journals.unizik.edu.ng/index-php/jcpl
ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW

An Exposition of the International and Commercial Concepts in International Commercial Arbitration

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Abstract

It has become common to speak of international commercial arbitration but there is no clear concept of what is meant by the terms international and commercial. Arbitration generally is a form of dispute resolution with a long history; from its ancient times, it has generally evolved into a method of resolving disputes that is popular across nations, jurisdictions, and legal traditions. What renders an arbitration 'commercial' and whenit is internationalare the focus of this paper. This paper adopted the doctrinal research methodology with the aim of explaining the meaning of the concepts - 'international' and 'commercial' which are the two key concepts in international commercial arbitration. The objective of the work is to help in differentiating or distinguishing between internationalarbitration and domestic arbitration and to know when arbitration is commercial and when it is noncommercial. It has been discovered that the understanding of these two key terms will help in a better understanding of international commercial arbitration. This is because an arbitration that is considered international and commercial under one lex arbitri might not necessarily qualify as international and commercial under a different lex arbitri.

Keywords: *Arbitration, Commercial, International, Lex Arbitri, Domestic*

Introduction

The global vision of improving the efficacy of world trade and foreign investment is enshrined in the development of international arbitration. In recent decades, international Commercial arbitration has developed into the predominant method and accepted by the commercial world as a preferred or at least an appropriate system for dispute resolution of international trade disputes[1]. However, despite its internationally shared foundations, international Commercial Arbitration shows fragmentation, and is increasingly subject to criticism[2]. Since its inception, there is no agreement among scholars on what the term international commercial arbitration means. There seems to be no authoritative definition of international commercial arbitration. One definition given by one author is often rejected by another. International commercial arbitration can best be defined by focusing attention on the two key terms 'international' and 'commercial'[3]. The question

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[1] J D M Lew *et al, Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) p. 18

[2] A Reiner, "International Commercial Arbitration: How International, How Commercial is it? How autonomous is It and should it be? *General Reports of the XIXth Congress of the International Academy of Comparative*, June 2017.

[3] G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (Enugu: Iyke Ventures Production, 2004) p. 144

then is what makes arbitration an international one? And what makes it commercial? What are the criteria employed for such classifications? The answers to these posers shall be the major discourse in this work.

The Meaning of "International" in International Commercial Arbitration

According to Redfern and Hunter, the term international in this regard is used to underline the difference between an arbitration which is purely national or domestic and that which in some ways transcend national boundaries and so, is international[4].Ferrari andRosenfeld seem to share the same view with Redfern and Hunter, to them "the difference between international arbitration and domestic arbitration reflects the fact that the framework for arbitration proceedings involving an element of internationality is often different from the framework for purely domestic arbitration"[5].

Generally, national legislations, scholars and various conventions on international commercial arbitration have adopted different means in determining whether an arbitration is international or not[6]. Some have used two criteria, either separately or in conjunction in defining the term international, in the context of an international commercial arbitration[7]. For the proponents of 'two criteria', there are two basic methods of defining the term "international" in the same context under review. One is to consider the transaction; does it involve a transaction that is either in a state other than the place of arbitration or that takes place in two or more states. The other method is to consider the parties do they come from different states[8].

According toLew, in his book, there are three ways of establishing the international character of an arbitration. To him, an arbitration may be international because (a) its subject matter or its procedure or its organization is international; or (b) the parties involved are connected with different jurisdictions; or (c) there is a combination of both[9]. These three criteria have been described byLew as objective criterion, the subjective criterion and modern combined criterion.

The objective criterion focuses on the subject matter of the dispute and the international or national character of the underlying transaction. Hence the international commercial interests, or the cross-border element of the underlying contract, or the fact that the dispute is referred to a genuinely international arbitration institution, such as the ICC[10], the LCIA[11] or ICSID[12] would be sufficient for the arbitration to qualify as international[13].

