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Internationality and *commerciality*[1] in the Uncitral Model Law: a functional and integrative analysis

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Abstract: This article investigates the nature of *internationality* and *commerciality* as these concepts appear in the Uncitral Model Law, from a functional point of view and in contrast with the connotations that the same terms of art have in domestic realms. Rather than a merely theoretical account, it crosses over elements of the civil and common law systems. Ultimately, it combines the descriptive and systematic rigor of the civil law legacy with the factuality and inductiveness of the common law heritage. In order to do that, it (a) decomposes the concerned concepts, (b) highlights the uniqueness of their contours within the peculiar domain of international commercial arbitration, (c) differentiates them from homonymous domestic categories, and (d) suggests the reconstruction of their meaning in light of a functional, integrated, and *de facto* perspective. In sum, it contends that both categories own its *ratio essendi*, content, and *functionality* to the autonomous, unique and aboriginal role that International Law exerts – through the international commercial arbitration dynamics – in the interest of the maximum efficiency of the international trade.

Keywords: International Arbitration. Uncitral Model Law. Internationality. Commerciality. Functional analysis. Integrative Analysis. Validity and efficacy versus recognition and enforcement. Civil and common law crossover approach.

[1] Both terms of art are italicized throughout this text, because of the peculiarities surrounding their specific understanding *vis-à-vis* homonymous expressions occasionally in vigor within domestic realms.

1 Introduction

There are four main reasons why the concepts of *internationality* and *commerciality* in the Uncitral Model Law were chosen as this paper's topics.

First, these concepts are foundational to the international arbitration field, being otherwise certain that the Uncitral Model Law framed them in a quite straightforward, broad, and unprecedented fashion, if compared to the prevailing connotations that the same terms of art traditionally bear within the many different domestic systems that form the international society. As phrased by the Uncitral Model Law, these seminal categories translate the very *ratio essendi* of the International Commercial Arbitration procedures, in all their peculiarities. The careful analysis of these concepts, therefore, is not only worth, but also necessary to the clarification of basic premises that, in the sentiment of the Author, have not yet been sufficiently discussed.

Second, this paper's investigation granted the opportunity of translating into practice a so far prescriptive contention of its Autor:[2] the usefulness of combining, in International Law studies, the methodological rigor of the Civil Law deductive legacy with the practicality of the Common Law inductive heritage, in a crossing-over perspective. Accordingly, one may hereby find a very *Civil Law analytical deconstruction* of the concerned concepts followed by a very *Common Law* factual *reconstruction*, the latter based upon concrete elements such as the *functionality* of *internationality* and *commerciality* for the maximum efficiency of the international trade. Hence, the first part of this scholar effort aims a systematic understanding of the concepts it investigates, and its second part highlights the empirical ties that the same notions bear with the concreteness of multinational commercial transactions.[3]

[2] Who, due to his peculiar formation and practice, teaches law using a Civil and Common Law crossing-over approach.

[3] The Author, by the way and as a legal researcher, is actually convinced of the utmost importance of a combined scholarship approach that could put together the advantages of an inductive system (as traditionally the common law system is portrayed) and of a deductive system (as the civil law is usually depicted). A panoramic view over the way with which substantial and procedural matters are treated in the International Commercial Arbitration casuistry may actually reveal how much this field could benefit from this combined approach, to the extent that the legal categories implied could be exemplarily and comprehensively treated from a joint and very rich perspective. In sum, all the backlashes and restrains historically accumulated in the way legal categories are approached in each of these separated systems (not to mention other marginally operating systems) could be surpassed and overcome by a careful and sensible combined approach, with great benefits to the field's scholarship and practice. Just as an example, it is worth to be noticed, in this paper, that the discussion of the two concepts to which the scholarship effort is devoted, as for instance in regards of classification (section "4") was only possible through the use of deductive and analytical methods that helped to dissect, decompose, and dismember the respective categories according to their many communicative possibilities. Through this effort - that does not substitute or supersedes the extremely useful approaches of the inductive common law system, but may be complementary to them – an abstract, theoretical, analytical, descriptive and comprehensive concept could be achieved, encompassing two autonomous, independent, distinct, but

Third, the two Uncitral Model Law concepts hereby referred are examples of a straightforward proclamation of the *Theory of Function*, basis of the Author's Ph.D thesis[4] and an uncommon foundational ground when it comes to legislation drafting, especially in Civil Law jurisdictions. Actually, the concept of *internationality* as enunciated by the Uncitral Model Law, besides factually anchored in the *commerciality* test laid down by the same diploma – in a rare case of integrative co-implication of legal terms of art – has nothing to do with notions which, by obvious pertinence, could hypothetically serve as references to its understanding. Rather, on the contrary. Once contrasted, for instance, with the *domestic* concept of *nationality*[5] – reasonably expected to be antipodal to the concept of *internationality* – the comparison reveals that both concepts are not only totally unable to counter-reference one another, but absolutely strange to each other.[6] In other words, *internationality* as an Uncitral Model Law term of art – preceded, by the way, by previous and equally *functional* international regulations[7] – does not draw or substantiate its peculiar meaning from domestic tokens, but has an aboriginal bound with the interest of granting maximum efficiency to the international trade.

Fourth, the publication of the present investigation, which is so far preliminary and subject to the due revisions, might open room for further and more profound

highly complementary and interconnected facets of the same phenomenon. Ideally, and in a mutually beneficial fashion, this effort could provide for the common law scholars and practitioners a window to a systematic, deductive, and top-down approach – that would greatly help the understanding, exploration and development of many categories – at the same time that it would render the same advantages for civil law scholars and practitioners, usually blindsided by excessively theoretical perspectives.

