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**Artículos**

# The Delocalization of International Commercial Arbitration. Principles and Practices in the Application of Provisional Measures [*]

La deslocalización del arbitraje comercial internacional. Principios y prácticas en la aplicación de medidas cautelares

*Iván Enrique Rodríguez Pulido* [a]
*Universidad de Guadalajara, Guadalajara, México*
rodriguezpivane@hotmail.com
ORCID: https://orcid.org/0009-0001-1311-1979

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## Abstract:

This text is about localization and delocalization in international commercial arbitration. These perspectives will be approached from a theoretical standpoint, in which the seat will be an important element in delving into the concept of different theorists, such as Jan Paulsson's pluralist thesis or transnational arbitration. Function of provisional measures in arbitration will be explained with interaction between arbitral tribunals and national courts. With that, its cooperative role with such measures. Finally, to further understand this interaction, there will be real cases from different countries where provisional measures were applied by local courts and arbitral tribunals, along with existing controversies and resolutions.

**Keywords:** Localization, Delocalization, Seat, International Commercial Arbitration, Provisional Measures, Courts, Arbitration Tribunals.

## Resumen:

Este texto trata sobre la localización y deslocalización en el arbitraje comercial internacional. Estas visiones serán abordadas desde el aspecto teórico en el que la sede será un elemento importante para profundizar en las conceptualizaciones de distintos doctrinistas, como lo es la tesis pluralista de Jan Paulsson, o en el arbitraje transnacional. Subsiguientemente, se explica la función de las medidas cautelares en el arbitraje y se toca el tema de la interacción que tienen los tribunales arbitrales con las cortes nacionales y su función cooperativa en relación con dichas medidas. Finalmente, y con el objetivo de comprender más esta interacción, se ejemplifican casos reales de distintos países en los que hubo la aplicación de medidas cautelares entre juzgados locales y tribunales arbitrales, así como las controversias existentes y las últimas determinaciones.

**Palabras clave:** localización, deslocalización, lugar, arbitraje comercial internacional, medidas cautelares.

## Introduction

In an increasingly globalized world, where commercial transactions cross barriers and economic relations are more difficult to manage, international arbitration has solidified as a fundamental mechanism for dispute resolution.

By examining the theories of localization and delocalization and the challenges they pose, this work seeks to provide an understanding of how arbitration can adapt to the changes in international trade and the role it will play in dispute resolutions.

Provisional measures play an important role in protecting the rights of the parties in a dispute. These measures are intended to prevent irreparable harm and ensure that arbitral award becomes effective in the context of delocalization of arbitration.

Some international examples will be examined and analyzed in order to gain insight into how judges have performed a cooperative role in issuing provisional measures in arbitration cases related to delocalization by issuing these measures in a different country from the arbitral seat. Some examples of how this has been contradictory will be reviewed, by issuing provisional measures that contravene the autonomy of an arbitral tribunal.

Author notes

[a]Autor de correspondencia / Correspondence author. E-mail: rodriguezpivane@hotmail.com

In order to understand these stances, it is essential to gain familiarity with the theoretical aspects pertaining to the seats, which will in turn facilitate an understanding of location and delocalization.

## Theories of the Seat

In the context of arbitration, "seat" refers to the location where the arbitration proceeding is conducted, as agreed upon by the parties involved. The arbitral procedure is not mandatory to take place in a particular location. Instead, the parties exercise their autonomy, and the arbitral tribunal, by adhering to the principle of arbitrability, can select a country where the proceedings occur.

Hearings or evidence presentations have to be considered. This is because at times, due to practicality or material impossibility, the members of the arbitral tribunal must travel to other locations to conduct inspections, carry out testimonial hearings, examine the object in dispute, or evaluate the provisional measures, among other tasks.

The location where the procedure will be conducted is highly relevant. This is due to the interaction between arbitration as an autonomous institution and the country's judicial courts. In the case of an arbitral tribunal, while it has the authority to make decisions regarding the dispute, it is also true that it does not have *imperium*, which means it lacks the power to enforce those decisions. That is why they must be supported by the judicial courts, which possess the power granted by the State, so cooperatively, they can execute those decisions.

Consequently, the seat is crucial because the *lex loci* or *lex arbitri* will be applied in this case. It will establish the reference system that would give the legal framework to use the arbitration, as well as the judicial authorities that will intervene to assist the arbitrators in their resolutions or as a way to control the awards, primarily regarding their annulment. [1]

In this way, there is a tendency toward territorialism, which asserts a connection between international arbitration and the State of the seat where the proceeding is conducted. Therefore, the local sovereign has the competence to regulate activities within its jurisdiction, including arbitration. [2]

Experts like Francis Mann support this theory. According to him, there is a local legal system that transcends beyond parties' will, and this is known as the *lex loci arbitri*. He states that the right or faculty that someone has comes from a local legal system. [3]

In this order of ideas, in the end, arbitration is a way to administrate justice, and it belongs to the State. It provides the rules and conditions for arbitration justice so it can be developed in its territory. That's how the arbitrators administrate justice, and the main reason is because the country allows it, and there will be regulations, which will be part of the internal legal system.

However, another micro theory, which is another point of view of the arbitration, is considered fiction. This is called *the attenuated jurisdictional theory* and it is close to the hybrid theory. [4] It was adopted in 1957, by the Institut du Droit International. Here, the origin of contractual arbitration is recognized, by emphasizing that this agreement removes jurisdiction from ordinary courts. This way, the arbitral tribunal doesn't own loyalty to the state's rules. It has to obey the parties' intentions so that it will solve the problem based on the national law that the parties decided. [5]

## The Legal Localization

The localization means that an arbitration procedure should have any location that can work with to regulate and make it efficient by itself. [6] Before discussing localization, it is essential to remember that it is related to

the "place" of arbitration, and we need to understand what this is. So, the place of arbitration refers to the location where the arbitral procedure will be developed and where the award is issued.

