

Law and Language in Partnership and Conflict

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Preface

If there ever was a time when research in law and language – legal linguistics – was of vital importance, that time is now. Questions of law and language are more pressing today than ever before as the development and change of societies are accelerated in an unprecedented way by the process of globalisation: national barriers are being brought down, resulting in a world where law is fast assuming a perspective that goes beyond jurisdictional concerns. Interdependencies between nations are being formed, creating a need for harmonisation in legislation and a need to understand and make oneself understood across national boundaries. Legal linguistics can facilitate our understanding of how language functions in our national jurisdiction as well as across jurisdictions.

In March 2010, the Chair of Legal Linguistics, the Legal Linguistics Association of Finland and the University of Lapland hosted a conference on legal linguistics. The focus was on law and language in international partnerships and conflicts. The members of the organizing committee were Professor Tarja Salmi-Tolonen (Chair), Ms Iris Tukiainen and Mr Richard Foley.

This was the second international conference on legal linguistics organized by the same team in Lapland. The first conference celebrated the founding of the legal linguistics chair at the University of Lapland; the second one marked the tenth anniversary of legal linguistic teaching at the University of Lapland and, sadly, also its end. With around 60 participants and a total of 36 presentations over three days, the conference provided opportunities to make new contacts as well as strengthen old ones. The themes covered by the speakers were varied, and lively discussions followed each paper. The chapters in this volume are extended contributions to the conference.

We would like to thank Ms Marja-Leena Porsanger of the Rovaniemi-Lapland Congresses and her team for taking care of the practical arrangements of the conference in a truly professional manner, Ms Pilvi Rimmanen for designing an appropriate conference logo and graphics, and Mr Michael Hurd for revising the language of the papers for publication, often going beyond the call of duty in helping to edit this volume.

We are very grateful to Rector Mauri Ylä-Kotola of the University of Lapland and the Dean of the Faculty of Law, Matti Niemivuo, for the possibility to use the University of Lapland as the venue of the conference, as well as to President Esko Oikarinen for inviting us to open the conference at the Rovaniemi Court of Appeal and the City of Rovaniemi for entertaining our conference guests at the city hall. We would like to thank the Federation of Finnish Learned Societies, the Finnish Cultural Foundation, the Rovaniemi Court of Appeal, the City of Rovaniemi, and the Association of Finnish Lawyers for their financial support.

We would like to express our special thanks to the Faculty of Law of the University of Turku and Deans Professor Heikki Kulla and Professor Jukka Mähönen for providing a stimulating research environment for the Language Risk and International Arbitration in Action project, where some of the ideas for the conference were incubated, where the work continues and the finishing touches to this publication were given.

Finally, we also wish to thank the editorial board of the *Lapland Law Review* for publishing the proceedings of the conference as a special issue of the review.

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Introduction

TARJA SALMI-TOLONEN¹

1. Background to the volume

Over time, the meanings attributed to concepts such as justice and law change, even if their linguistic symbols remain unchanged. As is well known, different paradigms find different perspectives for scrutinising the world, and conceptual systems are changing and changeable. Ways of thinking, making decisions and exercising power vary over time. Law is no longer understood only within the confines of the positivist tradition which has dominated legal thinking in the western world for the better part of a century and which saw law as a body of rules made by the national legislator. The trend today is towards a more pluralistic view of law that includes not only rules made by state legislatures but also a new body of rules, practices and processes by private actors, firms, NGOs, and independent experts like technical standard setters and epistemic communities, either exercising autonomous regulatory power or implementing delegated power conferred by international law or national legislation.² This development accentuates the enabling and empowering quality of law, thus also emphasising its future-orientation and pre-emptiveness. This reflects of course the reallocation of regulatory power and the changes in the world. Our concern, language, is not powerful *per se*; it gains power only in the hands of those who have been given institutional power. Nevertheless, the changes in the world and shift of interest in legal thinking and studies of law reflect an elaboration and broadening of the traditional paradigms in law and, along with them, legal linguistics.

Until recently, legal science examined language through the lens of jurisprudence, legal theories or legal philosophy, or examined jurisprudence, legal theories and legal philosophy with the help of the framework of language philosophy. Even if it is acknowledged that law in modern societies could not exist without language, no legal methodology has thus far introduced any kind of linguistic approach or linguistic method for studying or interpreting law. The role of language has basically been seen among legal practitioners and scientists as instrumental, a necessary tool for the legislator and the legal professionals for carrying out their duties. This view of language as merely a tool or instrument is reductionist and cannot be accepted any more, as language is inherently connected with human cognitive processes. Today, these issues are combined in questions of linguistic knowledge and legal knowledge and how they are intertwined in legal discourse.³

The extent to which language determines, rather than simply represents, our experience of the world is one of the major questions in philosophy and linguistics. The view espoused by the Anglo-American language philosophers John L. Austin and John Searle is that social and legal reality is not only represented through language but also constituted in language. These

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² See specifically Cafaggi, Fabrizio (2011) New Foundations of Transnational Private Regulation, *Journal of Law and Society*. Volume 38, Number 1, March 2011 (pp. 20-49 at 20-21); and Cafaggi, Fabrizio (2009) Private Regulation in European Private Law, *EUI Working Papers*, RSCAS 2009/31.

³ See generally Salmi-Tolonen, Tarja (2008) *Language and the Functions of Law; A Legal Linguistic Study*. Turku: Painosalama.

language philosophers, along with Paul Grice, are the ones who have most compellingly advanced the view of language as social action.⁴ The fit between the word and the world became a central concern in this tradition. This line of thought is the backdrop against which legal linguistic knowledge and research can be understood. Law is science on the one hand and praxis on the other. Such notions as force, status and quality are not inherent in the text; they derive from the different functions and uses of the legislation and have real-life consequences.

This view is strengthened by the recognition of the importance of language and the advancement of language awareness within the social sciences in general, which experienced a linguistic turn and further a discursive turn, the origins of which are in linguistics, around the turn of the century. In law, postmodern jurisprudence and legal autopoiesis share the linguistic turn away from the positivist sociology of law and the dissolution of social and legal realities into discursivity.⁵ The linguistic turn does not refer only to the new emphasis and paradigm shift in the theories of social sciences, but also to a more profound change in society in which the role of language is central. The growth of this role should be more emphatic in legal science as well.