4 Gevaerd, Jair. Direito societário: teoria e prática da função. Curitiba : Genesis, 2001. 2v., 706 pags. ISBN85-85947-06-3 (Gevaerd, Jair. *Corporate Law: theory and practice of function. Curitiba: Genesis, 2001. 2vol. 706 pages*).

5 Few concepts in the doctrine of International and Conflict of Law are so theoretical and cerebral than the concept of nationality, to the extent that it is absolutely embedded in the primeval roots of the State Theory, as envisioned by contractualists as Rousseau, Hobbes, Locke and other framers of the Political Theory.

6 *Id est*, the contrary of *nationality*, as it is defined in most domestic legislations, is *non-nationality*, not *internationality*, as defined by the Uncitral Model Law.

7 According to Redfern *et alii*, this is the case, for instance, of the advanced, precise, and very virtuous definition given by the revoked article 1492 of the French Code of Civil Procedure that stated: "*Est international l'arbitrage qui met en cause des intérêts du commerce international.*" ("*It is international the arbitration that refers the interests of international trade*" – free translation of this paper's Author, http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=E6A9BD612ACABE8DAD57CC7767D831BA.tpdila23v_1?idArticle=LEGIARTI000006412693&cidTexte=LEGITEXT000006070716&categorieLien=id&dateTexte=20110430). This specific provision, however, was superseded in May, 01st, 2011, by another formulation (even though the edition of the book cited in this footnote does not mention that the same article in not anymore valid). Nonetheless, another interesting and opportune citation is mentioned in Redfern *et alii* concerning, this time, to the definition generally adopted by the "*Cour de Cassation Française*", as follows: "*It is generally recognized that this definition covers the movement of goods or money from one country to another, with significant regard being paid to other elements such as the nationality of the parties, the place of the conclusion of the contract, etc.*" *Redfern, A., Hunter, M., Blackaby, N., & Partasides, C. (2009). Redfern and Hunter on International Arbitration (Fifth ed., p. 727). New York, NY: Oxford University Press, p. 281/282, item 1.24, p. 10.*

enquiries by the scholar community, as well as by the Author himself, whom is still developing research over the topic.

2 The specific language of the Uncitral Model Law

The Uncitral Model Law is a prototypical draft set up by the United Nations Commission on International Trade Law in December 1985 and revised in July 2006, containing all the necessary, useful, and convenient provisions for the functioning of international commercial arbitration. Theoretically and as originally formulated, it is ready to be ratified by all member States, unconditionally or with reservations. It envisions uniformity as for the treatment that domestic jurisdictions dispense for international arbitration regulation and practices, and it is intended to facilitate the use and efficiency of the same institute.[8]

Concerning *commerciality* and *internationality*, in the order that these concepts appear in the respective text, the Uncitral Model Law is spelled as follows:

> UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION
>
> Article 1. Scope of application[9]
>
> (1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.
>
> (…);
>
> (3) An arbitration is international if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

[8] The document "*Resolutions adopted by the General Assembly of the United Nations Commission on International Trade Law (64th plenary meeting – 4 December 2006) – 61/33*", clarifies and confirms this assumption, by stating: "*(…) Recognizing the need for provision in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures*".

[9] *The term "commercial" should be given a wide interpretation so as to cover matters from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement of concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.*

> (ii) any place where a substantial part of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.
>
> (4) For the purposes of paragraph (3) of this article:
>
> (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
>
> (b) if a party does not have a place of business, reference is to be made to his habitual residence.
>
> (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to the provisions other than those of this Law.

2.1 What the specific language of the Uncitral Model Law is actually *saying*?

Dully appraised, this question does not admit a simplistic answer. Most often than not, and in the heat of a bursting new case, attorneys take the provisions just quoted by their *face value* and end up overlooking their theoretical and practical importance. The usual sources, by their turn and as far as the Author could notice, seldom go beyond the literality of the legislative text. In sum, and perhaps in awe before other complexities that usually fill up the merits of an international arbitration case, very few interpreters seem to dig deep for the ultimate implications of the *internationality criterion* created by the provisions in sight. Nonetheless, by inadvertently jumping over the supposedly clear spelling of the Uncitral Model Law – and concentrating only on the apparent *meat* that lays ahead – interpreters might be dangerously skipping preliminary jurisdictional issues that might *reincarnate* later on time and disrupt the recognition and enforcement of an otherwise finished award. As shown hereby, a well-advised reading of the *internationality* test is key to the understanding of the complexities hidden in the apparently clear proposition of this piece of legislation.

In order to solve this conundrum, and according to a reverse dialectic method, this paper begins to face it by first explaining what *internationality* is *not*. After accomplishing this goal, and by contrast, the actual meaning of the concerned provision will be more easily explained.

2.2 What *internationality* is not, in the context of the Uncitral Model Law?

2.2.1 Internationality, concerning arbitration procedures, is not the contrary of nationality

2.2.1.1 The first possible meaning: *international* procedures and awards *versus national* procedures and awards

It might be appealing the idea that *international arbitration procedures* are those which are not *national*.[10] Correct? Well, generally speaking, yes! Legal concepts are usually explained and validated by contrast with others that, theoretically, represent its counter mirror image. That is the traditional bi-dimensional, bipolar, and diametrically contrastive method of definition that prevails in the legal field.

However, the attempt to obtain the definition of *internationality* through contrast, opposition, and/or counter-reference to any other antagonistic or antipodal notion – especially *nationality* – turns to be inconclusive, artificial, and meaningless. At least according to the state of art of the traditional Legal Theory. Here is why.