The parties can agree on the place of arbitration, but generally, if they are unable to do so, then the arbitral tribunal or, in its case, the arbitral institution will determine it. In some cases, the institutional regulations say that the law must apply in the chosen place unless the parties agree. [7]

It doesn't mean that all the arbitral hearings must be in one place because sometimes it would be easier for the arbitrators to move to another place to do these hearings instead of moving everything where the arbitrators are.

Now, there might be confusion about the place and the seat. The first one refers to the international context, which is also about the physical place. And the second one refers to the legal connotation, which will be applied to the specific case.

The theories of seats have a close relationship with localization because they are encouraged to direct the arbitration in the procedure rules missed by the parties or when the judicial courts have to be involved. Nevertheless, there are other points of attachment, which are considered micro theories, and they are substantial because they can be regarded as part of the essence of localization.

First, the *procedural law criterion* is recognized by Ernest Mezger [8] and Habscheid, [9] who considered arbitration law is primarily like procedural law. The law of the seats rules the proceedings. They agreed that parties choose the arbitral procedure by selecting the place, and thus, the law in this place is the one that will regulate it.

Then, there is the *legal continuum theory*. It says that arbitration originates in an agreement, so the law which the parties have already chosen must be applied in all the procedures. In this sense, if the parties select a substantive law that rules in a specific place, then the procedure must be attached and continued with the adjective law of that place.

The last micro theory is the *displacement of jurisdiction criterion*, which posits that the *lex arbitri* must be the same legal order as the judicial courts which have had the jurisdiction when there wasn't an arbitral agreement. This means that the arbitral procedure must be conducted under the terms of the law governing in the local jurisdiction, including the enforcement of the award.

## The Juridical Consequences of the Arbitration's Place

According to localization theory, the applicable legislation is based on the location where a procedure is taking place. This has significant legal implications, including the acceptance of the arbitration agreements, the appointment and challenge of arbitrators; the conditions to dictate provisional measures and preliminary orders; the way of requiring some proofs or bringing witnesses; the conditions to recognize and execute an arbitral award and the recourse against the awards.

That's why it is essential for the parties, particularly the arbitrators, to understand the local process law and the legislation from the other countries where the case is taking place. That's why the United Nations Commission of International Trade Law (from now on UNCITRAL) pointed out that it is important to consider the following factors:

a) The suitability of the applicable arbitration legislation at the place of arbitration.
b) The legislation, case law, and the practices from the place. Of course, they relate to the judicial intervention during the arbitral process, the scope of judicial review or the reasons to motivate the aside of an award, and the professional qualifications required of arbitrators and legal advisors.
c) To see if the State where the arbitration is taking place is part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (from now on, New York Convention) or other treaties on the enforcement of arbitral awards. [10]

Also, the UNCITRAL expresses that to choose the place, it is substantial to consider if it is the best for all the parties and the arbitrators, the availability and cost of the support services, the location of the subject matter of the dispute, and the proximity of the evidence, and the restrictions that could be presented.

Nowadays, technology has made it easier since hearings can now be conducted online, so the arbitrators do not need to be in a specific place. Nevertheless, some things will require the presence of arbitrators, and, as a result, they must be informed of local and international law, including global treaties.

In an international arbitration procedure, arbitrators face some obstacles because the legislation can be inflexible in some countries' legal systems [11] and its laws can differ between international and local arbitration. In this order of ideas, it is natural that the countries do not have absolute coincidence through themselves, and the same will happen with international treaties.

For example, the European Convention on International Commercial Arbitration, known as the Geneva Convention, contemplates in article 1 that the convention shall apply to arbitration agreements concluded to set disputes arising from international trade between persons when concluding the agreement, their habitual place of residence or their seat in different Contracting States, it means, where the operations or the conflict would have their habitual place of residence or their seat in different Contracting States. [12] It implies that the Geneva Convention's rules will apply to disputes that have arisen or that would arise from international operations between the persons or companies that have their seats in one or some of the Contracting States.

Another example would be the Arbitration Act [13] in England. Section 3 is about the seat or arbitration, which can be provided by the parties, an institution, or another person the parties would have authorized; the arbitral court if the parties agreed. Also, Section 4 states that the parties can select the law to apply, even if it is not applicable law in England and Wales or Northern Ireland.

Another example is the arbitration law from Spain, [14] which says in articles 1.2 and 1.3 that the law will be applied even if the seat is out of Spain and that the law will be supplementary to other arbitration laws. Also, article 8 contemplates explicitly the cases when a judicial court can interfere with the judicial appointment and removal of arbitrators, in the taking of evidence, for the judicial adoption of provisional measures, for the enforcement of awards or arbitral decisions, for the action to annul the award; and for the recognition and enforcement of foreign awards or arbitral decisions. [15]

Mexican legislation contemplates the same as in the Spanish law because, in the end, it is almost the same as the UNCITRAL Model Law, except that the *Código de Comercio* includes the costs for the judicial intervention.

Those are some examples worldwide, and as one can see, there are various differences in the legislation from one country to another. It doesn't mean that they are entirely different because, in the end, the legal order and arbitral procedures are pointing to solve the problems in commerce. However, the seat is essential because it defines the legal terms.

It could be an obstacle for the arbitrators and the parties because some acts can take place in more than one seat. It would be a challenge because they must be alerted to see that the procedures are being developed following the arbitral agreement and the local law.