Legal linguistics is a discipline that studies the imbrications between language and legal practices and, more broadly, between them and social, institutional and political structures: the macro level surrounding a linguistic event. This is compatible with Giddens's discussion of the relationship between human agency and social structure, where each individual action reproduces the structure and the structure shapes the individual action.⁶

Despite the linguistic and discursive turns in social sciences, law among them, and the fact that the legal profession and its practices above all are most obviously languaged, no other discipline, apart from linguistics, engages in, or has the methods for, analysing the textual level. Other disciplines are mostly concerned with explaining the context and situation surrounding the language event. Since Aristotle it has been acknowledged that form also carries meaning and function. Linguistic explanation is a method that has the potential to enrich legal research and provide a means of describing, interpreting and explaining how legal practices are accomplished and help clarify the ideological bases of the purposes and the methods of the profession. Too often legal linguistics is seen merely as the compiling of word lists or rules of correct language use by legal scientists and legal professionals despite the encouragement to engage in multidisciplinary and interdisciplinary studies and innovative approaches and methods in research policy papers at national and local levels.

The general understanding is that one cannot understand the macro without the micro.⁷ Therefore, it is also necessary to study the micro level and focus on a particular language, as

⁴ Austin, John L. (1962) *How to Do Things with Words*. Cambridge: Cambridge University Press. Searle, John (1969) *Speech Acts: An essay in the philosophy of language*. Cambridge: Cambridge University Press. Searle, John (1995) *The Construction of Social Reality*. New York: The Free Press. Grice, H. Paul (1975) Logic and Conversation. In Cole, P. and J. L. Morgan *Syntax and Semantics 3. Speech Acts*. New York: Ablex (pp. 41-58).

⁵ Teubner, Günther (1997), The Two Faces of Janus: Rethinking Legal Pluralism. In Tuori, Kaarlo, Z. Bankowski and J. Uusitalo (eds.) *Law and Power: Critical and Socio-Legal Essays*. Liverpool: Deborah Charles Publications (pp.119-140 at 120).

⁶ Giddens, Anthony (1979) *Central Problems in Social Theory*. London: Macmillan.

⁷ Cicourel, Aaron V. (1973) *Cognitive sociology: language meaning in social interaction*. Harmondsworth: Penguin.

well as to investigate what are known as universals: that is, features that are shared by most judicial languages. The research approach can be either synchronic or diachronic. One can focus on the changes in judicial language(s) within a shorter or longer period of time or look at the same phenomena at a given moment or time in history.

Furthermore, research in legal linguistics can focus on various levels of language in judicial texts: semantics at the utterance or lexical level, or syntax at the sentence or clause level. Larger units such as texts and their characteristics as speech acts are also of interest. The focus can also be placed on either intratextual or intertextual characteristics of legal texts or the function of judicial utterances or texts: in other words, their pragmatic meaning, an aspect which reaches beyond the boundaries of traditional semantic studies. Cognitive approaches investigate the relationship between specialist legal knowledge and text or specialist legal knowledge and lay knowledge.⁸

Legal linguistics, as I understand it, is structured in the following way: there is, first of all, the general legal linguistics, which is not bound to any particular legal language (legal English, legal French, legal Finnish, etc.) but rather studies special features of legal language that are shared by all – or at least most – Western legal systems and languages. This part also encompasses the formation and methodology of general theory. Then, there is the particular or special legal linguistics which examines the judicial language of a single legal culture or legal order that is dependent on a single given language – Finnish, English, French, etc. – or compares two or more judicial languages and cultures.

Among the applications of legal linguistics are the investigation of judicial translation or interpretation, terminology work and lexicography, the study of courtroom discourse, and various forensic applications, including forensic phonetics and forensic linguistics: e.g., speaker or writer identification. The study of language crimes⁹ such as bribery, defamation, libel, slander, perjury, extortion, threatening speech, and solicitation to murder are also among the applications of legal linguistics.

The task of legal linguistics is to generate new knowledge of how language and law function in society and provide a clear critical and explanatory focus on how they handle variety and constantly changing practices.

2. The contents of the volume

The papers of this volume address the theme of the conference – law and language in partnership and conflict – from different points of view and with different foci: law or language. They are based on analyses of real data, and some involve the researchers' "thick participation"¹⁰ in the form of collecting data through interviews and several types of texts and discourse: legislative, judicial, and private law instruments.

⁸ See e.g. Lundquist, Lita (2004) *From legal knowledge to legal discourse – and back again*. In Virtanen, T. (ed.) *Approaches to Cognition through Text and Discourse*. Berlin: Mouton de Gruyter (pp. 123-147).

⁹ See e.g. Shuy, Roger (2006) *Language Crimes*, Oxford University Press: Oxford; and Shuy, Roger (2008) *Fighting over Words: Language and Civil Law Cases*. Oxford University Press: Oxford.

¹⁰ This term was created by Aaron Cicourel. See *supra* note 7.

The papers are grouped into three sections which reflect a diversity of concerns and intersect at many points but nevertheless correspond to the main approach represented in the papers. A broad characterization of the salient themes of each section will be given under each subheading in this general introduction. The first section, entitled *Variation in the Discourse of Dispute Resolution*, focuses on the data and generic particularities of legislative texts (Özyildirim) and alternative dispute resolution (Bhatia, Gotti, Tessuto).

The second section, entitled *Legal Cultural Diversity*, addresses comparative aspects; the focus is more on methods: what kinds of methodological tools and approaches can help legal practitioners and translators (Goddard, Jeanpierre), how to compare the rhetoric of judges of different legal families and jurisdictions (Mattila), and how language teaching in law school curricula should be developed in order to best respond to the present-day needs of the legal profession (Meyer).

The third section is entitled *Contractual Indeterminacy*; the writers focus on the difficulty of interpreting international intergovernmental agreements (Sočanac, Viikari), public-private contracts (Sharma), international sports contracts (Fazio and Bernardo), and basic rights, participation and intra-governmental issues of dominance (Christiansen).

2.1. Variation in dispute resolution discourse

Along with the development towards a more pluralistic view of legislation and the reallocation of legislative powers, judicial practice has diversified: private mechanisms of dispute resolution have been established. International commercial arbitration is an alternative to national jurisdiction, in which the states, their coercive judicial measures and public judicial practices are considered the default. From this point of view arbitration practice entails the privatisation of public practices and transferring legal practice – conflict resolution – to private commercial actors. The first three articles in this section are concerned with analysing data generated by these private actors and judicial practices. In general, the focus in this first section is on the material of the analysis.

