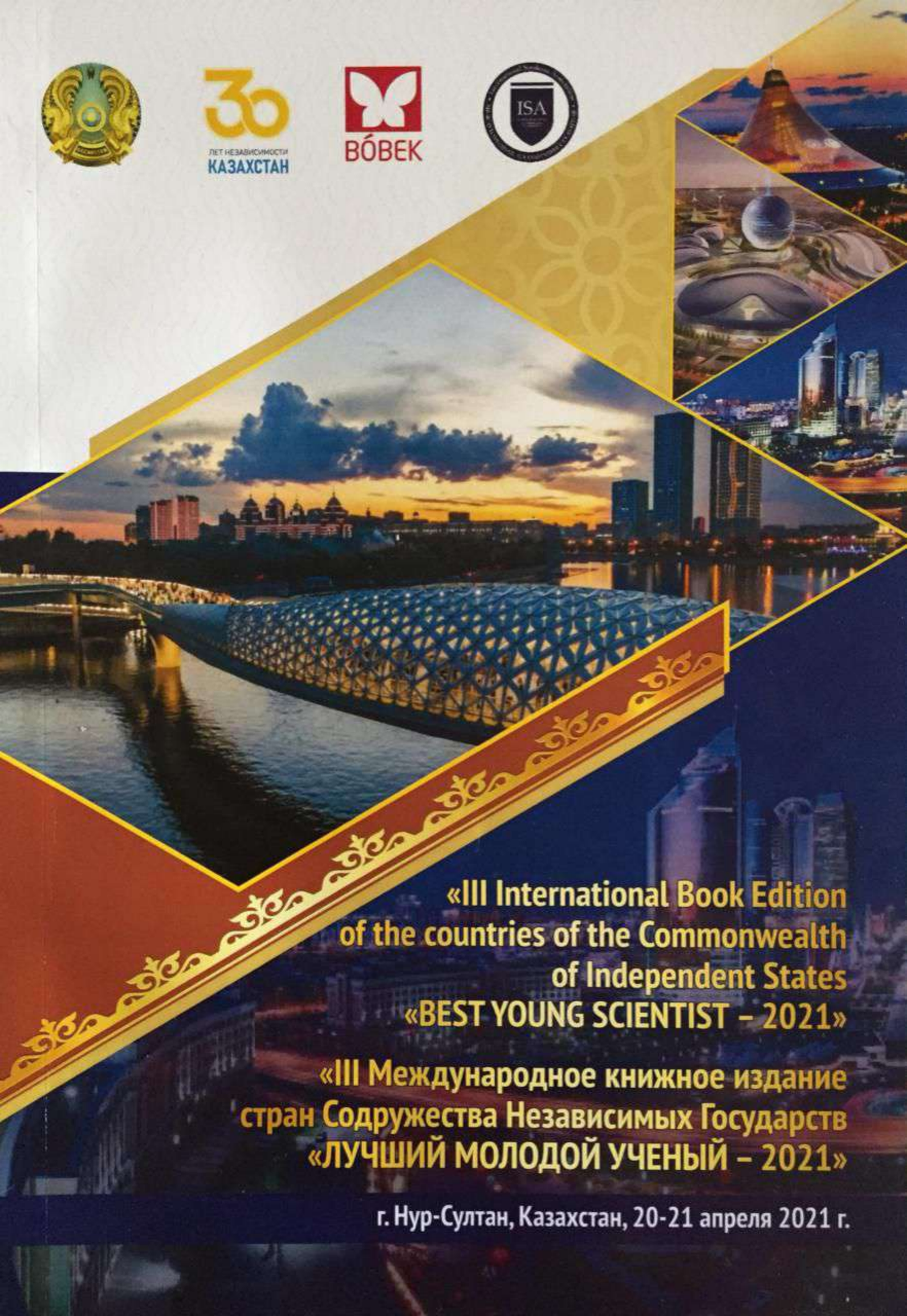

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Формирование научной базы III Международного книжного издания стран СНГ / «ЛУЧШИЙ МОЛОДОЙ УЧЕНЫЙ – 2021», несомненно, будет способствовать значительному расширению информированности научно-педагогической общественности о развитии науки в странах СНГ и Европы.