In addition, it could be a problem for the local judicial mechanism because the judges must be aware of the arbitration context, meaning they must know both local and international legal dispositions and they should apply the law not to be beyond the arbitrators but to fulfill a cooperative and supplementary function with them.

## The Delocalization

*A contrario sensu* to localization, delocalization argues that arbitration does not need to be based on a specific national legal order. It seeks to avoid reliance on internal law in any country while aiming to create regulations that can broadly apply to arbitration.

Roy Goode and Jan Paulsson mentioned the delocalization theory in their publications: "The role of *lex loci arbitri* in international commercial arbitration" and "*Deslocalisation* [16] of international commercial arbitration: when and why it matters."

In the first essay, Roy Goode explains the importance and the role of the *lex loci arbitri* in international commercial arbitration. Also, the extent to which judgment or orders made by a court of one state should influence a foreign court of another state, in which the arbitral award is sought to be enforced. [17]

On the other hand, Jan Paulsson tried to justify the delocalization, considering it a matter of principle. He put the party autonomy as a principle that must be present in the arbitration process, giving examples of arbitration institutions and international *ad hoc* arbitrations. [18]

The delocalization theory establishes that international commercial arbitration is a self-sufficient process in which the parties can stipulate and agree on the rules they want, excluding a country's internal legal order. [19]

Arbitration has been adopted as a dispute settlement in enterprises, their business, and worldwide operations, so it might attend not only one seat. In reason of it, arbitration has incorporated technology in information and communication, so it has built a way for delocalization. [20]

In this sense, many countries have ratified important bilateral or multilateral treaties in arbitration, such as the New York Convention of 1958, UNCITRAL Model Law, Inter-American Convention on International Commercial Arbitration, the Geneva Convention, etc.

These factors have made arbitrators and the parties pay attention to the seat, but they consider this a legal fiction. This means they see this as a formality to have a place where to develop the procedure, putting their interests first.

It means that parties and arbitrators stick to a specific country attending to its neutrality, its advances in international commercial arbitration, or because it belongs to one international treaty. Ultimately, they do not care if the seat is the same or different than the main seat where the problem, the commerce situation or the enterprises are.

It is in this situation, we realize that we are in a legal fiction about the arbitration seat and, consequently, in a delocalization. Because there are elements in different countries, and all of them are attached to its laws. This is why lawyers start to wonder if it should not be bound to local legislation and instead, go to the contract or private micro theory.

This micro theory says that the parties' consent creates arbitration, and they decide to solve the problem by a private entity, which was given authority by themselves. This decision is made by an agreement, where the parties exclude the State and they create a private justice system, which is more efficient, saving money and time. [21] So, in this context, the arbitrator's motions, including the award, must be executed in any country, no matter the local law, because those resolutions are binding on the parties.

Another theoretical trend supported by delocalization is transnational arbitration. This is not a national or international law but a combination of both. It was exposed by professor Fragitas, who said that the parties are not free to select the processual or substantive law. Still. They get involved in a national law, but this, at the same time, goes directly to an international order.

Then, we have Goldman, Fouchard and Savage, [22] who postulate that international law allows the parties the freedom to design their arbitral procedure but adhere to the international public order. From this point, there will be two positions: the source of the arbitration juricity, which Emmanuel Gaillard exposed, and the other which, Paulsson proposes, and it is about what is the regime that gives effect to arbitration?

## The Delocalization and their Thesis in the Arbitration Law System

The arbitral legal order is not considered like preexistent rules, which do not have to do anything with the state law. In fact, is the opposite of it because arbitration is based on their legal activity. Every country has its laws, but they try to rule a similar situation in the end, even if the legal systems are different.

In arbitration, the phenomenon is that most countries in the world agree that the arbitration resolutions must be complied with. There are differences between specific things and about how to execute them, how the courts can interfere in arbitral procedure, but the objective and the principles are similar. From this point, by looking at the national orders, there might be isolated local situations that may coincide with those of other countries in a global context.

With so many legal orders, there is the question of whether transnational arbitration is possible and how. René David used to say that the new commercial law is created by the arbitral tribunals, making it a natural law because no matter the codification in a State, if you do transactions from one country to another, you can automatically see the difference between local and international legislation. [23] Despite that, treaters must quit and adapt to the conditions in the country, including the legal procedure that is followed in a judicial court, and judges will follow only what the law says. [24]

But if you go with arbitrators to settle disputes in commerce, they will see beyond the law, try to solve it by considering the commercial interest, and even sacrifice some of the parties' rights if they consider it is the best for the operation.

Related to it, Emmanuel Gaillard exposes three mental representations in international arbitration, which can be considered like a thesis in the arbitration law system:

a) It is like a part of the legal order because it binds the arbitrator to a single jurisdiction which is the seat and it is considered like a forum. Under this conception, the award will not be considered "international" but like a local one just because it was dictated in this country.
b) The plurality of legal orders means, the source of juridical value of the arbitral award, which is not in a legal order that you can get in the seat, but yes, in the set of legal orders that recognize the effectiveness of the award. Under this conception, the arbitrators do not have a specific forum because it will be the entire world. So, the award will not be national, but international, it will be related to the seat's law, but only because it has to be recognized in a place.
c) The arbitration juridical order means that the juridical nature of arbitration is not in a legal estate order but in a third, which can be qualified as a legal arbitral order. It comes from the idea that arbitrators administrate justice not in the name of a nation, but it is a service to the international community. [25]

If it is true that it is a private dispute settlement method, their legitimation is given by the States around the world, which consent to recognize the authority to arbitrators.