The growing number of international trade disputes has prompted the development of alternative instruments for settling such disputes. In Europe, as in the rest of the world, arbitration has become more and more common as a mechanism for the settling of commercial disputes. In conflicts concerning cross-border exchanges, arbitration is regarded as an economical and effective alternative to litigation. However, the question has been raised whether there is a gap between the ideal and the real. What has been observed in recent discourse-analysis-oriented research¹¹ is the increasing colonization of arbitration practices by litigation – a development that seems to be contrary to the spirit of arbitration, which aims to resolve disputes outside of the courts¹² – and the tensions due to involvement in the arbitration process of actors from different nations and jurisdictions.¹³ Thus, the discourse of

¹¹ “The generic integrity of legal discourse in international commercial arbitration in multilingual and multicultural contexts” and “International arbitration practices: a discourse analytical study” both led by Professor Vijay K. Bhatia of the City University of Hong Kong.

¹² Nariman, Fali S. (2000) The Spirit of Arbitration: The Tenth Annual Goff Lecture. *Arbitration International* 16, 3 (pp. 261-278).

¹³ Bhatia, Vijay K., Ch. Candlin, J. Engberg and A. Trosborg (eds.) (2003) *Multilingual and Multicultural Contexts of Legislation. An International Perspective*. Frankfurt am Main: Peter Lang.

international commercial arbitration is influenced by a range of cultural factors at the level of national culture, legal culture and professional culture.¹⁴

The development and practice of private dispute resolution mechanisms offer a wealth of material¹⁵ for analysts to compare and contrast the expression of public and private judicial practices, and may result in findings which help us understand how language and law interact and function in resolving conflicts.

In his paper Vijay Bhatia, the leader of an international research project on arbitration discourse involving over twenty countries, focuses on the way international arbitration is being increasingly 'colonized' by litigation practices, threatening not only the integrity of arbitration as an alternative to litigation but also the very spirit of arbitration as a non-litigation practice. Another factor causing tension is the different practices of discovery and cross-examination in the common law adversarial system and the civil law system. As the experienced arbitrators interviewed for the study point out, common law counsels often have a competitive advantage because they are more familiar with direct oral testimony and the idea of discovery, which is becoming more and more common in international commercial arbitration.

The new models of online resolution of disputes have been widely diffused in all sectors and particularly in the virtual market. The extraordinary growth of online commerce and online transactions has consequently generated a number of disputes. But the Internet also provides resources for solving these conflicts, favouring the development of procedures to resolve disputes totally, or at least partly, on line. Online dispute resolution is a mechanism of ADR through another medium and in a virtual environment. In his paper, Maurizio Gotti draws our attention to this IT application in the service of dispute resolution. Drawing on documentary data, Gotti investigates the extent to which the integrity of arbitration is maintained in the evolution from ADR to ODR, providing examples from Italy and the US.

Girolamo Tessuto's paper focuses on discursive and generic features concerning online US agreement to mediate forms used between schools and parents of children with disabilities. Based on a corpus of sample agreements to mediate from the National Center on Dispute Resolution in Special Education (CADRE), whose purpose is to increase the USA's capacity to effectively solve special education disputes, the study shows that this genre adopts rich intertextual and interdiscursive patterning to achieve its communicative purpose.

Cross-border transactions and the new borders of the EU have created interest in the new neighbours which are economically dependent on access to EU markets. Turkey is one of them, but studies on Turkish legislative language published in European languages have been scarce. Işıl Özyildirim's paper sheds light on Turkish legislative language and presents the results of her corpus study, in which she analyses the Turkish Criminal Code in detail. She compares the characteristics of Turkish legal language with those of five other genres and reveals the highly nominal, impersonal, formal, static and informational nature of Turkish legislative language – characteristics which are not unknown in other legislative languages –

¹⁴ Hafner, Christoph A. (2011) Professional reasoning, legal cultures, and arbitral awards. *World Englishes*, Vol. 30, No. 1 (pp. 117-128).

¹⁵ It should be noted here that this material, despite of its richness, is not readily available or easily accessible because of the very nature of arbitration as a private and confidential procedure. Therefore the undertakings and efforts of the researchers are particularly laudable.

thus consolidating our understanding that some characteristics of legislative language tend to be universal.

2.2. Legal cultural diversity

Anyone who studies law, be it for application or translation or in search of information, is first of all confronted with language. It should therefore be acknowledged that because of the way in which language and law are intertwined, the study of legal language and its methods should be more prominent in legal science. Multilingualism is an inherent and inseparable part of legal expertise today, but knowledge of cultures and the study of language – and not just language skills – are no less important. The second section of this volume focuses on methodology, legal culture and comparative law in the service of either research or legal or translation practice.

Language itself is a cultural phenomenon that is tied to the community where it is used: language is characteristically a social practice. Persistence and change in the social system are both reflected in texts and brought about by means of texts.¹⁶ Research in legal linguistics encompasses culture. One can ignore language while studying legal culture, as seems to be the case in general, but one cannot study legal language using linguistic methods without at the same time studying culture, because the two are inseparable. If time is taken as the main variable, the study is either diachronic or synchronic. In the former case, the research examines changes in legal language over time and, in the latter, variations in either legal genres or legal languages in different legal orders at a given time in history. Changes over time are intertwined with socio-economic changes and changes in the approaches to law.

There are probably as many definitions of culture as there are those who write about culture. The same is true of legal culture, which is inescapably intertwined with culture in general. As was pointed out above, language is a cultural phenomenon and legal language is always related to legal culture. Today, as a result of economic globalisation, different languages and cultures have been brought into contact, and English often plays a role as a mediating global lingua franca: it is increasingly being used as a working language even in interactions where none of the parties speak English as a native language. It used to be called “International English”, but today the term “Globish” is often used.¹⁷

In methodological studies of law the concept of the legal system seems to be challenged by the concept of legal culture. “Legal culture” is a ubiquitous, catch-all expression especially when differences between legal orders or legal families are being described. The meaning of this expression is far from unequivocal, and it is perhaps because of its ubiquitousness that it

¹⁶ See generally, e.g., Halliday, Michael A. K. (1978) *Language as Social Semiotic*. London: Arnold.