В данном проекте приняли участие молодые ученые Республики Казахстан, Российской Федерации, Республики Узбекистан, Республики Таджикистан, Республики Киргизстан, Республики Беларусь и т.п. в рамках международного сотрудничества во благо дальнейшей интеграции науки.

III The international book publication of the countries of the Commonwealth of Independent States "BEST YOUNG SCIENTIST 2021" ("Scientists - CIS") is a unique project aimed at promoting the science and personal success of young scientists from all over the CIS and Europe.

The formation of the scientific base of the III International Book Edition of the CIS countries / "BEST YOUNG SCIENTIST - 2021" will undoubtedly contribute to a significant increase in the awareness of the scientific and pedagogical community about the development of science in the CIS and Europe.

This project was attended by young scientists of the Republic of Kazakhstan, the Russian Federation, the Republic of Uzbekistan, the Republic of Tajikistan, the Republic of Kyrgyzstan, the Republic of Belarus, etc. in the framework of international cooperation for the benefit of further integration of science.

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THE SIGNIFICANCE OF DELOCALISATION THEORY IN THE HISTORY OF INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract: *The significance of delocalisation theory in international commercial arbitration is of paramount and copious importance. 'Delocalisation' refers to the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it. The parties are not only free to choose the applicable procedural and substantive law in international arbitration, but also they can detach the arbitration from the national law, and lodge it to international law so as to be "a-national", "supra-national", "detached", "stateless", "transnational", or "floating" arbitration.*

Keywords: *international commercial arbitration, delocalization theory, enforcement of arbitral awards.*

International arbitration has become the principal and fundamental method of settling disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment.[i] Particularly, international commercial arbitration is the mechanism which provides greater flexibility and pliancy for the arranging of business transactions abroad; it simplifies the enforcement of foreign arbitral awards and standardizes enforcement procedures; and it strengthens the concept of safeguarding private rights in foreign transactions.[ii] Petrochilos appropriately mentioned that arbitration is 'the process whereby a third party determines a dispute between two or more parties in exercise of a jurisdictional mandate entrusted to him by the disputing parties'.[iii]

The significance of enforcement of awards and the meaning of arbitral seat in international commercial arbitration is of paramount and copious importance. Therefore there was a heated debate about the viability of delocalisation theory for over 20 years.[iv] However, it is still controversial issue whether to treat the delocalisation theory as expedient and fruitful conception in practical terms if we consider a matter in all its bearings.

There are some controversial aspects of enforcement and recognition of awards which were set aside in the country of origin in different jurisdictions such as political aspects, different attitudes of countries towards enforcement. Insofar as I am an advocate of delocalisation theory, my dissertation work is devoted to the research about the degree of viability of delocalisation of arbitration, to what extent it is feasible and practicable. The delocalisation theory is just a theory not recognised in legislation, namely in practical sense. Therefore it is interesting to explore its actual purpose and how it works in practice.

First and foremost, it is appropriate to determine the concept of delocalisation theory. In essence, it derives primarily from the idea that parties from different countries, in order to attain neutrality, wish to eschew as much as possible the interference of their respective courts, and simultaneously the application of the rules of their respective countries.[v] It is not representative of mainstream thinking which remains inclined to an idea seeking to detach international commercial arbitrations from controls imposed by the law of the arbitral seat and to serve initially the interests of international trade. [vi] In the contrary, 'delocalisation' refers to the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it.[vii] Basically, it represents a quintessential choice or mode of international commercial arbitration.[viii]

Second, theories of 'non-national' or 'a national' arbitration have sometimes been induced to justify enforcement of awards set aside at the place of arbitration.[ix] According to the view of one of the

outstanding proponents of delocalisation theory Philippe Fouchard, the country where a losing party has assets might recognise an award even if it had been vacated in the place of rendition. A fervent debate was generated among courts, arbitrators and scholars arguing on implementability of the theory.