Arbitrators and judicial courts should keep these affirmations in mind when they analyze essential subjects related to arbitration, such as the execution of annulled awards, in *anti-suit injunctions* [26] and all the measures that can hind the arbitral procedures.

## The Delocalization and its Pluralist Thesis

Jan Paulsson questioned what the regime that gives effect to arbitration is. To answer this, he proposed the pluralist thesis, which is identified by four micro-theses:

a) Territorial thesis: The States have jurisdiction in their territories, so they will be relevant only if those are recognized by the State of the seat, and any external norm is considered as not having legal support. So, any arbitration will be national, and it will be valid just according to the local law. [27]

This theory could be seen as rigid and obsolete in reason of globalization. Also, it might overlook the practice of arbitration practice, because the parties may choose jurisdictions that do not necessarily belong to the seat. The aim is neutrality and flexibility, so this stance can be criticized on the grounds that arbitration should be attached to a national legal system.

Furthermore, it could limit the autonomy of the parties to choose the best legal context that suits their needs. Even worse, this could create inequalities in access to justice, which may further impact parties who belong to developing countries that do not have such a modern legal system.

Another point to criticize is that being rooted in a national legal system carries the risk that other legal orders may not be able to coexist, even if it benefits the arbitration process. Thus, adhering to this theory may not be ideal, as it could hinder the promotion of arbitration law.

b) Pluralistic thesis: It says that many legal orders can influence arbitration, so international law is complex. This vision recognizes many legal orders that are not necessary from a State, so the arbitration can be affected by more than one law. [28]

International arbitration is a social reality in which judicial assistance exists. So, yes, the support in the cases that the law contemplates is necessary because of the missing *imperium*. The fact that international commercial arbitration exists with a structure many countries accept to practice, has worked as a base for other arbitration structures.

A factor to analyze in this thesis is that multiple legal orders could result in contradictory resolutions, and it could be hard to know how to apply the law in different jurisdictions. Thus, legal certainty could be affected, because the parties would face these contradictions.

The plurality of legal systems could complicate the enforcement of resolution because it can be enforceable in one country but not another. It means that awards may be recognized in one forum but not in another. It hinders the effectiveness of arbitration as a dispute resolution mechanism. Furthermore, the execution of this thesis could lead to the *reef de lex executionnisme*, in which the arbitral tribunal applies the less favorable rules for the parties.

On the other hand, this proposal could be negative because the coexistence of many legal orders might prevent the creation of a single harmonious legal order, which would be the opposite of achieving an effective international arbitration system.

c) Autonomous arbitral legal order: Arbitration is generated by an autonomous legal regime, and arbitrators as judges accept it. This means an independent law can operate in arbitration rather than legal systems. In this sense, this order allows arbitrators to execute their decisions, but without a limit that a local law stands. [29]

A point to criticize the autonomous arbitral legal order is that it might be disconnected from how arbitration really works in practice. Although the arbitrator has independence, consciously or unconsciously, his decisions will tend to align with one or several national laws.

Also, awards must be recognized and enforced by national courts, which will be according to national and public policies. Therefore, the effectiveness of the resolutions will depend on local judges to recognizing and implementing them.

It is also essential to remember that, on the opposite side of contract micro theory, there is the risk that arbitrators may not respect the rights of the parties, leaving aside impartiality, fairness and due process. Having that much autonomy could bring abuses or arbitrary decision-making, and there might be the question of whether there should be an international institution to supervise them.

d) The plurality of arrangements: If there is a plurality of arrangements, there would not be a need for local law and judges. So, there are agreements that can make arbitration easier, allowing a context for only one legal system. It goes beyond the territorial limits. [30]

This is the ideal process because it will be according to the arrangement that the parties would have done, and in the end, in private law, the parties make the maximum law. But, by being part of the arrangements and the rules agreed by the parties, there will be points where there might be legal gaps. It might lead to two possible consequences: a) unless the agreement would have been very particular, the arbitrator could give his own interpretation, but it might be different to tie parties' intention; and b) the arbitrator might be bound by a law that likely belongs to a country, which could put in disadvantage to one of the parties.

## Provisional Measures or Interim Measures and the Delocalization

Provisional measures of protection, also known as interim measures in an arbitral process, are tools used to protect the subject of the dispute in an arbitration process. They aim to maintain a situation of fact or right to safeguard rights or assets and to prevent irreparable harm before the issuance of the award.

To be valid, provisional measures must have the condition of urgency and serious harm, which must be justified. When we say *urgency*, it means that if it waits until the award, it would be too late to ensure the protection of the rights or assets under threat.

It is crucial to analyze the ambiguity that the word *urgency* can generate because there is no clear definition for which cases can be applied. Therefore, the arbitrator will make an entirely subjective assessment, which could result in the error of not deeming it urgent. The same could happen in *irreparable harm*, as it may be an utterly evident situation or a condition that indeed has the character of harm but is replaceable or easily repairable.

When it refers to harm, it does not mean any damage but rather one that is irreparable, meaning that it cannot be remedied by monetary compensation; otherwise, the harm would simply be addressed in the final award without further sanction.

Thus, the objective of provisional measures will be to maintain the *status quo*, prevent the loss or damage of something, facilitate the progress of an arbitral procedure, take or preserve evidence, and prevent the transfer of dissipation of assets. [31] These objectives ensure that arbitrations fulfill their function of resolving a dispute and, consequently, that the award is executed.

There might be many reasons to issue provisional measures. Still, some of them are to avoid irreparable harm, to have financial guarantees, to avoid hostile publicity, to protect the jurisdiction of the court and parallel local proceedings, to seek to preserve or obtain evidence, to enforce payment orders for advance expenses, to avoid judicial restriction to start or continue an arbitral procedure, to avoid the destruction of the object of the procedure, to not sell the objects, measures against *anti-suit injunctions*, among others.