¹⁷ The term “Globish” was coined in 2004 by Jean-Paul Nerrière, a former IBM executive from France who noted that non-native English speakers were able to communicate with a minimal vocabulary of English words. Robert McCrum sees Globish as an economic phenomenon, the language of businessmen and European officials commenting on financial markets. See McCrum, Robert (2010) *Globish: How the English Language Became the World’s Language*. New York: Norton. The “culture” to which Globish belongs is thus not English culture but the culture of global business. Although the vocabulary and grammar are those of general English, they are limited and utilitarian. Globish is thus a variety of English for special purposes, ESP. It remains to be seen whether “Globish” is simply a trendy catchphrase soon to be replaced by another term, but the phenomenon it represents will remain.

is at risk of theoretical blurring. There seems to be no general understanding, let alone a definition, of it. Nevertheless legal comparatists especially have found it useful to explain any differences between jurisdictions as being due to legal culture. Sometimes “legal culture” is apparently used as a synonym for “difference”. The vagueness of the concept may be a reason for its attractiveness, as Van Hoecke points out.¹⁸ In particular, researchers who discuss the tension emerging in the globalisation and harmonisation processes seem to find it convenient. Is legal culture a method for examining differences between legal systems or is it an explanation for a wide range of phenomena or an umbrella under which several activities can take place? Generally speaking, notions which are vague, unspecified and ubiquitous are not useful as research tools. Furthermore, if the content and its definition are not generally agreed upon, it is not a concept, just a general expression.

What then are the characteristics of legal culture on which there seem to be some kind of agreement? Sometimes “legal culture” and “legal tradition” are used in parallel, which indicates that legal culture is something old.¹⁹ This connotation presents a problem as some of the “cultures” are the result of very recent developments, such as, for instance, European legal culture.

If we examine the notion of legal culture from the perspective of time, where do we place legal culture in the general development of human culture? Time is a dimension of societal life²⁰ and therefore also a cultural phenomenon. The well-known historian Ferdinand Braudel²¹ suggests three kinds of duration with respect to time and society. The first is the long duration (*la longue durée*), which is associated with slowly developing things such as climate, nature, trade routes and cultivation methods; Braudel’s followers have concluded that language, mentalities, world views, and peoples’ everyday habits and customs belong to this category. The second level is *les conjunctures*, a time which is more rapid than the first category, yet slower than time experienced by an individual in everyday life; this category includes phenomena such as economic systems, societies, and civilisation. Only at the third level do we encounter what is traditionally called history: Braudel calls it short-term duration (*les événements*). This last concept is governed by the power elite of each age.

The four factors that give legal languages their essential characteristics are social, political, historical and linguistic ones. Using Braudel’s framework, we can deduce that from the viewpoint of legal language and legal culture all three durations of time are interdependent, but culture in general – comprising language, mentalities and customs, and belonging to the long duration – is primary to legal language and culture, which would belong to the *conjunctures*; but only the third – short-term duration – gives us history and the power elite which, in our knowledge society today, would also refer to the expert elite. It is the third,

¹⁸ Van Hoecke, Marc (2007) European Legal Cultures in a Context of Globalisation. In T. Gizbert-Studnicki (ed.) *Law and Legal Cultures in the 21st Century*. Plenary papers presented at the IVR World Conference, August 1-6, 2007. Karkow (pp. 81-99 at 82). Available at <<http://biblio.ugent.be/record/1060884>>.

¹⁹ See Van Hoecke’s discussion of parallel expressions, *supra* note 18.

²⁰ Luckman, Thomas (1991) The Construction of Human Life in Time. In Bender, John and David E. Weelerby (eds.) *Chronotypes. The Construction of Time*. Stanford University Press: California (pp. 151-167 at 151).

²¹ See Braudel, Fernand (1982) *On History*. Translated from the French original *Écrits sur l’histoire* by Sarah Matthews. London: University of Chicago Press. See, e.g., pp. 3-5.

then, which is the most subject to change, but simultaneously and in interaction with the other two.²²

Legal language changes slowly, but nevertheless it does change. The explanation can be found in Braudel's framework of time. Language in general is constitutive of any culture. Legal language, the basis of which is in the general language of that given culture, on the other hand, constitutes social institutions and also itself together with the creation of social institutions and finally the power elite. All these change over time: whereas the powers that be in legal practice were once laymen, today they have a university education and some of them are women; in addition to working in various positions within the legal system, including judgeships in the Supreme Court, they write learned academic books on law and legal practice. This is bound to have some effect on the argumentative style of court decisions, however conventional they might be. Political factors are perhaps the ones that change legal language at the fastest pace since legislative bodies are politically elected and their ideologies affect the issues regulated in society. They also change legal language the most radically. The part of legal language that changes the most quickly is the vocabulary, which is also the case with language in general.

The three Aristotelian types of appeal are *Ethos*, the linguistically mediated message of believability, reliability and competence, *Pathos*, the emotional appeal, which may not be expected in legal writing, and *Logos*, which refers to authority and data. The use of these types varies across jurisdictions: in civil law jurisdictions, the references are mostly of the *logos* type, but in common law examples, *pathos* also surfaces along with *logos*. This is demonstrated at the level of the text. No text stands alone, as texts refer to one another and form complex networks of interaction. Intertextuality is a concept first introduced in literary studies by Bakhtin and Kristeva.²³ The concept has also been used in both sociology and linguistics to describe discourse communities and their structuring of knowledge. Three types of intertextuality are suggested by Devitt: the generic, the referential and the functional.²⁴

Representatives of the legal profession often mistakenly take legal language to mean legal terms and terminology and think that legal translation simply means translating these terms or words into another language. They frequently make misleading statements and fail to recognize the communicative function of legal texts. Even legal translation is, however, about translating meaning – which is more a consequence of words and phrases than of their inherent quality and communicative functions – not just translating words.²⁵

²² Understanding the concept of time has ramifications in translation. Considerations of time are particularly critical in juridical translation since tradition and conventions are prominent. For possible approaches and strategies see Salmi-Tolonen, Tarja (1995) Time and Translation. In Oittinen, Riitta and Jukka-Pekka Varonen (eds.) *Aspectus varii translationis*. Studia translatologica. Ser. B, Vol. 1. Tampere (pp. 47-58).

²³ Bakhtin, Michel (1981) *The Dialogic Imagination: Four Essays*, ed. M. Holquist, trans. C. Emerson and M. Holquist. Austin: University of Texas Press; Kristeva, Julia (1986) Word, Dialogue and Novel. In T. Moi (ed.) *The Kristeva Reader*. Oxford: Blackwell, (pp. 36-61).

²⁴ Devitt, Amy J. (1991) Intertextuality in Tax Accounting: Generic, Referential, and Functional. In Bazerman, Charles and J. Paradis (eds.) *Textual Dynamics of the Professions. Historical and Contemporary Studies of Writing in Professional Communities*. Madison: The University of Wisconsin Press (pp. 336-358).