The subjective criterion focuses on the Diversity of nationality/place of business of parties. According to the subjective criterion the focus is on the different nationality or domicile or place

[4] A Redfern, *et al*, *The Law and Practice of International Commercial Arbitration*, (London: Sweet and Maxwell, 1999) p. 14
[5] F Ferrari *et al*,*International Commercial Arbitration: A Comparative Introduction* (Cheltenham: Edward Elgar Publishing Limited, 2021) p. 18
[6] G C Nwakoby, *op. cit*, p. 145
[7]*Ibid*
[8]*Ibid*
[9] J D M Lew *et al, op.cit*, p.18
[10] International Chamber of Commerce
[11] London Court of International Arbitration
[12] International Centre for Settlement of Investment Disputes.
[13]*Ibid*

of business of the parties to the arbitration agreement. It follows that parties, individuals, or companies, should come from different jurisdictions.

The modern combined criterion is a hybrid approach which combines both the objective and subjective criteria. This criterion takes into consideration both the nature of the transaction that is the subject matter of the dispute and the nationality or domicile of the parties to the arbitration agreement. The internationality of both the subject matter and the parties are of the essence.

Some Legislations which define "International" in the Context of International Commercial Arbitration.

Article 1492 of the French Code followed the objective criterion of Julian Lew. Thus, the French law used the nature of the dispute in analyzing whether a dispute is international. Therefore, Article 1492 of the French Code of Civil Procedure reads: "An arbitration is international if it concerns interests of international trade. The French courts have taken liberal approach in interpreting this requirement. According to the French case law, it suffices that an arbitration concerns a transaction with cross border elements[14]. Thus, the French Law considers an arbitration to be 'international' if the nature of the business (for instance the movement of goods or money) is itself 'international', even if the parties concerned are based in the same country or are of the same nationality[15].

The ICC[16] Rules in 1923 also adopted the nature of the dispute as its criterion for deciding whether an arbitration was an 'international arbitration'. At first, the ICC considered business disputes to be 'international' only if they involved nationals of different countries, but it altered its Rules in 1927 to cover disputes that contained a 'foreign element', even if the parties were nationals of the same country. An explanatory booklet issued by the ICC as a publication state that:

> *The international nature of arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State it is international*[17]

Some other arbitration laws define internationality based on a more subjective element relating to the parties to arbitration. This second approach does not focus attention on the nature of the dispute, but on the parties to it. This involves reviewing the nationality, place of residence, or place of business of the parties to the arbitration agreement. It is an approach that was adopted in the European Convention of 1961[18] which, although little used, contains several useful definitions, including a definition of the agreements to which it applies as "arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States…."

Switzerland is one of the states in which the nationality of the parties determines whether an arbitration is 'international'. In Swiss law, an arbitration is 'international' if, at the time when the

[14]*Carthago Films Sarl v. Babel Sarl,* paris Court of Appeals, 29 March 2021 cited in F Ferrari *et al, op. cit,* p. 18
[15] S Kroll *et. al, International Commercial Law Synergy, Convergence & Evolution* (Netherlands: Kluwer Law International, 2011) p. 45
[16] International Chamber of Commerce cited in F Ferrari *et al, op. cit,* p. 18
[17] ICC Publication, No. 301, 1977, 19 cited in G C Nwakoby *op. cit.* p. 146.
[18] European Convention 1961, Art. 1 (1) (a)

arbitration agreement was concluded, at least one of the parties was not domiciled or habitually resident in Switzerland[19].

According to Austrian Law, an arbitration agreement must be regarded as international when it is made outside of Austria and awards made thereunder would be enforced by Austrian court only on the grounds that they are covered either by multi-lateral conventions which have been ratified by Austria or by bilateral treaties which provide that arbitral awards made within the territory of that country would be recognized and enforced[20].

The International Commercial Arbitration Act which applies to international commercial arbitration, subject to any agreement which is in force between Canada and any other state or states, and which applies in British Columbia has also defined international as thus:

3 (1) An arbitration is international if-

a) The parties to the arbitration agreement have at the time of the conclusion of the agreement their places of business in different states,

b) One of the following places is located outside the state in which the parties have their places of business:
   - the place of arbitration if determined in, or pursuant to, the arbitration agreement;
   - any place where a substantial part of the obligations of the commercial relationship is to be performed;
   - 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 state.