Some legislations say that arbitrators are competent to issue provisional measures like the *Code Judiciare Blege*, [32] the German Code *Zivilprozessourdnung*; [33] the *Loi Fédérale Sur le Droit International Privé* from Swiss, [34] or UNCITRAL Model Law. [35] Other legal orders forbid the arbitrator's intervention unless the parties agree, like the Italian *Codice di Procedure Civile*. [36]

## The Provisional Measures Issued by the Judicial Authority, Before and After the Arbitration Tribunal is Constituted

As mentioned, there is no legislative uniformity regarding the power of an arbitral tribunal to issue provisional measures. Some countries allow them, while others reserve these powers exclusively for state judges. However, most countries that promote arbitration grant arbitrators the freedom to issue these measures.

For example, countries such as the United Kingdom, [37] France, [38] Germany, [39] Spain, [40] Mexico, [41] and Colombia [42] allow concurrent jurisdiction, in which arbitrators and judges can issue provisional measures before and after the arbitral tribunal has been constituted.

In this sense, concurrent jurisdiction will have three consequences: a) The parties can request the judicial courts to issue provisional measures even if there is an arbitration agreement. b) The request for provisional measures does not constitute a waiver of the right to arbitration. c) The arbitral tribunal has jurisdiction to issue provisional measures.

Before the arbitral proceedings, the parties may request provisional measures from a judge. These provisions are entirely reasonable because the arbitral tribunal has not yet been constituted, and there is a situation of urgency with the potential of irreparable harm, so it is expected that there would be a request.

Judges can also issue provisional measures during the arbitration process, even after the arbitral tribunal has been constituted. This is interesting because it is understandable beforehand, but the fact that it can happen afterward may create uncertainty for the parties. It originates in the wording of article 9 of the UNCITRAL Model Law. [43]

Before its issuance, it was determined that there wasn't uniformity in state courts regarding whether judges had the authority to issue provisional measures even with arbitrators present. While some did it to ensure that awards were enforceable after preserving the subject of the dispute, others refrained from doing so because they believed it would impede the efficient development of the arbitration process. [44]

As for the arbitral tribunal's authority to issue provisional measures, it is not entirely limited, so it can issue any measures it deems appropriate according to the circumstances as long as they pertain to the subject matter. Therefore, the only limitation will be when it orders measures that are designed for third parties who are not part of the dispute.

This is when the problem arises because it can create the risk of conflict of jurisdiction and contradictory decisions. Thus, one of the parties may first request the issuance of measures from the arbitral tribunal and then from the national judge in order to increase the chances of obtaining the provisional measures.

There will be a limitation because the arbitrators do not have the authority to enforce those measures because they do not have the *imperium*. Therefore, judicial cooperation will be essential to make those measures effective when there is opposition from the parties to their enforcement.

The power that an arbitrator, by the request of a party, can demand judicial assistance to execute a provisional measure was proposed and examined by "The working group on international contract practices" in the work of its sixth session. On this Assembly, its members proposed an addition to the UNCITRAL Model Law with the mentioned objective, and also that the tribunal could require a guarantee to be sure for the cost of such measures. [45]

This session discussed and indicated that judicial assistance in enforcement was optimal, as it benefits the arbitrator and the parties. However, it was determined that this addition should be omitted because it could be against the local law regarding issues of procedures and the competencies of national courts, or it might result in many countries not accepting it. Thus, judicial assistance in issuing provisional measures requested by the arbitral tribunals remains open to the discretion of each country.

## The Provisional Measures Issued by the Judicial Authority in Arbitration around the World

It is vital to conduct a comparative analysis of cases in which judicial courts have issued provisional measures in an arbitration process that is taking place in another country, regardless of whether it is before or after the arbitral tribunal has been constituted.

In this way, it will be examining some practical cases from countries with this experience, their determinations and their actions in issuing provisional measures to support the arbitration located abroad.

### *Cases in Union Kingdom*

British jurisprudence has been the most active on this issue to the point where other jurisdictions have based their actions on it. One of the first cases was *Channel Group v. Balfour Ltd*. [46] This dispute concerns a construction and operation contract breach for the *Channel Tunnel* or *Eurotunnel.* In this case, the agreed obligations and quality standards were not completed, which included technical and financial aspects related to the construction and installation of a cooling system in the Eurotunnel. The contractors warned that work would be halted until certain conditions were fulfilled.

The problem had been agreed to settle by the rules of the International Chamber of Commerce located in Brussels, Belgium. However, the Commercial Court of London ruled that there would be no provisional measure if contractors committed to not halting the work. The applicant appealed this sentence for the provisional measure. In 1992, the Court of Appeal in London said that, although the requested provisional measure should be partially enforced in England, the British courts did not have jurisdiction to grant it since the agreed seat for arbitration was in Brussels.

Another example of relevant jurisprudence is the case of *Econet Wireless Ltd. v. Vee Networks Ltd and Ors*.[47] It was about a shareholders' agreement and first-refusal right to acquire shares in Vee Networks Ltd., which was incorporated in Nigeria. The parties agreed that in case of dispute, they would be applying the laws from Nigeria and the arbitration rules would be in accordance with UNCITRAL rules, with Nigeria as the seat.

Econet Wireless stated that there was a breach of the shareholders' agreement and requested provisional measures from a British court which granted some measures, such as: A ban on the use of trademark, a suspension of commercial activities, and the provision of relevant information. However, in appeal, the High Court overturned these measures, stating that Nigerian judges should issue provisional measures, not the British ones.