²⁵ See also Šarčević, Susan (1997) *New Approach to Legal Translation*. The Hague: Kluwer (p. 5 and *passim*).

A paradigm shift in translation, along with judicial translation, took place in the 1980s, when the focus was shifted from source texts to target texts. Previously, fidelity to source texts had been considered the ideal, but after Vermeer introduced his *skopos* theory, the target text was no longer considered inferior to the source text; now it became equally important and had value of its own. The purpose and function of translation had been taken into consideration long before Vermeer, but the shift can be said to have taken place after the introduction of the *skopos* theory.²⁶ Translators of normative texts must take legal considerations into account, but, as in all translation, pragmatic considerations are also important. The communicative purpose of the target text may be different from that of the source text, and that purpose may vary from situation to situation. The TL text does not necessarily retain the force of law; it may simply be informative or instructive. Then the strategy is different and should take into consideration the informative needs and the previous knowledge base and capabilities of the audience or the users of the target text. Therefore, establishing prescriptive rules for legal translation would be no easier than for any translation; for what it is worth, one can only give recommendations.

The findings of legal linguistic research will perhaps provide bases for the choices and decisions we need to make while interpreting legal texts, regardless of whether the purpose of the interpretation process is to apply the law, translate judicial texts, or make comparisons between legislative processes in order to aid in making rational decisions or justifying our actions. A study in this vein in legal linguistics may not provide direct instructions on how to proceed or give absolute answers, but it will display tendencies based on systematic investigation rather than intuition.

Heikki E. S. Mattila's paper focuses on the intertextuality of judgments. Referential intertextuality is discussed in court decisions in Germany, France and the UK, as the influence of their judicial style has been considerable around the world. The study also extends to court decisions in other parts of the world outside Europe. There seems to be an identifiable core of linguistic practices which differentiates the discourse communities in different jurisdictions and most notably in different legal families.

Legal translation is one of the applications of legal linguistics. Christopher Goddard discusses the potentiality of comparative law, legal culture and legal ideology as methods for legal translators and lawyers. Citing numerous works and a multitude of views expressed in legal literature, he argues that while research under these rubrics is needed, they are not precise enough to serve as tools for legal translators or lawyers engaged in legal research.

Eric Jeanpierre reminds us of the dangers inherent in legal translation between two different legal families: civil law and common law, French and English. Jeanpierre discusses issues that need to be taken into account for successful legal translation, especially in translating from French into English, and looks into the spirit of the two legal systems. Translation methodologies and the extent of legal harmonisation and its consequences for French-English legal translation are then discussed.

The issue of curriculum development is addressed by Almut Meyer, who discusses legal language courses in the law school curriculum and course design in the light of her investigation among practicing lawyers concerning what kind of German they need in their

²⁶ Vermeer, Hans J. (1978) Ein Rahmen für eine allgemeine Translationstheorie. *Lebende Sprachen* 23, 3 (pp. 99-102).

work. Meyer's starting point is that legal practitioners deal with conflicts; she considers whether language teaching should also focus on those conflicts and how to select the most relevant focal points.

2.3. Contractual indeterminacy

Relationships, partnership and contracting are all language-related issues, and successes and failures in these relationships are successes and failures in language use in one way or another. The authors of the papers in this section address these issues from different perspectives and in different contexts.

Precision and determinacy are qualifications required of normative texts and private law documents to ensure legal certainty and avoid conflicts. It is also an accepted fact that for norms to be applicable in a number of cases, they must be sufficiently generic. Thus two seemingly conflicting aims exist. Drafters must strike some kind of balance between the two.²⁷ Nevertheless, parties to a contract often assign different meanings to the contract clauses. It is not unusual to find expressions like the following in an arbitral award: "Each of the parties has explained what their understanding of the term is. However, no explanation is given concerning the mutual understanding of the term at the time when the contract was signed." Such cases show that in practice there should be an understanding that meanings assigned to terms must be negotiated and agreed upon. As was noted above, meanings should not be taken for granted and cannot always be found in dictionaries.

In this section the focus is on indeterminacy in contracts between a state and a private party, or between two or more states, or between a sports team and an individual player. Interestingly, all the papers also reflect on the imbalance of power between the parties.

One of the tendencies of our age is the juridification of sports, as it has become increasingly professional and commercial. Especially in team sports, where high-value contracts are signed between sports associations and the athletes, the contracts usually contain an arbitration clause. A special international court of arbitration (CAS) has been established to settle disputes in sport. Alessandra Fazio and Amelia Bernardo's paper deals with the risks of misinterpretation in international commercial contracts and sports arbitration awards. They set out to evaluate whether failures caused by language interpretation lead to judicial failures. A case in point is the interpretation of the modal verb *may* in a contract between the French international football player Franck Ribéry and the Turkish football club Galatasaray Sk.

Lelija Sočanac discusses translation ambiguities and lexical indeterminacy in international arbitration in a border dispute between states. The case in point is the arbitration agreement between Croatia and Slovenia; a problem arose following the disintegration of the communist states of the Balkans and the creation of new state borders. The agreement between Croatia and Slovenia concerning the maritime borders of these two states was not clear. Sočanac

²⁷ See generally, e.g., Endicott, Timothy (2000) *Vagueness in Law*. Oxford: Oxford University Press; and Endicott, Timothy (2005) The Value of Vagueness. In Bhatia, Vijay K., Jan Engberg, Maurizio Gotti and Dorothee Heller (eds.) *Vagueness in Normative Texts*. Linguistic Insights, Volume 23, Peter Lang: Bern (pp. 28-48).

demonstrates how the parties applied different interpretations to some expressions, such as “junction”, in the agreement.

Basic rights are inescapably related to language, be it a question of language rights or the right to use a language or imbalance of power in the use of languages. Thomas Christiansen discusses the struggle of Australian Aboriginal peoples to participate in legal discourse relating to land rights. His paper examines various petitions written either by or on behalf of Aboriginal people and the combination of Aboriginal and Anglo-Australian legalistic, semiotic and linguistic elements in them.

Lotta Viikari’s concern is dispute resolution mechanisms in the air and space sector, which is in need of binding and detailed methods of settlement that would accommodate – in addition to state actors – private entities, which play an important role in spacefaring today. In her paper, several international instruments, treaties and conventions, as well as conceptual and terminological discrepancies and indeterminacies in them, are highlighted from this point of view.