4. For the purposes of subsection (3),
   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, and

   b. if a party does not have a place of business, reference is to be made to the party's habitual residence.

5. For the purposes of subsection (3), the provinces and territories of Canada must be considered one state[21]

The Model Law, which was specifically designed to apply to international commercial arbitration, combined the two criteria and added a third criteria. Accordingly, the Model Law defines the term 'international' as thus:

An arbitration is international if:

[19]Art 176 Federal Statute on Private International Law, https://www.swissarbitration.org/files/34/swiss%20international %20arbitration%20law/IPRGF_english.pdf cited in Ferrari *et al*, p. 18

[20] W Melis, *A Guide to Commercial Arbitration in Austria, Vienna*, 1983, 28 cited in G C Nwakoby *op. cit*, p. 147

[21]International Commercial Arbitration Act 1996 Cap 233 s. 1 (3) available on <https://www.bclaws.gov.bc.ca/civix/Document/id/complete/statreg/96233_1accessed on 5th Nov. 2021.

(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;

(ii) any place where a substantial part of the obligations 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[22].

Also, our Arbitration and Conciliation Act of Nigeria states that an arbitration is international if:

d) The parties to an arbitration agreement have at the time of the conclusion of their agreement, their places of business in different countries; or

e) One of the following places is suited outside the country in which the parties have their places of business;

(a) The places of arbitration if such place is determined in or pursuant to the arbitration agreement;

i. Any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

ii. The parties have expressly agreed that the subject matter of the agreement relates to more than one country; or

iii. The parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration[23]

Among all these legislations, it is only Model law and the Arbitration and Conciliation Act of Nigeria that gave a more encompassing and detailed definition of the term 'international'. They both included all the criteria. The only difference is the inclusion of paragraph 2 (d) in the Arbitration and Conciliation Act. It is worthy to note that in all the definitions from all the legislations discussed above, it is observed that some legislations defined international arbitration by referring to the parties, others refer to the place of arbitration or the subject matter of the dispute or a combination of all.

Further, the instruments that have developed international arbitration historically rang from the Geneva Protocol of 1923 through the current New York Convention and UNCITRAL Model Law, all undoubtable have general international character in their scope of application. Having looked at the term 'international' from the different legislations, we shall also look at the various definitions of the term 'commercial' from the perspective of different legislations.

[22] Model Law on International Commercial Arbitration, Art. 1 (3).
[23] Arbitration and Conciliation Act Cap A 19 Laws of Federation of Nigeria 2004. s. 57(2)

The Meaning of 'Commercial' in International Commercial Arbitration.

The definition of this term 'commercial' is important because it will help to distinguish between contracts that are 'commercial' and those that are not. This distinction was important at one time because there were (and still are) countries in which only disputes arising out of 'commercial' contracts may be submitted to arbitration. If one looks at the legal framework governing arbitration proceedings one can observe that several instruments are limited to 'commercial arbitrations or commercial disputes. For example, the UNCITRAL Model law was designed for commercial disputes.

The question of what was to be included in commercial was squarely faced for the first time during the preparation of the Model law, adopted in 1985. Foot note 2 of the UNCITRAL Model Law makes it clear that:

> *The term commercial should be given a wide interpretation to cover matters arising 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 transactions for the supply or exchange of goods or services, distribution agreement; commercial representation or agency; factoring; leasing; construction works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea or road*[24].

This model law definition was followed by several states when they adopted the Model Law, those jurisdictions incorporated the definition of commercial by the Model Law into their respective arbitration laws[25] While in other jurisdictions, the UNCITRAL Model law was implemented without any restriction to commercial arbitrations at all.