First, there are the die-hard contentions over whether international commercial arbitration, while a legal phenomenon, directly or indirectly derives from the jurisdictional power of the state in which it takes place, that is, if it is (i) an *indirect judicial* process, (ii) a *quasi-judicial* process, (iii) *a judicial-like* process or, otherwise, (iii) a *contractual* creation whose adjudication and enforcement depend on national sources.

Second, it is beyond any reasonable doubt that the *validity* and *efficacy* (national categories), as well as the *recognition* and *enforcement* (international categories)[11] of international commercial arbitration procedures are – in the internal domain of the implicated domestic State(s) – almost always dependent on the observance of the regulations of domestic regulations, such as the law of the seat, not to mention other possible concurrent jurisdictional regulations as, for instance, those pertaining to governing laws.

[10] Redfern, A., Hunter, M., Blackaby, N., & Partasides, C. (2009). Redfern and Hunter on International Arbitration (Fifth ed., p. 727). New York, NY: Oxford University Press, p. 281/282, item 1.16, p. 8. The same author's, however, recognize the vulnerability of this contention in item 1.17, same page.

[11] In order to thoroughly understand the outreach and meaning of this particular contention, please see a following paragraph in which *functionality* is defined as an aboriginal, autonomous, and "*purely international category, not only useful, but completely necessary for the balanced survival of the whole international community*".

This means that *international* commercial arbitration procedures do not *fluctuate* suspended in the transnational stratosphere. Conversely, and paradoxically, they own their very existence, validity, and efficacy (encompassing their domestic enforceability) to the application of at least one national legal order. In other words, and according to the specific sense explored in this paragraph – that strictly construes meaning from the reading of traditional categories of the State Theory (*e.g.* the contractualist[12] notion of *sovereignty* and the *principle of effectiveness of the state jurisdiction,* as laid down by Hugo Grotius)[13] – the international arbitration procedures are not international, but legal phenomena totally dependent on national and domestic jurisdictions.

But, please wait! Let us not allow this obvious realization – posed as a rhetorical, nonetheless truthful, argument – impair the proper understanding of this article's contention. This does not imply, however, that the *functionality* of an international arbitration procedure or award – granted by the *internationality* test herein discussed – is dependent on any whatsoever national jurisdiction (and that is what this paper is highlighting).

Agreed! This might be a so far unheard contention and/or a new perspective from which to look at *internationality*, as posed by the Uncitral Model Law. Just the same, it is perfectly coherent with what the same legal diploma proclaims when it spells the *internationality* test, and with the application of the Grotian principle of effectiveness to the international realm. Moreover – and as dully explained ahead – the synergic, factual, and directive proposition contained in the Uncitral Model Law referring *internationality operates* "*in function of*"[14] a foundational and very specific international *value* or *interest*: the maximum efficiency of the free transnational commerce flow (i.e., the *commerciality* test, also proclaimed by the same Law).

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[12] Either as envisioned by Locke, Hobbes, Hume, Rousseau, or, far more recently, Rawls (Legal Theory Lexicon 058: Contractarianism, Contractualism, and the Social Contract. https://lsolum.typepad.com/legal_theory_lexicon/2006/09/contractarianis.html).

[13] Hugo Grotius. The Law of War and Peace, De Jure Belli Ac Pacis Libri Tres (Francis W. Lelsey trans. The Bobbs Merrill Company, Inc. 1925). For an updated account of the contemporary influence of Grotius' ideas in International Law, please see John T. Parry, *What is the Grotian Tradition in International Law?* 35 U. PA. J. INT'L. L. 299, 316-18 (2014).

[14] With the due rhetoric license, and to pour a drop of multidisciplinary on the definition of *functionality* ("in function of") as employed in the text, this following mathematic account might come handy*:* "*Function definition. A technical definition of a function is: a relation from a set of inputs to a set of possible outputs where each input is related to exactly one output. This means that if the object xx is in the set of inputs (called the domain) then a function ff will map the object xx to exactly one object f(x)f(x) in the set of possible outputs (called the codomain). The notion of a function is easily understood using the metaphor of a function machine that takes in an object for its input and, based on that input, spits out another object as its output. A function is more formally defined given a set of inputs XX (domain) and a set of possible outputs YY (codomain) as a set of ordered pairs (x,y)(x,y) where x∈Xx∈X (confused?) and y∈Yy∈Y, subject to the restriction that there can be only one ordered pair with the same value of xx. We can write the statement that ff is a function from XX to YY using the function notation f:X→Yf:X→Y*". (In https://mathinsight.org/definition/function.)

But, why? What are the additional evidences – or, at least, the indicia – that this interpretation is viable?

One, as it was just explained, because in the legal lexicon *nationality* is a totally cerebral and political domestic concept. Soaked in the classic contractualist Theory of Law and State, it lays down a multitude of rather aleatory criteria to attribute jurisdictional affiliation in favor of natural and juridical persons. Based upon this very truthful account, how the *internationality* test mentioned in the Uncitral Model Law remotely relates to the concept of *nationality*?

In no conceivable way! Contrary to the *nationality* test in vigor in most domestic jurisdictions, the *internationality* test of the Uncitral Model Law is a non-theoretical, but a *factual* and integrative system, that establishes precise integrative grounds – or, more specifically, undoubtful *de facto* hypothesis – which, once verified, *authorize* domestic legislations regularly implicated in a given international arbitration procedure to give *free passage* and grant full *recognition* and *enforcement* to an indigenous and self-sufficient conflict resolution instance, totally strange to the classical national ones (precisely, the international commercial arbitration procedure).