The threats to the integrity of the arbitration process as an alternative to litigation is the subject of Rajesh Sharma’s paper, in which he addresses the possibility of a state raising sovereign immunity as a defence in the arbitral process in cases where the other party is a private party. Sharma points out that in the course of the evolution of arbitration as a method of dispute resolution, states used to exercise a certain degree of self restraint in invoking sovereignty in public-private disputes, but, referring to some famous cases, he shows that even the concept of sovereignty may be undergoing a semantic change.

3. Conclusion

The diversity of discussions concerning a multitude of juridical and linguistic aspects in this volume provides evidence of the importance of legal linguistics and contributes to our understanding of the relationship between language and law. The papers in this volume add and contribute to our understanding of the dynamic and constructive role of discourse in structuring areas of knowledge as well as social and institutional practices. Through detailed, polysystemic descriptions of language variation, they also enhance the body of knowledge constituting legal linguistics and add to the formation of theory in this dynamic field.

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I VARIATION IN THE DISCOURSE OF DISPUTE
RESOLUTION

Judicialisation of International Commercial Arbitration Practice: Issues of Discovery and Cross-examination

VIJAY K BHATIA¹

International commercial arbitration offers an interesting site for the study of witness examination as an interdiscursive phenomenon across professional, jurisdictional, linguistic and cultural boundaries. It is contentious not only because it is shared across two rather distinct practices – i.e., litigation and arbitration, bringing together international participants, particularly stakeholders who carry their individual baggage in the form of different ethnic and cultural backgrounds and languages, as well as interdisciplinary expertise – but also because it is meant to integrate two distinct legal systems and cultures, i.e., common law culture and civil law culture. Drawing on a multiperspective analysis of interdiscursive aspects of discovery and witness examination practices from arbitration and litigation, this paper makes attempts to identify and discuss some of the issues emerging from the hybrid nature of this legal practice, which may be seen as problematic in maintaining the integrity of arbitration practice as an alternative to litigation in international commercial context.

1. Overview

International commercial arbitration, especially the way it is practiced today, presents a number of challenges to practitioners as well as to corporate stakeholders. Some of these challenges include the selection of an appropriate arbitration panel, increasing costs and excessive time taken in the resolution of disputes, smooth and challenge-free enforcement of awards, the complexity of issues associated with confidentiality and privacy of the whole process, and of course, transparency of the award² itself, among many others. All these challenges tend to contribute to the increasing judicialisation of international commercial arbitration practice, making it very similar to litigation and thus compromising the very integrity of arbitration as an alternative to litigation³. So it will not be inaccurate to say that although arbitration is a process by which parties voluntarily refer their dispute to an impartial third person as arbitrator selected by them for a decision based on evidence and arguments presented by the parties themselves, in practice, the arbitrators selected are most often members of the legal community who are experienced in litigation; hence in presenting

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² Vijay K. Bhatia, Christopher N. Candlin and Rajesh Sharma, in their article (2009) *Confidentiality and Integrity in International Commercial Arbitration Practice*, point out the need to make the arbitration process and awards more transparent and accessible for the training of new arbitrators and the development of arbitration as an institution.

³ Fali Nariman, in his Goff Lecture published in 2002 (262), asserts that “modern International Commercial Arbitration [...] has become almost indistinguishable from litigation, which it was at one time intended to supplant”.

the evidence and arguments on behalf of each of the parties, they invariably use tried and tested litigation procedures. One of the major consequences of this overwhelming preference for legal specialists to act as legal counsels and also as members of arbitration tribunals is that international commercial arbitration is being increasingly questioned as an economical and effective alternative to litigation for settling commercial disputes. However, parties still continue to prefer arbitration to litigation to solve their commercial disputes, possibly because litigation is viewed essentially as adversarial in nature, which often involves, at least in the Anglo-Saxon common law tradition, almost unlimited discovery of documents in an attempt to put the other party at a disadvantage and hence make it lose the case, as both parties cannot win. This adversarial approach invariably magnifies differences between the disputing parties, thus hardening the attitudes toward each other. This often tends to lead to an eventual termination of the business relationship, which can be and often is highly valued in business contexts. Arbitration, on the other hand, tends to preserve and sometimes even enhance the mutual interests of the disputing parties. For international commercial dispute, therefore, arbitration still seems to be the ideal mode of dispute resolution.

Arbitration is an institution which is free from the jurisdictional constraints of any national court, in that the jurisdiction, selection and authority of the arbitrators are almost entirely determined by the disputing parties, who have complete autonomy in this respect. They can select, challenge or even dismiss the arbitrators, discuss their authority and even have the freedom to choose procedures for all forms of decision-making, without any interference from courts. Arbitration trials generally take place in an arbitration centre (institutional arbitration) or at any other place (ad hoc arbitration) mutually agreed by the disputing parties. The process normally consists of an initial phase in which the parties and the arbitration tribunal agree to a specific set of procedures adopted for the trial, including the question of jurisdiction, challenges to the selection of arbitrators, if any, and a number of other preliminaries. This is followed by the presentation of facts and other details concerning the dispute by the two parties, invariably through their individual teams of legal counsels, sometimes involving direct examination of witnesses, or more often written testimonies by their respective witnesses, followed by cross-examination. It is this stage of the arbitration trial that we are primarily concerned with in this paper. The final phase of the trial consists of the giving of an award, which is somewhat equivalent to the judgment in a court of law, although, unlike a court judgment, awards are final and enforceable in any jurisdiction internationally and generally very difficult to challenge in a court of law.

In litigation, there are well-defined rules of procedure that control the nature and manner of evidence that is admissible in a court of law. In the case of arbitration, however, there are no set rules of procedure to regulate the evidentiary phase of arbitration. Whatever general rules are available, they all give arbitration tribunals wide-ranging discretionary powers to determine what evidence can or cannot be presented, at what time, and in what manner. In general, the tribunals admit almost all the evidence that the parties can offer and then determine what relevance, value and credibility should be given to specific aspects of evidence so presented. Within the framework of the international arbitration rules, the presentation of evidence in international arbitrations falls within three general categories: (1) submission or discovery of documentary evidence with statements of claims, replies or other briefs, (2) witness statements, and (3) oral testimony. It is interesting to see in what respects this evidential phase of international commercial arbitration practice is similar to or different from the evidentiary phase in litigation within the common and civil law systems. This paper focuses on the second phase of the arbitration process, which concerns the discovery of facts and witness examination.