Nigeria is one of the countries that adopted the Model Law and incorporated its definition into its Arbitration and Conciliation Act which is the canon law of arbitration in Nigeria. Section 57 of the Act[26] defined the term commercial in the very language of the UNCITRAL Model Law. It provides thus:

> *Commercial means all relationships of a commercial nature including 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 or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road.*

Also, the British Columbia International Commercial Arbitration Act has a replicaof the Model Law definition of commercial as thus:

> 1(6)An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following:

[24] Footnote to Art 1 (1) of the UNCITRAL Model Law 1985

[25]The Singapore International Arbitration Act Schedule 1; British Columbia International Commercial Arbitration Act 1986 Art. 1 (6); Bulgarian Law on International Commercial Arbitration 2001 Art 1 (2)

[26] Arbitration and Conciliation Act Cap A 19 Laws of Federation of Nigeria 2004

a) a trade transaction for the supply or exchange of goods or services;

b) a distribution agreement;

c) a commercial representation or agency;

d) an exploitation agreement or concession;

e) a joint venture or other related form of industrial or business cooperation;

f) the carriage of goods or passengers by air, sea, rail or road;

g) the construction of works;

h) insurance;

i) licensing;

j) factoring;

k) leasing;

l) consulting;

m) engineering;

n) financing;

o) banking;

p) investing[27].

Countries whose arbitration laws are not based on the UNCITRAL Model Law but also require arbitrations to be commercial often favour a broad interpretation of the term. While a few jurisdictions which have not enacted the Model Law, make references to commercial arbitrations or commercial transactions, almost none appears to define commercial in the context of arbitration[28].

Few Arbitration Rules define commercial or commercial transactions. CIETAC[29] Rules 2001 defines commercial disputes that can be resolved by arbitration to include disputes between an enterprise with foreign investment and another Chinese legal or physical person or economic organization or arising from project financing, invitation to tender, bidding, construction and other activities conducted by Chinese legal or physical persons and/or other economic organizations through utilizing the capital, technology or service from foreign countries, international organizations or from the Honk Kong SAR, Macao, Taiwan Regions[30].

International Commercial Conventions also refer to the commercial nature of transactions. They do not necessarily limit their scope to commercial disputes. Most of them, however, operate only for commercial transactions. The New York Convention allows for a distinction to be made

[27] British Columbia International Commercial Arbitration Act Art 1 (6)
[28] J Lew *op. cit*, p. 54
[29] The China International Economic and Trade Arbitration Commission
[30] CIETAC Rules 2001 Art 2 (3) & (4)

between commercial and non-commercial arbitration. It suggests that commercial should be characterized based on national law[31]. Thus, it provides:

> *When signing, ratifying, or acceding to the convention … any state may … declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not which are considered as commercial under the national law of the state making the declaration[32].*

But it did not define commercial on its own but rather left it for national laws to characterize legal relationships whether contractual or not which are commercial.

Although European Convention on International Commercial Arbitration was the first international instrument to refer to international commercial arbitration by name, yet it failed to define the term 'commercial' it does not contain a specific definition of 'commercial[33]' the Convention was limited in application to "arbitration agreement concluded for the purpose of settling disputes arising from international trade between …"

Also, the 1987 Amman Arab Convention on Commercial Arbitration also contain no clear definition of commercial transactions. Art 2 provides only that the convention will apply:

> *"…to commercial disputes between natural or legal persons of any nationality linked by commercial transactions with one of the contracting states or one of its nationals, or which have their main headquarters in one of these states."*

Conclusion and Recommendations

The above research shows that different instruments apply different definitions to the two terms "International" and "Commercial" in international commercial arbitration. There seems to be no uniform definition of the said terms. An arbitration that is considered international or commercial in one *lex arbitri* or convention will not be considered so in another *lex arbitri* or convention. Therefore, it becomes a necessity that to determine the meaning of the two terms in a particular place one must have a cursory look at the *lex arbitri* of that place. Also, to appreciate the meaning of the two terms generally, reference must be made to various legislation and instruments as has been done in this work. This work therefore recommends that a working definition of the two concepts should be agreed and adopted by all states in their laws to ensure uniformity.

[31] J Lew *op. cit*, p. 55
[32] New York Convention Art 1 (3)
[33] European Convention on International Commercial Arbitration, 1967, Art 1 (1) (a).