In other formulation, the factual *internationality* test described by the Uncitral Model Law – because it comes integrated with the *commerciality* test also defined by the same legislation – grants *functionality* to a peculiar and autonomous dispute resolution method which has nonetheless been, as an international legal genre, validated *ex ante* by the potentially implicated national jurisdictions, through the typical due process tools (reception, enactment etc.).

Two, because according to the token set up in the previous paragraph, *validity* and *efficacy* – which are legal attributes of an arbitration procedure *within* the territorial realm of the state(s) specifically implicated in the suit – are totally theoretical and national categories, fully rooted in equally cerebral domestic tests which, by their turn, are stemmed in the co-respective *nationality* concept.

Three, because *functionality*,[15] on the other hand - defined as the *capacity* of a legal, ethical, and persuasive command pragmatically *cause* a *de facto* circumstance that ends up recognized/enforced for the sake of a greater good (*commerciality*) – is a purely international category, not only useful, but completely necessary for the balanced survival of the whole international community.

That is to say – according to the reasoning hereby proposed – that an international arbitration procedure/award will be *valid* and *effective*, in the realm of a given and implicated jurisdiction, if it complies and was formed in accordance

[15] Once more and for what it is worth, the whole definition: *functionality* is the capacity of a legal, ethical, and reasonably persuasive command, once coming from a self-imposing authoritative source, to pragmatically cause or produce a *de facto* circumstance to be fully effectuated, observed, or complied with.

with pre-established conditions stipulated by the same jurisdiction. Notwithstanding this, and for it to be *functional* – and therefore *recognizable* and *enforceable* as such (a binding international arbitration procedure/award) – it has to be established in accordance to the *internationality* and *commerciality* tests set up in the Uncitral Model Law, alone.

This is what the *internationality* test is: a stemming notion for the international commercial arbitration field. It proclaims, in complete detachment of the most traditional categories of any domestic legal system, an entirely *original*, *peculiar* and *functional* category. This autonomous and purely category, combined with the *commerciality* test also established in the same diploma – and based solely upon the effectiveness of the international commerce (not on the artificiality of the purely theoretical legal doctrines) - makes possible and warrants the desirable free flow of the transnational commerce.

Accordingly, *internationality* is not a descriptive, but a rather functional concept. Beyond a merely theoretical notion, it refers a *state of fact*, a "*de facto*" reality that characterizes a given and peculiar legal proceeding (the international arbitration procedure). Factually, it derives from the particular way that an international trade transaction is conceived, contracted, intended, and/or actually performed, to any extent.

2.2.2 *Internationality*, concerning arbitration procedures, is not *only* about (a) extraterritoriality, (b) application of different national laws, (c) multiple nationality of the parties or (d) the combination of all the above

2.2.2.1 The second possible meaning: would it all sum up to a (a) topographic criteria, (b) multiple regulations, (c) different nationalities or (d) a *potpourri* of the above?

All domestic States seat on exclusive territories. By the way, the key elements that according to the State Theory characterize the unique and self-sustaining entity which is the national State is (a) the exertion of the monopoly of power (b) over an identified population (c) *within* the four corners of a given territory.[16]

[16] A final ingredient of sovereignty is territoriality, also a feature of political authority in modernity. Territoriality is a principle by which members of a community are to be defined. It specifies that their membership derives from their residence within borders. It is a powerful principle, for it defines membership in a way that may not correspond with identity. The borders of a sovereign state may not at all circumscribe a "people" or a "nation," and may in fact encompass several of these identities, as national self-determination and irredentist movements make evident. It is rather by simple virtue of their location

Would this mean that every commercial arbitration procedure that happens outside the frontiers of a given State is, for that same domestic jurisdiction, an international commercial arbitration?

Going a little further, and implicating the domestic jurisdictional token, would by chance be international, for all domestic jurisdictions, that commercial arbitration whose seat and regulations are foreign?

Or else: would be international, the commercial arbitration which parties are nationals from different domestic States?

Last, but not least, would an occasional combination of foreign elements - place of arbitration, applicable laws, multinational parties, etc. - be a valid criterion to characterize a commercial arbitration as international?

In a demonstration of the full application of what this article contends in the earlier section, the answer to all those questions is *negative*.

The sole introduction of extraterritorial elements, isolated or altogether considered – and no matter if geographical, jurisdictional, or personal – does not hijack the national affiliation of a given commercial arbitration procedure, neither turns it into an international suit. That is, by the way, one more reason to affirm that *internationality*, as posed by the Uncitral Model Law, is not the contrary of *nationality*, as an International Law concept, nor it has to do with purely territorial or solely multi-jurisdictional criteria.

2.2.2.1.1 About the topological token

Although virtually every State has a geographical, topological, and territorial reference – and regardless the realization that, as a matter of ordinary reference, everything happening outside its four corners is an *international* deed – this logic does not necessary apply to arbitration. The place of arbitration, as an isolated factor, says nothing, or very little, about the international nature of a commercial arbitral procedure. In short, multi-nationality, transnationality, and extraterritoriality are important geographic notions which are frequently coadjutant to the definition

within geographic borders that people belong to a state and fall under the authority of its ruler. It is within a geographic territory that modern sovereigns are supremely authoritative. Territoriality is now deeply taken for granted. It is a feature of authority all across the globe. Even supranational and international institutions like the European Union and the United Nations are composed of states whose membership is in turn defined territorially. This universality of form is distinctive of modernity and underlines sovereignty's connection with modernity. Though territoriality has existed in different eras and locales, other principles of membership like family kinship, religion, tribe, and feudal ties have also held great prestige. Most vividly contrasting with territoriality is a wandering tribe, whose authority structure is completely disassociated with a particular piece of land. Territoriality specifies by what quality citizens are subject to authority — their geographic location within a set of boundaries. International relations theorists have indeed pointed out the similarity between sovereignty and another institution in which lines demarcate land — private property. Indeed, the two prominently rose together in the thought of Thomas Hobbes (In https://plato.stanford.edu/entries/sovereignty/).

of an international commercial arbitration, as one can see by merely glimpsing the verbatim spelling of the Uncitral Model Law article 1, *caput* (and very especially, its *footnote*), combined with 1(3)(a) and (b), (i) and (ii). But the core of the *internationality* concept is only incidentally affected by topological contingencies.