2. Discovery in International Commercial Arbitration

Often legal counsels experienced in litigation are hired to represent party positions in international commercial arbitrations, and they invariably assume that the discovery process in commercial arbitration will be the same as in litigation, with which they are very familiar. American counsels, for instance, often assume that the discovery and deposition procedures will allow evidence and witnesses to be examined before trial. However, the experienced civil law counsel will expect each party to produce a limited range of documents relevant to the case without any need for discovery through direct witness examination. Most international arbitrators attempt to find a balance between the two extremes.

International commercial arbitration relies for its processes and procedures on arbitration laws, the institutional rules of application, and the specific rules of the arbitration centre, i.e., the seat of arbitration. UNCITRAL and most of the leading arbitral institutions, such as the American Arbitration Association, the London Court of International Arbitration, and the International Chamber of Commerce provide general guidelines for discovery, but none of them explicitly provide specific guidelines as to the scope or nature of discovery; they all tend to leave the final responsibility to the discretion of the arbitrators. As a consequence, when the parties cannot agree on the appropriateness or extent of discovery, all matters related to discovery, its scope, and the methods depend on the arbitrators' personal views and preferences and especially on their legal backgrounds. The revised IBA Rules⁴, which are used in conjunction with institutional rules of international commercial arbitration, provide mechanisms for the presentation of documents, witnesses, site inspections and the conduct of evidentiary hearings.

The IBA Rules are an attempt to integrate the strengths of the two legal systems, civil and common law. In line with the civil law system, these rules allow the arbitral tribunal to be proactive in gathering evidence, whereas it allows the fundamental common law principle that each party has the right to know the evidence that is likely to be used by the other party⁵. The rules also provide for cross examination. The IBA Rules are meant to ensure that arbitration is economical in terms of time and cost. Unfortunately, however, the outcomes are most often swayed by the legal background of the participants, arbitrators as well as legal counsels, thus pushing the evidence-gathering processes towards increasing judicialisation of arbitration practice. Legal counsels, and oftentimes even the arbitrators or arbitration tribunals involved in international commercial arbitration, often tend to follow familiar procedures of litigation to conduct arbitration. Some even assume that arbitration is just another form of litigation, which is sometimes referred to as 'private litigation'⁶.

The generally agreed procedure, however, is that the parties will prepare for inspection all documents considered relevant to the issues in a particular arbitration dispute. It is also expected that the parties will cooperate in the discovery of evidence either by limited

⁴ IBA Rules on the Taking of Evidence in International Commercial Arbitration, at <www.ibanet.org/images/downloads/IBA%20rules> (accessed 3 March 2010).

⁵ The IBA Rules follow the principle that "each Party shall be entitled to know, reasonably in advance of any evidentiary hearing, the evidence on which the other parties will rely." IBA Rules of Evidence, preamble (4).

⁶ Mattli Walter (2001) *Private Justice in a Global Economy: From Litigation to Arbitration*, International Organization, 55/4, pp. 919-947, The MIT Press Stable. <<http://www.jstor.org/stable/3078620>> (accessed 20 December 2009).

examination of the witnesses through oral testimony or written statements. Some practitioners, especially those with a common law background, believe that without some form of discovery, however limited, there is a risk that the hearing may not lead to a reasonable conclusion, because they think it is important that evidence must be presented to parties before they respond to it. Tribunals, however, often discourage lengthy and irrelevant discovery. This and other related issues are generally addressed and negotiated at the preparatory phase of an arbitration trial. To sum up, although it is possible to get away with some discovery in international commercial arbitration, even within a civil law jurisdiction, a typical American-style discovery in the common law tradition is less likely to be allowed. It is interesting to note that Lucy Reed⁷ claims:

A recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration “takes too long” (with 56% of those surveyed strongly agreeing) and “costs too much” (with 69% strongly agreeing). [...] Many people blame it on outside counsel – especially those from the United States – for requesting too many documents, making too many motions, and generally filing too many pages. Others blame in-house counsel for not using their authority to rein in practices they criticize as inefficient or wasteful. And some blame the arbitral institutions themselves for not constructing a system that reins in everyone.

It is not surprising that there is an increasing trend to prefer the use of documents, witness statements, site inspections, and expert views. American-style depositions are generally dispreferred, except in very exceptional circumstances.

3. Divergent practices across jurisdictions

Unlike the standard court procedures, direct testimony of witnesses in international commercial arbitration is often replaced by detailed written statements in order to reduce the time and cost of the arbitration process and also to avoid the need for discovery or disclosure. Discovery is a typical American common-law adversarial litigative practice which is sometimes viewed as a ‘fishing expedition’⁸. Although discovery is not common in international arbitration, it is sometimes allowed at the discretion of the arbitral tribunal. It may be pointed out that discovery is an unfamiliar practice in civil law jurisdictions; therefore, parties and counsels from civil law jurisdictions do not feel comfortable with the prospect of discovery in arbitration proceedings. Instead, they prefer to see witness testimony presented through written witness statements as a substitute for the witness’s direct oral testimony. The widespread use of written evidence in international arbitration reflects the distinct influence of civil law tradition, whereas discovery is seen as a distinct American practice. In the civil law tradition, evidence is often presented in written form, and the questioning of witnesses is conducted not by the legal counsel, but rather by the arbitrator or

⁷ Lucy Reed in a recent post on the Kluwer Law International blog posted these comments under More on Corporate Criticism of International Arbitration, at <<http://kluwerarbitrationblog.com/blog/author/lucyreed/>>.

⁸ Goldstein, Marc J. (2006) *Crossing the Common Law-Civil Law Divide in International Arbitration: A Primer for the Perplexed Practitioner*. Hodgson Russ LLP, p. 4, at <www.hodgsonruss.com/files/1_2_1/MJG_Common_Law_Civil_Law_Divide.pdf> (accessed 4 June 2010).

the arbitration tribunal. Direct examination of witnesses is generally not permitted in arbitration, especially if the tribunal is dominated by specialists from civil law jurisdictions.