One of the most relevant cases was *Mobil Cerro Negro Ltd. v. Petróleos de Venezuela*, [48] which was about a contract for oil exploration in Orinoco, Venezuela. The government took 41.7 % of the Project and transferred the rights to lots that belonged to foreign companies to companies in which Venezuela was a shareholder.

After not compensating Mobil Cerro Negro, the company requested to British courts a *mareva* or *freezing injunctions*[49] as a provisional measure so that the arbitration could take place in New York, according to the rules of the International Chamber of Commerce. However, the Commercial High Court overturned this resolution because there must be *exceptional features*, and since they were not established, these measures were revoked. [50]

Although this was an investment arbitration, it is essential to mention it as it was a quite relevant case with implications for international commercial arbitration. Although the provisional measures were denied, there was a precedent that British courts were competent to issue provisional measures even outside the country.

Another case is *Essar Oilfields Services Limited v. Norscot Rig Management PVT Limited*.[51] This is about a drilling services contract, Noscort requested provisional measures from the British courts to ensure that Essar did not interfere in the arbitration process and had enough assets to comply with an arbitral award. Thus, the court ordered that certain relevant assets not be transferred and forbade the transfer of funds from bank accounts. It also forbade litigations in other jurisdictions related to this conflict because Essar intended to do it to local judges in India, despite agreeing that International Chamber of Commerce rules would solve the conflict.

### *Cases in Singapore*

Mentioning Singapore is relevant because its jurisdiction can be considered the most favorable for arbitration in Asia,[52] in reason that it has the International Arbitration Act,[53] which delineates the jurisdiction of the courts in relation to arbitration.

One of the most relevant cases is *Swift-Fortune Ltd. v. Magnifica Marine*.[54] It was about a sales contract for a vessel, which stipulated that in case of a dispute, it would be settled through arbitration with the seat in London. Swift-Fortune requested provisional measures to prevent that Magnifica Marine disposed of the vessel or the income while the arbitration was being solved. Thus, it requested an *injunctions*, but the High Court of Singapore determined that the lacked the competence to grant the provisional measure.

There was also the case *Front Carriers v. Atlantic & Orient Shipping Corp*.[55] It involved the transportation of assets and the breach of contract regarding their delivery and condition. Front Carriers requested the state courts to grant *Mareva injunctions* to take place in London. The Singapore Court interpreted the International Act alongside the UNCITRAL Model Law and determined the courts were indeed competent to order an *injunctions* in favor of foreign arbitration.

Thus, there was a contradiction between the judicial determinations, so Parliament amended the International Arbitration Act to establish that state courts could indeed issue an *injunction*.

Another recent case is *Troy Foods v. Cargill International*.[56] This involves a food supply contract in which Troy Foods claimed that Cargrill International was breaching the agreement due to the quality of products and the delivery terms, resulting in damages.

Because of the fear that Cargill International might not have enough assets and thus become insolvent and deplete its assets before the issuance of the award, Troy Foods requested provisional measures to the courts of Singapore, even though the arbitration was based in Hong Kong. In response, the Singapore courts ordered the measures, including the freezing of assets, restrictions on commercial transactions, and required the preservation of documents related to the case.

Thus, it is possible to see that Singapore has positioned itself as an arbitrator in arbitration matters, which are worthy of mention and consideration on the Asian continent.

## Cases where there Have Been Contradictions in Concurrent Jurisdiction

It has been mentioned that concurrent jurisdiction is valid in many countries. However, there is a risk of contradiction between the provisional measures issued by a state court and an arbitral tribunal, as each party may request measures in its favor.

A great example is *West Tankers Inc. v. Allianz SpA*.[57] This case involves the breach of an insured party in relation to a maritime charter agreement. The contract was based on the British law and included an arbitration clause to take place in London. The matter concerns a vessel owned by West Tankers that caused damage to a jetty owned by Erg Petroli SpA.

Erg requested compensation from insurers Allianz and Generali, so it initiated arbitration proceedings in London against West Tankers. This denied its responsibility and Erg collected on the insurance policies. In 2003, Allianz and Generali filed a claim against West Tankers in an Italian court to recover the amounts paid to Erg.

West Tankers lodged an objection to jurisdiction based on the arbitration agreement. In 2005, the High Court of Justice in England and Wales issued an *anti-suit injunction* against Allianz and Generali. Meanwhile, the Italian court issued a provisional measure to allow Allianz to act within its jurisdiction.

This created a conflict, which brought the matter to the Court of Justice of the European Union. [58] This court confirmed that the arbitral tribunal was competent and that the provisional measures from the Italian court interfered with the arbitral process. This set a precedent that arbitral tribunal must respect arbitration agreements so the parties can resolve their disputes through this mechanism when they have agreed to do so.

Another example is the case *Fiona Trust & Holding Corporation v. Privalov*. [59] This case involves a breach of ship management and administration contracts, which stipulated that any disputes would be submitted to arbitration in London.

Fiona Truts requested the arbitral tribunal for provisional measures to prevent Privalov from liquidating assets or taking actions that would impair his ability to pay damages. Meanwhile, the court in Russia issued provisional measures allowing Privalov the freedom to dispose of his assets. This was clearly contrary to the measures ordered by the arbitral tribunal.

Finally, the London arbitral tribunal decided to confirm its jurisdiction and the arbitration process continued. The award was favored Fiona Trust, determining that Privalov had breached the contracts and ordering him to pay damages, including costs and fees.

These two cases are highly relevant because, despite the contradictions, both reaffirm international commercial arbitration as an independent process that should be followed without interference from national courts.