The international commercial arbitration system works perfectly within a framework that has five interwoven aspects: Expedient arbitration clauses; Efficient procedural rules; Proficient arbitral institutions; National laws that assists arbitration; and International treaties that assure the recognition of agreements to arbitrate and the enforcement of foreign arbitral awards.[x] They all comprise tiny inherent elements of one solid root of international commercial arbitration in its history and gradual development. Alternatively, we can enunciate that international commercial arbitration is enrooted progressively due to the indefeasible assistance and support of national courts, due to the application of procedural and substantive rules in settling dispute, due to the administration of arbitral process by impartial and independent arbitrators, and of course, due to the workability of national laws and transnational rules.

The meaning of the delocalisation concept was argued by Professor Fragistas for the first time in the history of international commercial arbitration.[xi] He emphasized that the parties are not only free to choose the applicable procedural and substantive law in international arbitration, but also they can detach the arbitration from the national law, and lodge it to international law so as to be "a-national", "supra-national", "detached", "stateless", "transnational", or "floating" arbitration.

The delocalised system emerged on a basis of certain theory. Therefore, it is vital to divine the sense of different theoretical approaches employed in different jurisdictions in order to determine whether the award can be enforced are controlled by the relevant national laws.[xii] The statements about the nature of arbitration have been gathered into four different theories: the jurisdictional theory, the contractual theory, the hybrid theory and the autonomous theory. Amongst them, the jurisdictional theory is connected with a foundation of the entire supervisory powers of states, specifically with strong basis for the national courts to adjust any international commercial arbitrations within their jurisdiction, whereas the contractual theory demonstrates that international commercial arbitration originates from a valid arbitration agreement between the parties and that, therefore, arbitration should be carried out according to the wills of parties. In fact, jurisdictional theory ignores the existence of delocalisation and flexible method to settle their disputes outside of the court systems.[xiii]

From the mid-1900s there was a fervent debate about the two main schools of thought – localisation and delocalisation which has generated and formed arbitral practice and the laws of states.[xiv] In particular, the courts have taken two contrasting approaches in considering whether to enforce the award which has been set aside in the country of origin: the territorial approach and delocalised approach. The territorial approach, 'seat theory' or 'localisation theory' is differentiated with its dominance of the law of the seat which governs the creation of arbitration agreement and composition of the arbitral tribunal.[xv] The "localisation" theory that an arbitrator should apply the substantive law of the seat of arbitration - was widely acknowledged in the 1940s and 1950s.[xvi] It constitutes a true supervisory power of the courts at the seat of arbitration to set aside which ensures that legality, equality and liberty of parties is respected.[xvii] The parties' agreement is mainly subordinates to the lex arbitri[xviii] or alternatively, the seat anchors arbitration to the legal order of the state in which it takes place[xix] by providing certainty and encouraging simplified recognition and enforcement of the award.[xx]

Delocalised approach is based on the completely opposite concept, opposite nature, and opposite objectives. It is not mandatory to arbitrators to apply the procedural rules in force in the state of the seat of arbitration. Arbitrators deduce their powers from the sum of all the legal orders that recognise the legitimacy of the arbitration agreement and award.[xxi] Unlike a national judge, thus it is considered that arbitrators have no forum even for procedure and choice of law, which refers to the idea that arbitrators do not have to abide by the rules of forum. The role of arbitrators in the arbitral proceedings is immense and of inherent importance in arbitration. Mayer made an emphatic point that there is a fact which should be mentioned: 'the arbitrator is not considered as a substitute for a state judge; he is regarded as a judge

administering justice in the name of the international community of merchants'.[xxii] Of all arbitrators' duties and obligations, the obligation to aspire to or obtain an enforceable award may certify the most persistently troublesome, as it entangles not only clashes among the different duties themselves, but also contradiction between the arbitral seat and the law of the enforcement forum.[xxiii]

According to the localisation and delocalisation approaches, there was an establishment of two opposite doctrines reflecting contrasts in relation to the theory of enforcement of awards: Those who are in favour of delocalisation theory, for example, scholars such as Jan Paulsson, G. Bernini, Fouchard, Goldman, Frederic Eisemann, Lambert Matray, Pierre Lalive, Philippe Kahn, Eric Loquin, Lotfi Chedly, Jean-Baptiste Racine[xxiv] and etc.