Hence, it is perfectly possible that, for random reasons, an entirely national arbitration -involving domestic parties, domestic laws, and domestic places of performance and execution – seats outside the territory of that particular domestic State. It is also possible that a *classical* international commercial arbitration happens on a seat located in a given domestic State which, in addition to host the procedure itself, borrows its statutes as governing law, *and* its territory as a place of performance, recognition and enforcement. In conclusion, by itself – and even if combined with other also coadjutant factors and elements – the extraterritoriality of the place of arbitration does not necessarily indicate the international character of a given procedure.

2.2.2.1.2 About the jurisdictional token

The authority of one or more sovereign regulatory body over an international commercial arbitration procedure, and/or the incidence of laws and regulations derived from jurisdictions different from that of the seat of that particular suit, are not, as well, a determinative criterion of *internationality*.

As far as the concerned domestic law allows – and most of them do – a national arbitration procedure could apply foreign laws without implying, as an unavoidable consequence, any inference of *internationality*.

2.2.2.1.3 About the multiple nationality of the parties

The nationality of the parties, by its turn, cannot be considered as a definitive test on whether a given arbitration procedure is international. As seen along the developments of this paper, *internationality*, while a notion referred to commercial arbitration, is a concept that may coexist with all prevailing systems that define *nationality* in the traditional doctrine of International Law and Conflict of Laws. It is also true that the coexisting grounds for *nationality* might be as diverse as the *locus regit actum* theory, the concession by extraterritorial incorporation, the acquisition by annexation of foreign territory, the granting in view of economic, scientific or other relevant status, and/or the recognition based on the *ius soli* or *ius sanguinis* tests, among others. In other words, it is actually possible, and even quite common, to have a national commercial arbitration among parties that are nationals of different states, and *vice-versa*, without any rippling effect as for the necessary *nationality* or *internationality* of the procedure.

2.2.2.1.4 About the *potpourri* of criteria

The combination of the tests aforementioned – as for example (i) place of arbitration, (ii) nationality of the parties, and (iii) application of foreign sources – by its sole joint effect, does not determine, as well, the *internationality* of the concerned procedure. Way beyond formal requisites, substantial requirements related not only to the nature of the subject-matter, but also to the concrete and factual nature of the underlying material relationship between the parties, are the controlling factors for the determination of the *internationality* of an arbitral procedure, as it is seen in the *segue*.

2.3 What *internationality* is, in the context of the Uncitral Model Law

A systematic, teleological, integrative and functional interpretative approach[17] is what actually reveals the core of the *internationality* concept.

Indeed! By broadly referring (i) "*place(s) of business*", as in 1 (3) (a) and 1 (4) (a) (b), (ii) "*place of arbitration*", as in 1 (3) (b) (i), (iii) "*place where the substantial part of the obligations of the commercial relationship is to be performed or the place to which the subject-matter of the dispute is most closely connected*", as in 1 (3) (b) (ii)[18] – and by clearly stating the extremely eloquent forewarning of the footnote #1 to its article (1) – the Uncitral Model Law went far beyond any *geographic* and/or *legal* concept. When referring to "*(place of) business*" or "*commercial relationship*" or "*obligations*" it actually has gotten past the traditional concepts of *extraterritoriality*, *multi-nationality* and/or *transnationality*, and incorporated a *geo-economic* and *geo-strategic* notion of *international trade transactions*.

As a *systematic*, *historical*, and *teleological reconstruction* of the aforementioned provisions reveals – and to bring up a definitive argument that uncovers the exact *mens legis* and *mens legislatoris*[19] thereto implicated – the *geo-economic* and *geo-strategic* token just mentioned, fully understood as an International Law principle and precedent, significantly precedes the advent of the Uncitral Model Law, and applies to the best interest of the *free international*

[17] About the interpretation methods state of art, see Greenberg, Mark. What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants. Feb. 10, 2017, 130 Harv. L. Rev. F. 105 (In https://harvardlawreview.org/2017/02/what-makes-a-method-of-legal-interpretation-correct-legal-standards-vs-fundamental-determinants/), and Actes du colloque pour le cinquantième anniversaire des Traités de Rome. Report of Mr. Justice John L. Murray, President of the Supreme Court and Chief Justice of Ireland. Methods of Interpretation – Comparative Law Method (In, https://curia.europa.eu/common/dpi/col_murray.pdf).

[18] The underlining is not from the original source.

