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厦门大学

博士学位论文

国际商事仲裁程序“非国内化”研究

On ‘Delocalization’ of Procedure in International
Commercial Arbitration

张美红

指导教师姓名：徐崇利教授

专业名称：国际法学

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内 容 摘 要

传统国际商事仲裁程序制度强调仲裁地法对仲裁程序的绝对适用，然而，随着全球化的发展，国际商事仲裁程序越来越脱离仲裁地法的支配或控制，出现了所谓的“非国内化”或“非当地化”趋势，具体体现在三个方面：一是在国际商事仲裁程序法的选择适用上，允许当事人或仲裁庭选择仲裁地国法之外的国家法律，甚至是任何非特定国家的法律规则（如国际法、一般法律原则、国际商事惯例等）作为支配仲裁的程序法；二是在国际商事仲裁裁决的撤销上，允许当事人约定排除仲裁地法院撤销权的协议；三是在国际商事仲裁裁决的承认与执行上，相关执行国不顾仲裁地法院的撤销决定，对已撤销的“非国内化”仲裁裁决予以承认与执行。越来越多的西方国家出于各种利益的考量实行国际商事仲裁程序上的“非国内化”。有鉴于此，本文以国际商事仲裁程序“非国内化”为研究对象，系统考察了国际法律文件和西方国家的相关规则以及西方国家的仲裁和司法实践，总结它的样态，旨在为完善我国国际商事仲裁程序制度和相关实践提供建议。

除引言和结论外，主文共分为四章。

引言部分介绍了本论题的源起和重要意义、研究现状、研究框架、研究方法以及创新之处。

第一章是总论，从国际商事仲裁程序“非国内化”的产生和影响它的样态因素入手，阐释了国际商事仲裁程序“非国内化”的基本原理。指出，国际商事仲裁程序“非国内化”的产生是多种内外因素合力推动的结果，但就目前来看，它的样态应该是有限的。换言之，它不可能完全脱离仲裁地法的控制和彻底摆脱仲裁地法院的监督。

第二章和第三章都是分论，主要考察国际商事仲裁程序“非国内化”的实践，分析它的样态。其中，第二章考察了国际商事仲裁程序法适用上和仲裁裁决的撤销上的“非国内化”的相关规则、仲裁和司法实践，接着总结了“非国内化”在这两个方面体现的样态。指出，在国际商事仲裁程

序法适用上的“非国内化”已表现出一种普遍的国际趋势，而在仲裁裁决的撤销上尚未形成一种趋势。第三章考察了“非国内化”仲裁裁决的承认与执行的相关司法实践，进而总结它的样态，并分析呈现该样态的原因。指出在“非国内化”仲裁裁决的承认与执行上也未形成普遍的国际趋势，原因复杂多样。

第四章在上述三章的研究基础上，论述了我国在国际商事仲裁程序“非国内化”的趋势下，应采取何种对策，并就《仲裁法》的相关修改提出建议。指出，我国应采纳有限的“非国内化”，并应在未来修改《仲裁法》时合理设计“非国内化”条款。

结论部分总结了国际商事仲裁程序“非国内化”的现状，并展望其发展前景。指出，目前国际商事仲裁程序“非国内化”是一种有限的“非国内化”，未来不管如何发展都只能是有限的情形。

关键词：国际商事仲裁；仲裁程序；非国内化；样态

ABSTRACT

Traditionally, the system of procedure in international commercial arbitration emphasizes the law of the situs absolutely applicable to the arbitral procedure. However, with the development of globalization, the procedure in international commercial arbitration increasingly detaches from the law of the situs, which results in ‘delocalization’. Specifically, ‘delocalization’ embodies the following three aspects: firstly, the parties or arbitral tribunal may choose other relevant municipal laws other than those of the situs, even including any non-domestic rules(international law, general principles of law, international commercial practices, etc.) applicable to the arbitral procedure. Secondly, the parties are permitted to contract exclusion agreements to waive or exclude annulment actions against arbitral awards in international commercial arbitration. Thirdly, the related countries recognize and enforce the annulled ‘delocalized’ arbitral awards regardless of the court’s vacature decision on them in the seat. More and more western countries enact laws embodying ‘delocalization’ of procedure in international commercial arbitration after weighing various interests. In view of this, the dissertation focuses on ‘delocalization’ of procedure in international commercial arbitration, summarizing its patterns by comparing the relevant rules in international law documents and domestic legislations in western countries concerned and the relevant practices in western countries concerned. All these rules and practices aim to raise recommendations to perfect the existing legislation and rationalize the relevant practices in China.

Besides introduction and conclusion, this dissertation contains four chapters.

The introduction introduces the origin and significant meaning of the theme, the existing research on the theme, the structure, the research methods and the innovative points of this dissertation.

Chapter I inquires into the basic theoretical issues of procedure in international commercial arbitration by means of analyzing the emergence and

factors affecting the patterns of ‘delocalization’ of procedure in international commercial arbitration. The author argues that ‘delocalization’ of procedure in international commercial arbitration resulted from many factors, and however its patterns are limited. In other words, it is impossible for procedure in international commercial arbitration completely to detach from the law and control of national courts of the seat of arbitration.

Chapter II and III compose the individual part of this dissertation. This part analyzes the practices in ‘delocalization’ of procedure in international commercial arbitration. Particularly, Chapter II explores the related practices of ‘delocalization’ of the application of procedural law and annulment of arbitral awards in international commercial arbitration, and summarizes respectively which patterns of ‘delocalization’ they belong to. The author points out that ‘delocalization’ of the application of procedural law has developed into a general trend, but ‘delocalization’ of annulment of arbitral awards has not. Chapter III deals with the relevant judicial practices in recognition and enforcement of the ‘delocalized’ arbitral awards, and then the author holds that ‘delocalization’ trend in recognition and enforcement of the ‘delocalized’ arbitral awards does not come into being, as is caused by many different reasons.

Based on the former analyses, Chapter IV discusses how to cope with ‘delocalization’, and raises suggestions to perfect the Chinese Arbitration Law. The author suggests that China adopt the limited ‘delocalization’ of procedure in international commercial arbitration and draft ‘delocalization’ clauses while revising the Chinese Arbitration Law.

The conclusion summarizes the patterns of ‘delocalization’ of procedure in international commercial arbitration and predicts its future. The author insists that the patterns of ‘delocalization’ of procedure in international commercial arbitration are limited at present, and will always be limited in the future.

Key Words: International Commercial Arbitration; Arbitral Procedure;
‘Delocalization’; Patterns

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《纽约公约》	1958年《承认及执行外国仲裁裁决公约》
《欧洲公约》	1961年《欧洲国际商事仲裁公约》
《华盛顿公约》	1965年《关于解决国家与他国国民之间投资争端公约》
《示范法》	1985年《国际商事仲裁示范法》
ICC	The International Chamber of Commerce 国际商会
《ICC 仲裁规则》	1998年《国际商会仲裁规则》
《美洲公约》	1975年《美洲国家间关于国际商事仲裁公约》

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