Those that reject the existence of delocalised arbitration and who are in favour of territorial approach - academics and professors such as William W. Park, F. A. Mann, Roy Goode, Albert Jan van den Berg, Pieter Sanders, Bucher A., Schwartz E. and etc. On a basis of the research of the abovementioned scholars and academics the controversies' concerning the viability of delocalised arbitration, facts and arguments will be contemplated deeply in discussing pros and cons of the theory, strengths and weaknesses.

It can be deduced obviously that proponents of the delocalisation theory have a dream that one day international commercial arbitration will be floating without any restriction from national laws; whereas proponents of the seat theory affirmed that one would never escape from a national jurisdiction.[xxv] One of the outspoken opponents of delocalisation theory, Roy Goode argues that delocalised system of law represents a disregard for international comity principles by disowning from the lex arbitri.[xxvi] He contemplates that contemporary international arbitration does not need the delocalised arbitration at all insofar as it has some risks of divergent decisions and the disintegration rather than the harmonisation of rules or preservation of uniformity of awards around the globe.

In any case, the primary postulate of the delocalisation theory of arbitration is that an arbitration proceeding is not rendered invalid by virtue of the fact that it is conducted independently of both the laws and the courts of the place of arbitration provided transnational minimum standards are observed by the arbitrators.[xxvii] Furthermore, the main inherent features of delocalized arbitration are the following: It is detached from the procedural rules of the place of arbitration; It is detached from the procedural rules of any specific national law; It is detached from the substantive law of the place of arbitration; It is detached from the national substantive law of any specific jurisdiction.[xxviii]

Delocalisation theory can be applied at two stages of the arbitration proceedings.[xxix] One is delocalising the arbitral procedures from the surveillance of the lex fori. The other one is delocalising arbitral awards which refer to removing the power of the courts at the place of arbitration to make an internationally valid and forceful declaration of the award's nullity. While delocalised arbitral process guides to arbitration which is autonomous of the purview of any municipal procedural law and courts, the concept of delocalisation of awards is slightly more nuanced. The latter acknowledges the power of the supervisory courts but limits their power.[xxx]

Obviously, laws of the seat have an adequate connection so far as national courts are involved, but whether the same is true in arbitration is disputed.[xxxi] Garnett argued that the parties can shape their own procedural law without regard to local statutory rules in delocalised arbitration.

Therefore, the application and choice of procedural law is another important aspect of arbitral proceedings. To conclude, there was a representation of origin or wellspring of delocalisation theory – theoretical approaches developing in the history of international commercial arbitration; proponents and opponents of the doctrine; the role of national courts and procedural law in international commercial arbitration, inter alia, in delocalised arbitration.

References

1) Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, OUP, 2009) 1

2) [ii]Jan Paulsson, 'International Arbitration is not Arbitration' (2008) 2 Stockholm International Arbitration Review 19-20

3) [iii]Petrochilos Georgios, *Procedural law in International Arbitration* (OUP, 2004) 3

4) [iv]Pippa Read, 'Delocalization of International Commercial Arbitration: Its relevance in the New Millennium' (1999) 10(2) Am. Rev. Int'l Arb. 177

5) [v]Pierre Mayer, 'The Trend Towards Delocalisation in the Last 100 Years' in Martin Hunter, Arthur Marriott, V. V. Veeder (eds), *The Internationalisation of International Arbitration* (The LCIA Centenary Conference, Graham Trotman/ Martinus Nijhoff, 1995) 37

6) [vi]Hong - lin Yu, 'Defective awards must be challenged in the courts of the seat of arbitration – a step further than localisation?' (1999) 65(3) Arbitration 196; Jay R. Sever, 'The Relaxation of inarbitrability and Public Policy Checks On U.S. And Foreign Arbitration: Arbitration Out Of Control?' (1990-91) 65 Tulane Law Review 1690