[19] Latin expressions that mean, respectively, *the intent or purpose of the law* and *the intent or purpose of the legislator* (the draftsmen).

trade and to the *functionality* of international commercial arbitration suits. Symptomatically, Redfern *et alii*[20] observes that the French Civil Procedure Code already proclaimed the geo-economic and geo-strategic token, as follows: "[*e*]*st international l'arbitrage qui met en cause des intérêts du commerce international*" ("*It is international the arbitration that refers the interests of international trade*").[21] Also, the "*Cour de Cassation Française*" had ruled that: "[*i*]*t is generally recognized that this definition*" (international commercial arbitration) "*covers the movement of goods or money from one country to another, with significant regard being paid to other elements such as the nationality of the parties, the place of the conclusion of the contract, etc.*".[22]

That equals to say that, long before the statement of the *Internationality Principle* by the Uncitral Model Law – which is totally integrated with the *commerciality* test – the current and overspread understanding of the international commercial arbitration community about the same matter had been construed in the way that corroborates what was, afterwards, proclaimed by the same legal diploma, in the following language:

> The term "commercial" should be given a wide interpretation so as to cover matters from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for

[20] Redfern, A., Hunter, M., Blackaby, N., & Partasides, C. (2009). Redfern and Hunter on International Arbitration (Fifth ed., p. 727). New York, NY: Oxford University Press, p. 281/282, item 1.24, p. 10.

[21] The mention is to the "(…) Article 1492 (as amended by Decree no.81-500 of May 12, 1981) of the French Code of Civil Procedure", as explained by Bonnel, Michael Joachim. Do We Need a Global Commercial Code? 106 Dickinson Law Review (2001) 87-100. (In https://www.cisg.law.pace.edu/cisg/biblio/bonell1.html).

[22] About the contemporary application of this same token in France, see Mauziau, Nicolas; Cazala, Julien; Trigeaud, Alexis Marie Laurent.
Jurisprudence française relative au droit international (année 2013) [article]. In Annuaire Français de Droit International Année 2014 60 pp. 867-891. Quotation: "*Section III : Arbitrage, qualification interne ou international. 24. Dans une affaire très simple, la Cour de cassation rappelle que la volonté des parties à l'arbitrage ne peut tout. Elle doit plier face aux règles d'ordre public relatives à la qualification de l'arbitrage (Cass. civ. 1ère, 20 novembre 2013, Saica Pack France SAS c. Société Automation Group, arrêt nº 1318 F-P-B, pourvoi nº M-12-25266 ; Rev. Arb., 2014-2, p. 383). Une société française conclut en 2006 avec une société italienne un contrat commercial dans lequel figure une clause compromissoire prévoyant que les différends nés de l'exécution du contrat seront réglés par la voie de l'arbitrage. Cette clause est activée et un tribunal arbitral rend une sentence en mars 2011. La justice française est rapidement saisie par l'entreprise italienne d'un recours en annulation de la sentence. Pour procéder à l'annulation, la cour d'appel de Dijon retient que l'arbitrage est, conformément à ce que prévoit la clause compromissoire, soumis au droit interne. Or, la Cour de cassation considère «qu'il n'appartient pas aux parties de modifier le régime interne ou international de l'arbitrage, dont la qualification est déterminée en fonction de la nature des relations économiques à l'origine du litige». Aux termes de l'article 1504 du Code de procédure civile, «*[*e*] *st international l'arbitrage qui met en cause des intérêts du commerce international» . L'enjeu de la qualification reste entier bien que le jurisprudence française relative au droit international 891 décret nº 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage vienne limiter sensiblement les différences de régime entre arbitrage interne et arbitrage international. La qualification permet toujours de déterminer, notamment, les voies de recours à l'égard de la sentence (CA Paris, Pole 1, ch. 1, 5 mars 2013, Me B. Pascal ès-qualités c. Société Eiffage International, nº Rép. Gén. 11/ 13246)*".

> the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement of concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

The bottom line here is obvious. Any interpreter that considers the totality of the legal and factual circumstances evoked in the text of the Uncitral Model Law, and construes the *internationality* concept from an integrative connection with what is stated by article (1) and its over-eloquent footnote, will certainly reach the understanding that the controlling interpretative vector that determines the actual sense of *internationality* is, precisely, *commerciality*.

According to this reading, *internationality* may be related – incidentally and as hereby referred – to (i) geographical tests, (ii) international places of businesses, performances, and executions, (iii) international, extraterritorial, transnational and/or multi-national subject-matters, and (iv) concurrent foreign legislations, among other factors. Nevertheless, the *controlling* test for the ultimate determination of the *internationality* of a given arbitration procedure is the existence of an underlying commercial relationship that is *consistently*, *inherently,* and *innately* linked to the uniform, reiterated, and constant flow of the international trade.[23]

2.4 *Commerciality* as the controlling criterion for the determination of the *internationality* of a given arbitration procedure.[24] Twin tests connected by function

Indeed, as proposed by the Uncitral Model Law, *internationality* cannot be understood outside the factual framework encompassed by the *commerciality*

[23] A banking agreement, for instance, that was celebrated in Brazil and will be executed and performed in Brazil, but is intended to be governed by the laws of the Canton Zurich, Switzerland, and adjudicated by the ICC, in Paris, is an international arbitration not because of the (inter)nationality of the parties, the (inter) nationality or extraterritoriality of the performance or because the extraterritoriality of the governing law. But because the connection that this particular economic operation bears with the international flow of capitals and the essentially international financial system. In other words, because of its *commerciality*, as referred by the Uncitral Model Law. If, in spite of the many extraterritorial factors mentioned in this hypothetical, this specific peculiarity cannot be evidenced – meaning that the underlying economic operation cannot be subsumed to the *commerciality* test of the Uncitral Model Law -, even the presence of a foreign governing law would not impede the characterization of the arbitral procedure as merely national. In sum, and according to the Author's opinion, the pertinence to the *commerciality* criterion, as stated by the Uncitral Model Law, is determinative and material to the qualification of a given arbitration procedure as international.

