable, and Jewish law was deemed one of the applicable laws, depending on which part of the contract it applied to [72].

Currently, there is no completely independent transnational approach free from any state's laws, as seen in French legal practice, which is considered one of the most internationalist approaches in ICA. French judiciary views the regles materielles as governing the validity of arbitration agreements independently of any state laws, even when parties have not made an explicit or implied choice. In the Dalico case (1994), the Cour de Cassation ruled that, "according to a substantive rule of international arbitration law, the arbitration clause is legally independent from the main contract it is included in or references. Its existence and validity depend solely on the mutual intention of the parties, without needing to reference a national law"[73] . This perspective has been consistently upheld in subsequent French cases and was unaffected by later changes to the French Code of Civil Procedure.

Critics argue that this approach can lead to unpredictable and arbitrary outcomes[74]. Others suggest that the principles of transnational law are recognized either through domestic or public international law, rather than through an autonomous, detached legal system[75]. While French regles materielles may be considered transnational as they apply only to international arbitration, this does not necessarily mean they are recognized across national legal systems without being formally adopted by each jurisdiction[76].

Conclusion

The exploration of the theoretical underpinnings of International Commercial Arbitration (ICA) reveals a rich tapestry of legal thought and practice that underscores the complexity and dynamism of resolving commercial disputes on a global scale. This discussion has traversed the jurisdictional, contractual, hybrid, and autonomous theories, each offering unique insights into the nature of arbitration and its operational mechanisms within the international commercial landscape. Through this examination, several key findings emerge, alongside recommendations that aim to enhance the practice and understanding of ICA.

Findings:

1. **Multiplicity of Theories:** The existence of multiple theories around ICA indicates the multifaceted nature of arbitration, which cannot be fully encapsulated by a single theoretical framework. Each theory contributes valuable perspectives on the autonomy of parties, the role of state laws, and the procedural essence of arbitration.
2. **Importance of Party Autonomy:** Central to the contractual and hybrid theories is the principle of party autonomy, which is paramount in shaping the arbitration process. This principle allows parties to tailor arbitration to their specific needs, highlighting the personalized nature of arbitration as a dispute resolution mechanism.
3. **State Law's Influence:** The jurisdictional theory underscores the significant influence of the seat's legal framework on arbitration, especially concerning the validity and enforcement of awards. This emphasizes the legal sovereignty of states and the impact of national laws on international arbitration.
4. **Recognition of Arbitration's Unique Nature:** The autonomous theory advocates for recognizing arbitration's unique, self-contained system, challenging the conventional dichotomy between contractual and jurisdictional perspectives. This theory reflects the evolving nature of ICA as a distinct entity within international law.

5. Practical Challenges: Across the theories, practical challenges in applying theoretical concepts to real-world arbitration scenarios become evident. These include issues related to the enforceability of awards, the application of non-state laws, and the interplay between national legal systems and arbitration agreements.

6. Global Commerce Needs: The theories collectively acknowledge the critical role of ICA in facilitating global commerce, underscoring the need for a dispute resolution mechanism that is adaptable, efficient, and reflective of the international trade community's needs.

Recommendations:

1. Enhance Legal Frameworks: National and international legal frameworks should be continuously updated to reflect the evolving nature of ICA, ensuring that they support rather than hinder the effective resolution of disputes.

2. Promote Party Autonomy: Arbitration institutions and legal systems should further promote party autonomy, allowing parties greater freedom in tailoring arbitration processes while ensuring procedural fairness and respect for public policy.

3. Encourage Uniformity in Enforcement: Efforts should be made to promote uniformity in the recognition and enforcement of arbitral awards, reducing the variability and uncertainty associated with the legal frameworks of different states.

4. Support Hybrid Approaches: Arbitration practice should embrace the flexibility of hybrid approaches, which integrate the beneficial aspects of both jurisdictional and contractual theories, offering a balanced and pragmatic framework for dispute resolution.

5. Invest in Arbitration Education: Legal education and professional training should include comprehensive coverage of the various theories of ICA, preparing practitioners to navigate the complex landscape of international arbitration effectively.

6. Foster Global Dialogue: Ongoing dialogue and collaboration among arbitration practitioners, scholars, and legal systems worldwide are crucial in addressing the challenges and opportunities in ICA, fostering a more harmonized and effective global arbitration community.

In conclusion, while the theoretical exploration of ICA presents diverse viewpoints and complex challenges, it also offers a roadmap for the continuous improvement and adaptation of arbitration practices. By embracing the insights from these theories and implementing strategic recommendations, the arbitration community can enhance the efficacy, fairness, and global acceptance of ICA as a cornerstone of international commercial dispute resolution.

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