These examples highlight the importance of the autonomy of arbitration and, consequently, the law must anticipate these situations, because, if they do not, it will generate uncertainty and risks for the parties involved.

Its risk is such that companies may choose not to resolve their disputes through arbitration, as judicial interference creates a sense of legal uncertainty. Therefore, arbitral decisions must be recognized and respected in order to enhance cooperation between different legal systems around the world.

## Conclusion

The debate about localization and delocalization is a topic that must be considered in international law, especially in light of the existing and growing globalization. Determining which law to apply in a conflict to be resolved through arbitration still needs to be defined, but it must be studied as a way to break down legislative barriers.

Delocalization, understood as the ability to conduct arbitration proceedings without being tied to a national legal system, reflects the arbitration's evolution to adapt to the realities of contemporary international trade.

Although there is no global legal uniformity regarding judicial intervention in arbitration, the autonomy of the parties plays an important role that should be considered even more than domestic legislation, as long as it does not go against public policy. Therefore, the ideal would be a flexible regulatory framework that accommodates the dynamism of international trade.

Focusing on the delocalization of arbitration in the issuance of provisional measures, after exemplifying conflicts with cases that have occurred in practice, it is possible to see that judicial cooperation is sometimes effective in making arbitration effective and reaching an award.

However, the judicial authority also represents a risk when issuing provisional measures that contradict the resolutions made by the arbitral tribunal. This should not be the case, as the parties have determined from the outset that the arbitral tribunal is considered the highest authority regarding that specific conflict. Therefore, this represents a challenge to be overcome in the international community.

It may be an utopic challenge to think that there could be transnational regulation, but the evolution of private international law must move in that direction. It needs to generate international cooperation among all or most countries in the world, as conflicts of this nature will continue to exist, and a way to reduce conflicts of laws will be that option.

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## Notes

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**1** *Cfr.* María Fernanda Vásquez, *Relevancia de la sede arbitral y criterios que determinan su elección*, 16 Revista chilena de derecho privado 75-134, 82 (2011).

**2** *Cfr.* Francisco González, Arbitraje 174 (Porrúa, 2018).

**3** *Cfr.* Francis Mann, *The problem of stale arbitrations in England, a possible riddance of Bremer Vulkan?*, 2, Arbitration International, 241, 240-241 (1986).

**4** There are different micro theories of arbitration, but the three mains are: *Jurisdictional theory*. The State controls the administration of justice through its courts but allows the existence of arbitration as a function delegated by the State itself. *Contract or private theory*. Arbitration arises from the will of the parties and not from State control. The award is a consequence of contractual freedom and, therefore, is a system of private justice. *Hybrid or mixed theory*. It has characteristics of jurisdictional and contact

theories. Arbitration arises from a private agreement, but it also has jurisdictional elements because the arbitrator has jurisdictional functions to resolve a dispute through an award. Unlike a state court, the arbitrator does not have the coercive power that a judge has. Therefore, arbitration is a hybrid institution that has the support and cooperation of the State.

**5** *Cfr. Mitsubishi Motors Corp. V. Soler Chrysler Plymouth, Inc.* (1985).

**6** Francisco González, *supra* note 2, at 174.

**7** *Cfr.* Comisión de Naciones Unidas para el Derecho Mercantil Internacional, *Notas de la CNUDMI sobre la organización del proceso arbitral*, Naciones Unidas, New York, 13 (2016).

**8** *Cfr.* Ernest Mezger, *Der internationale Handelsshiedsgericht* (Duncker & Humbolt, 1979).

**9** *Cfr*. Henri Habscheid, *Droit de l'arbitrage international* (Librairie Générale de Droit et de Jurisprudence, France, 1999).

**10** Comisión de Naciones Unidas para el Derecho Mercantil Internacional, *supra* note 7, at 14 (2016).

**11** *Cfr. Saudi Law of arbitration*, Saudi Arabia, art. 55 (2012). For example, the Saudi Law of Arbitration of 2012 allows the intervention of local courts in different stages of arbitration process. And it will be if they contradict Sharia, which is an Islamic legal and moral system derived from Quran, including the review of awards and their annulment.

**12** *European Convention on International Commercial Arbitration*, Geneve, art. 1 (1958).

**13** *Cfr. Arbitration Act*, London, sections 3 and 4 (1996).

**14** *Cfr. Ley 60/2003, de Arbitraje*, Madrid, arts. 1 and 8 (2003).

**15** *Ley 60/2003, de Arbitraje,* Madrid, arts. 1 and 8 (2003).

**16** Roy Goode and Jan Paulsson use the word "deslocalisation", but the term that is used in English is "delocalization".

**17** Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 *Arbitration International* 19-40, 19 (2001).

**18** Jan Paulsson, Deslocalisation of International Commercial Arbitration: When and Wy It Matters, 32 The International and Comparative Law Quarterly 1, 53-56, 57-59 (1983).

**19** *Cfr.* Santiago Talero, *Deslocalización del arbitraje comercial internacional: ¿hacia dónde va la Convención de Nueva York?*, 28 Revista de Derecho Privado 45-63, 46 (2002).

**20** Guillermo Palao, *El lugar de arbitraje y la "deslocalización" del arbitraje comercial internacional*, XLIV Boletín Mexicano de Derecho Comparado 130, 171-205, 183 (2011).

**21** *Cfr.* Mauricio Foeth, *Responsabilidad del árbitro en el arbitraje comercial internacional* 11-12 (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, México, 2019).

**22** *Cfr.* Emmanuel Gaillard, & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* 32-35 (Kluwer Law International, Amsterdam, 1999).