[24] As one can easily notice, the explanatory notes that go with the 2006 amendment of the Uncitral Model Law are consistent with the perspective explored in this paper. "*Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006. (…) a. Substantive and territorial scope of application. 11. Article 1 defines the scope of application of the Model Law by reference to the notion of "international commercial arbitration". The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of*

concept. Both notions are intimately linked and, combined, they serve a very precise purpose: the protection of the many factual forms that grant the uniform, constant, continuous, reiterated and ever evolving flow of international trade.

That is to say that, if a given case fails to portray evidence of an underlying "de facto" relationship that involves the vivid economic factors that keep the global capitalistic mode of production constantly moving, *internationality* will not be characterized, in spite of the eventual presence of other extraterritorial, transnational, multi-national, or foreign elements.

The interaction between the two criteria, as set up by the Uncitral Model Law, is justified and explained by the *utilitarian*, *protective*, and *functional* interest in the preservation of the continuous and massive movement of goods, services, commodities, capitals, and technologies which allows and harbors the survival of a global economic system that, through its great diversity, feeds the international community of States with resources that are indispensable to its subsistence.

Essentially functional for both (a) the international trade system and (b) the international legal arbitration system – and similar to how two equally well assembled sustentation pillars work in support of a massive structure – *internationality*, on one hand, and *commerciality*, on the other, held together a multilayered and cooperative legal framework that guarantee fairness and fluidity to vital sectors of the global economy.

Through a judicial-like structure that extensively utilizes traditional resources of different families of law (as for instance the Civil and the Common Law systems), this concatenated and adaptable legal structure allows international arbitral tribunals – in cooperation with national courts – to deal with complex substantial and procedural aspects of a multiplicity of cases, and to provide adjudication, enforcement, and effectiveness to a portentous web of national and international laws, treaties, agreements, contracts and other sources of obligations, checks and balances.[25]

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that agreement, their places of business in different States" (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law. 12. In respect of the term "commercial", the Model Law provides no strict definition. The footnote to article 1 (1) calls for "a wide interpretation" and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, "whether contractual or not". The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of "commercial law" that may exist in some legal systems" (www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB explanatoryNote20-9-07.pdf).

[25] The *commerciality* test proclaimed by the Uncitral Model Law is not original neither new. In fact, its roots can be traced backwards to the dawn of the commercial capitalistic production mode, usually identified

In conclusion, *internationality* will be present whenever the tests mentioned by the article 1, (3) and (4) of the Uncitral Model Law appear corroborated by factual relationships involving the production, circulation, distribution, transportation, storage, trade and consumption of riches in the international system of trade.

3 A particular consideration

3.1 The case of the article 1 (3) (c) of the Uncitral Model Law

After analyzing the general formulation of the *internationality* concept, a parenthesis must be opened to address the concerning wording of the article 1 (3) (c) of the Uncitral Model Law.

What would it imply?

Would it by chance suggest that it suffices the legal test the sole contractual representation of the parties as for the *internationality* of its dispute, dispensing an underlying material commercial relationship of any kind?

According to the Author's meditated opinion, no. It seems tautological on this regards that the mere representation of the parties about the *internationality* of a given dispute, unaccompanied by any corroborating factual *indicia* in the same direction, would not only be unacceptable but would also open leeway to all sorts of frauds, conspiracies and collusions.

Therefore, a literal interpretation that would advocate the possibility of an "*internationality by representation of the parties*" – but totally empty of material evidence – seems to be completely inadmissible.

Apart from that, and referring to another factual possibility, it is actually questionable the extent to which episodic and isolated commercial relationships – with no real functional significance for the maintenance of the flow of the international trade – would be considered international, in light of the cannons of the Uncitral Model Law.

The most sensible interpretation, in such cases and pursuant to this paper, is that any given relationship that presumptively present an actual underlying

with the early thirteenth century. It consists of a finalistic, functional, and ontologically oriented criterion largely based in the factuality of the concrete economic circumstances rather than derived of historical or theoretical considerations. The very existence of Commercial Law (*ius mercatorum*), as an autonomous legal field that did nor evolve from the common stem of civil law, and affirmed long before the development of Common Law, is a consequence of the appliance of this functional approach. In this domain, the sources of law were mainly factual and directly derived from the practices of the economic and mercantile environments, while adjudication was exercised by the guilds of merchants (Galgano, F. Storia del diritto commerciale. Nuova scienza. Il Mulino, 1976). Contemporarily, the so-called Entrepreneurship Law, based upon the enterprise theory, is overspread through most of the western civil law jurisdictions and is decisively supported by quite the same functional and ontological criterion.

commercial motivation shall be admitted as commercial, until evidence on the contrary is presented by any interested intervener.

Therefore, if the underlying commercial relationship in a given case is not, by its particularities, authentically representative of the *commerciality* referred by the article 1 (1) of the Uncitral Model Law, it would be up to the interested parties – what evidently includes the arbitration panel and even the institutional authority that hosts the arbitral procedure – to raise the issue and dully challenge the supposedly irregular contention.

Besides the inherent logic that supports this reasoning, public policy is also a concern that may advise the parties to make sure that the *functional criteria* of the law (i.e. the materiality and factuality of the *commerciality* test) are in fact present in the case. Since *internationality* is clearly *extraordinary* – in the sense that it puts aside the ordinary jurisdictional power of one or more domestic states over irreconcilable conflicts of interests – the domestic authority to whom the *exequatur* of an international commercial arbitration award competes may challenge the materiality of its commercial merit and refuse recognition or enforcement on grounds that there is no underlying relationship attending the requirements of the Uncitral Model Law. Or, to problematize the issue in a Socratic way: considering the core of the Uncitral Model law definition of *internationality*, intimately connected to *commerciality*, would not be the case of applying the materiality test to certify the situations in which *internationality* is really at stake and therefore avoid the misuse of the concept, along with its potentially illicit and fraudulent consequences?