7) [vii]Jan Paulsson, 'Arbitration in three dimensions' (2011) 60(2) I.C.L.Q 298

8) [viii]Olakunle O. Olatawura, 'Delocalized arbitration under the English Arbitration Act 1996: an evolution or a revolution?' (2003) 30(49) Syracuse J. Int'l L. & Com. 72

9) [ix] Park W. William, Arbitration of International business disputes: studies in law and practice (2nd edn, OUP, 2012) 129

10) [x]H. E. Judge Howard M. Holtzmann 'A task for the 21st century: creating a new international court for resolving disputes on the enforceability of arbitral awards' in Martin Hunter, Arthur Marriott, V. V. Veeder (eds), *The Internationalisation of International Arbitration* (The LCIA Centenary Conference, Graham Trotman/ Martinus Nijhoff, 1995) 110

11) [xi]Petrochilos (n3) 35

12) [xii]Hong- lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp. Asia Arb. J. 283

13) [xiii]Hong-lin Yu, 'Explore the void - an evaluation of arbitration theories: Part 1' (2004) 7(6) Int. A.L.R. 183

14) [xiv]Petrochilos (n3) 19

15) [xv]Herbert Kronke, Patricia Nacimento, Dirk Otto, Nicola Christine Port, *Recognition and enforcement of foreign arbitral awards - A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 325; Giulia Carbone, 'The Interference of the Court of the Seat with International Arbitration' (2012) 1 Journal Of Dispute Resolution 220

16) [xvi]Jarrod Wiener, 'The "Transnational" Political Economy: A Framework for Analysis. Delocalised International Commercial Arbitration' (1996) <http://www.jus.uio.no/lm/the.transnational.political.economy.a.framework.for.analysis.jarrod.wiener.ukc/portrait.pdf>

17) [xvii]Jean – Louis Devolve, 'The Fundamental Right to Arbitration' in Martin Hunter, Arthur Marriott, V. V. Veeder (eds), *The Internationalisation of International Arbitration* (The LCIA Centenary Conference, Graham Trotman/ Martinus Nijhoff, 1995) 147

18) [xviii]Richard Garnett, 'International Arbitration Law: Progress towards Harmonisation' (2002) 3 Melb. J. Int'l L. 406

19) [xix]Kronke, Nacimento, Otto, Port (n32) 325

20) [xx]Stephen J. Toope, *Mixed International Arbitration: studies in arbitration between states and private persons* (Grotius publications limited, 1990) 29

21) [xxi]Kronke, Nacimento, Otto, Port (n32) 325

22) [xxii]Mayer (n5) 41

23) [xxiii]Park (n9) 19

24) [xxiv]Emmanuel Gaillard, John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, 1999) 892

25) [xxv]Li (n14) 384; William W. Park, 'The interaction of courts and arbitrators in England: the 1996 Act as a model for the United States? ' (1998) 1(2) International Arbitration Law Review 55

26) [xxvi]Roy Goode, 'The adaptation of English Law to International Commercial Arbitration' (1992) 8 Arbitration International 1; Roy Goode, 'Arbitration – should Courts get involved?' (2002) 2 Judicial Studies Institute Journal 49

27) [xxvii]Patrick C. Osode, 'State Contracts, State Interests And International Commercial Arbitration: A Third World Perspective' (1997) 9 Afr. J. Int'l & Comp. L. 126

28) [xxviii]Dejan Janićijević, 'Delocalization in International Commercial Arbitration' (2005) 3(1) Law and Politics

29) [xxix]Jan Paulsson, 'The extent of Independence of international Arbitration from the law of situs' (1986) J. Lew edn, Contemporary Problems in International Arbitration 141

30) [xxx]Poon Nicholas, 'Choice of Law for Enforcement of Arbitral Awards - A Return to the Lex Loci Arbitri? ' (2012) 24 SacLJ 139

31) [xxxi]Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melb. J. Int'l L. 228; Pippa Read, 'Delocalisation of International Commercial Arbitration: Its Relevance in the New Millennium' (1999) 10 American Review of International Arbitration 177, 179

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