**23** *Cfr.* Emmanuel Gaillard, *Aspectos filosóficos del derecho del arbitraje internacional* 76 (Grupo Editorial Ibáñez, 2012).

**24** *Id.*

**25** *Id*., at 69.

**26** *Cfr*. M. Requejo, *Sobre la anti-suit injunction y la cláusula arbitral en el espacio europeo de justicia. Observaciones para la cuestión pejudicial en el as. C-165/07 The Front Comor*, 1 Arbitraje: Revista de arbitraje comercial y de inversiones 403-433, 407-408 (2008). An *anti-suit injunction* is a measure in which a court, at the request of a party, issues an order to a person under its jurisdiction to forbid the beginning or continuing a proceeding in another judicial court. It can be filed when the plaintiff request the judge to prevent or terminate a behavior of the opposing party that consist in suing in another country. It can also occur when the parties have agreed on a forum or arbitration instance and one party attempts to start a procedure in another instance, usually the judicial.

**27** *Cfr.* Jan Paulsson, *Arbitration in Three Dimensions*, Law Society Economy Working Papers 4-6 (2010).

**28** *Cfr. Id*., at 7-10.

**29** *Cfr. Id*., at 11-15.

**30** González, *supra* note 2, at 179.

**31** *Id*., at 774.

**32** *Code Judiciare Belge*, Belge, art. 1696 (1967). Article 1696. 1. Without prejudice to Article 1679, paragraph 2, the Arbitral Tribunal may order interim and conservatory measures at the request of party, except for attachment orders.

**33** *Zivilprozessourdnung*, Germany, § 1041 (1950). § 1041. Provisional measures.-| If the parties have not agreed otherwise, the arbitral tribunal may order, at the request of a party, provisional or protective measures that are deemed appropriate regarding the subject matter of the dispute. The arbitral tribunal may require any of the parties to provide the corresponding security in connection with the measure.

**34** *L oi Fédérale Sur le Droit International Privé from Swiss, Swiss*, art. 1831 (1987). Art. 1831.- 1 Except for a agreement, the arbitral tribunal can issue provisional measures or interim measures by the request of one of the parties.

**35** *UNCITRAL Model Law*, art. 17, (1985). Article 17. Power of arbitral tribunal to order interim measures.- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

**36** *Codice di Procedure Civile*, Italy, art. 818 (1940). Art. 818. Provisional measures. The parties may, including by reference to arbitration rules, give the arbitrators the power to grant provisional measures by the arbitration agreement or by a document before the arbitral proceedings. The arbitrators have exclusive provisional jurisdiction.

**37** *Cfr. Arbitration Act*, London, section 44 (1996).

**38** *Cfr. Code De Procédure Civile*, France, arts. 1449 and 1468 (1976).

**39** *Cfr. Zivilprozessourdnung*, Germany, § 1041 and 1050 (1950).

**40** *Cfr. Ley 60/2003*..., op. cit., arts. 8.3, 11.3 and 23.1.

**41** *Cfr. Código de Comercio*, Mexico City, arts. 1425 and 1478 (1889).

**42** *Cfr. Ley 1563 de 2012*, Colombia, art. 71 (2012).

**43** *UNCITRAL Model Law,* art. 9, (1985). Article 9. Arbitration agreement and interim measures by court.- It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

**44** United Nations Commission on International Trade Law, *A/CN.9/168. Report of the Secretary-General: study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Award*, para. 29 (1979).

**45** *Cfr*. United Nation General Assembly, *A/CN.9/245 Report of the Working Group on International Contract Practices on the Work of its Sixth Session*, para. 70 (1984).

**46** *Cfr. Channel Tunnel Group LTD. And Another v. Balfour Beatty Construction LTD and Others* (1992).

**47** Stewart R. Shackleton, caso *Econet Wireless Ltd. v. Vee Networks Ltd and Ors.,* 1 Annual Review of English Judicial Decisions on Arbitration 261-269 (2006).

**48** *Cfr. Mobil Cerro Negro Ltd. v. Petróleos de Venezuela* (2008).

**49** David Capper, *The Need of Mareva Injunctions Reconsidered*, 73 Fordham Law Review 5, 2161-2181, 2162 (2005). A *marvea injunction* is an interlocutory injunction restraining a defendant in civil litigation from disposing of assets so as to render itself judgment proof. It operates in *personam* against the defendant and does not confer upon the plaintiff any rights in the assets or enhanced priority in the event of defendant's insolvency.

**50** *Cfr.* E. Pezo Arévalo, *¿Puede un juez peruano dictar una medida cautelar en apoyo de un arbitraje con sede en el extranjero?*, 10 Revista de Economía y Derecho 41, 61-88, 67 (2014).

**51** *Cfr. Essar Oilfields Services Limited v. Noscort Rig Management PVT Limited* (2018). High Court of Justice Queen's Bench Division Commercial Court, *Essar Oilfields Services Limited v. Noscort Rig Management PVT Limited*, EWHC 2361 Comm (2016).

**52** *Cfr*. Pezo Arévalo, *supra* note 50, at 64.

**53** *International Arbitration Act*, Singapore (2001).

**54** *Cfr. Swift-Fortune Ltd. v. Magnifica Marine* (2007).

**55** *Cfr. Front Carriers v. Atlantic & Orient Shipping Corp* (2007).

**56** *Cfr. Troy Foods v. Cargill International* (2018).

**57** *Cfr. West Tankers Inc. v. Allianz SpA* (2003).

**58** *Cfr.* The Court Grand Chamber, *Allianz SpA, fromely Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc. Case C-185/07* (2009).

**59** *Cfr.* Fiona Trust & Holding Corporation v. Privalov (2007).

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