3.2 The article 1 (5) of the Uncitral Model Law and the public policy reservations

In spite of all the considerations so far spent, and as naturally admitted in matters involving the self-disposition of sovereign powers, any State may establish, by law or other kind of regulations, exceptions for the appliance of the any criteria and/or dispositions laid down by the Uncitral Model Law. This caveat shall be accepted as a matter of sovereignty and may actually prevent the efficacy of the cannons of this law in light of special circumstances, at the convenience of each member and adopting State.

4 Characteristics of *internationality*, according to the Interpretation Construed Hereby

According to the interpretation proposed in this paper, the characteristics of *internationality* in the Uncitral Model Law are:

- *Commerciality* – as extensively seen, the criterion of *internationality* in the Uncitral Model Law depends on a due integration with the *commerciality* test, for its full understanding and application. Both criteria are actually co-dependent and tied. Taken out of the context of the materiality of the economics of the global production mode – and deprived from the reference to the specific relationships that grant the uniform, constant, and reiterated movement of goods, services, and riches in the international trade settings – *internationality* remains purely a geographical concept that does not translate the purpose of the Uncitral Model Law's draftsmen.
- *Functionality* – instead of theoretical and rational constructions, the *leitmotiv* of the particular *internationality* concept adopted by the Uncitral Model Law is the protection, preservation, and warranty of the ever-flowing continuum of the international trade. By allowing the fair functioning of a quasi-judicial system of adjudication, enforcement, and control of the economic relations that support this global system – within the material and factual scope described in the footnote to its article – the Uncitral Model Law actually fosters the perpetuation and the fair operation of the international trade. This intended and reciprocal causality – that co-implicates the legal concepts of *internationality* and *commerciality* within the concrete reality of the international trade environment – can be called *functionality* and is one of the most peculiar features of the concept hereby discussed.
- *Factuality* – as opposed to abstractness, the word *factuality* is employed in the context of this paper as the real, objective, concrete, and practical nature of the *internationality* concept. Its ontology is entirely exhausted in the natural world, without any reference whatsoever to rational contents. *International*, according to this characteristic, are the commercial relations that owe its existence to the concrete needs of the international trade of goods, services, and riches, as well as its ancillaries, regardless all other cerebral and/or theoretical considerations.
- *Spontaneity* – *internationality*, as stated by the Uncitral Model Law, is a "*de facto*" and spontaneous reality that dispenses any other theoretical element for its dully configuration. It exists – independently, before, and regardless the definition of the law – as a material phenomenon of life and by the sole imposition of a commercial factual relation. In other words, its materiality does not require any qualification coming from the law and its existence, as well, is not a logical creation (or an attribution of) the law.
- *Coexistence and concurrency* – by proclaiming a totally factual, utilitarian, and functional concept of *internationality*, the Uncitral Model Law created a system of attribution of status (the *international* status) that is *parallel* and

may perfectly *coexist* with the traditional system of attribution of *nationality*, that is peculiar to the domestic jurisdiction. In other words, a party, a contract or a business, that by a given domestic system of attribution is consider to be ordinarily *national* (Brazilian, American, Belgian, etc.), *once* in the *area* of regulation of the Uncitral Model Law (through its functional, utilitarian, and factual criteria), becomes *international*, for the purposes of that particular arbitration procedure. Notice that these two different systems of attribution (domestic = *nationality*/Model Law = *internationality*) can harmonically coexist and be concurrent, since they are deemed to prevail in different legal settings and for different legal purposes.[26]

- *Impermanency* – when applied to a party, the attribution of *internationality* is not permanent or perpetual, but valid only for those specific relations that fall under the prevision of the Uncitral Model Law. Consequently, it is an *ex post* attribution strictly valid for that particular *mother-circumstance*, as well as for those directly derived from it, according to a *case-by-case* checking appraisal. As long as the factual situation of the party, or of the business relation specifically concerned, may change, the attribution of *internationality* may change as well, and no longer be sustainable. *Internationality*, therefore, is a transitory and impermanent attribution, whose functional validity is limited to the concerned commercial arbitration procedure(s).

5 Conclusion

This paper conveys a preliminary investigative effort whose intention is limited, so far, to the identification and initial exploration of a prolific research topic that might be further developed. Foreseeing this purpose – and in connection with the conclusions sparsely distributed along the paper – new investigative directions were suggested and left open along its text. Nevertheless, and to a minimally acceptable extent, the Author believes to have highlighted and discussed, in a scholarly fashion, some of the unique features of the two concepts investigated,

[26] This interesting peculiarity of the system of attribution of *internationality* created by the Uncitral Model Law somehow contradicts and challenges the notion of *state* or *status* prevailing in civil law systems and typically applied in the fields of International Public Law and Conflict of Laws. According to this notion, the *status* or *state* or a natural or juridical person are innate, inherent, and immutable legal privileges that corresponds to a natural right as well as a warranty of the concerned individual. It encompasses traditionally intangible elements as name, gender, filiation, nationality and other legal privileges (corporate limited liability and property rights, for instance), which shall not be violated and/or changed and must be protected to the maximum possible extent, also in the international setting. The occasional violations of *state* or *status'* rights, by virtue of inconsistent and abusive attribution of *internationality*, is an interesting topic for research, as far as the public policy of domestic states may be concerned.

bringing a modest contribution to the understanding of *internationality* and *commerciality*, as envisioned by the Uncitral Model Law. If this purpose were at least partially fulfilled – what is for the readers to ascertain – then the paper's effort would be paid off.

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