Ideally, the disclosure process in international commercial arbitration needs to strike a balance between common law and civil law traditions and practices. The rules and procedures in international arbitration reflect a mixture of common law and civil law norms; however, the system is increasingly evolving in the common law direction that favours the adversarial process. As the concept of adversarial cross-examination of witnesses is drawn from the common law approach, it requires extensive training and practice, neither of which civil law counsels receive in their legal training. Therefore arbitrators from the United States and the United Kingdom are generally at a competitive advantage. Gabriël Moens, a well-known arbitration practitioner and trainer with a common law background, when asked about arbitration as adversarial practice in a special interview conducted within the framework of this project, claimed, ‘You must remember that your client who is paying you money is sitting behind you or even at the same table, and they want you to do your very best for them [...] and therefore I find that it is definitely an adversarial process. If I am involved in it, I use it as an adversarial process’.⁹

4. Written statements v. direct oral examination

Many lawyers prefer to have an opportunity for a brief direct examination to highlight key points of the written statements. They would like the arbitrators to be fairly familiar with the key elements of witness statements before they hear any challenges to it. The IBA Rules on the ‘Taking of Evidence in International Commercial Arbitration’ have given cross-examination skills some importance, indicating a clear preference for the common law adversarial system. However, in practice it is left to the discretion of the arbitration tribunal and the parties to the dispute when arbitration procedures are agreed upon in the preliminary stage of the arbitration process. It is difficult to predict the way tribunals will deal with counsels from different legal cultures, especially when they come with different expectations about the role of cross-examination. The IBA Rules can be seen as an effort to harmonize common law and civil law procedures into a common framework for witness-examination¹⁰. Unfortunately however, these Rules have neither been adopted by any prominent arbitral institution, nor regularly incorporated in arbitration clauses. Instead, it is claimed, they are cited opportunistically by counsels either to justify their position in a case, or to reject the other party’s position, most notably oral depositions, which are a common practice in America¹¹.

The use of written witness statements can nevertheless have an effect on witness testimony. Oral witness testimony can often help a witness give truthful testimony and thus establish his or her credibility. However, arbitration tribunals tend to give comparatively less importance to written testimony if the witness in question has been subjected to cross-examination. Besides, the tribunals have considerable discretion in the matters of credibility of written witness testimony when the witness is available for cross-examination.

⁹ Gabriël Moens, in a specialist interview.

¹⁰ Goldstein (2006) *supra* note 8.

¹¹ See Moens *supra* note 9.

5. Identity and voice in written testimonies

In courtroom examination, particularly in common law jurisdictions, there is a perception that defendants have no voice of their own and their identity is often manipulated by legal counsels. The issue in common law jurisdictions is: How much of a witness's testimony is presented by the witness, and how much by the counsel? If this is really so, the valid question to raise then is: Whose narrative is unfolded in the court? This presupposes that the witness, and not the counsel, is the real presenter of evidence. In International Commercial Arbitration therefore one may also legitimately ask: Who is responsible for written statements? Often the witness provides the facts, and the counsel constructs a statement based on the submitted facts. Written narratives from witnesses thus often become repetitive accounts of their factual positions, thereby removing in the process the individual identities of the witnesses in almost every statement, which raises an interesting issue: to what extent is the individual identity of the witness crucial to maintain the integrity of witness examination, which is invariably lost in written testimony as it is written by the counsel? One may justify this action of the counsels by arguing that witness statements need to be intertextually referenced to the documents submitted by the parties, and this kind of intertextuality¹² can only be adequately and meaningfully provided by the counsels. One may also argue that oral testimony by witnesses is likely to be more time-consuming than written testimony, and since legal counsels may have a much better understanding of the issues at stake in a particular dispute, it saves time to allow counsels to write witness statements instead of asking witnesses to do it on their own. This again brings direct witness examination in arbitration and litigation somewhat closer to each other. Another concern that disputing parties have is that the counsels have the ability to take out any weak points to limit unnecessary exposure to negative and hence damaging aspects of their case in cross-examination. Written testimony thus can be an effective strategic instrument in the hands of legal counsels to avoid focus on weak points of the case during cross-examination.

It must be pointed out that cross-examination following written submissions raises unique challenges for arbitrators from the common law tradition as well, because they are trained to conduct cross-examination after they have conducted the oral testimony¹³. Since oral testimony is not common in international arbitration, common law arbitrators also find themselves in more or less equally unfamiliar territory. Written disclosures are restricted and are carefully constructed by legal counsels, and hence provide limited opportunities for cross-examination. Although international commercial arbitration does allow parties to choose procedures that best suit a particular case and that are agreed to by both the parties, the very flexibility in the choice of procedures and processes itself becomes a challenge for the tribunal to agree on a common strategy acceptable to both parties at dispute. The procedures are still evolving and may take a long time to develop. Rubinstein¹⁴ summarises this issue when he points out:

¹² Bhatia, Vijay K. (2004) *Worlds of Written Discourse: A Genre-Based View*. London: Continuum, p. 35. Bhatia observes that most legal documents are intertextually and interdiscursively rich, as they have a complex textual relationship with others, both written and spoken, that have some relevance to what is being said or written, signaling links with them.

¹³ Rubinstein, Javier H. (2004) International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions. In *Chicago Journal of International Law*, (CJIL) 5 (1) pp. 303-310, p. 309.

¹⁴ Ibid, p. 310.

It is possible, although unlikely, that someday there will exist a set of universal procedural rules to govern international arbitrations, much like the rules of civil procedure that govern domestic litigation. In the meantime, though, the field of international arbitration will remain a new frontier, continually evolving at the crossroads of the common law and civil law traditions.

I would now like to highlight some of the important aspects of witness-examination in litigation and international arbitration before giving more substance to the issue of harmonisation between the two professional practices, cultures and jurisdictions.

6. Witness-examination in litigation

The courtroom is a highly formalized setting where disputes are negotiated and resolved through the questioning of witnesses. In an adversarial court system, the outcome of questioning is as much a function of the contributions made by the witnesses, the communicative strategies used by the legal counsels and the degree of credibility established by the witnesses and destroyed by the counsels, as it is of the supposed facts of the case. Facts, therefore, are not viewed simply as objective entities in this context; they are constructed and established through the questioning of witnesses. Courtroom questioning techniques are primarily used to win cases, not necessarily to help the court uncover the facts of the case. As a consequence, expert counsels do not present facts as they might be in reality, but as they want the court and the jury to see them. Much of this is made possible because of the highly institutionalized setting of the court, where forms of communicative behaviour – i.e., turn-taking, participant roles, questioning and responding strategies, and even the content of questions and responses – are strictly regulated and controlled by the rules of evidence¹⁵. In one sense, it is often seen as a game being played by the two counsels, in which the judge and the jury may be seen as referees. The rules that govern this game include: (a) all interactions should be carried out in formal language, and turn-taking is pre-allocated and strictly controlled by the judge; (b) the type of speaking in which one engages is also pre-assigned and controlled by the rules of the court; the counsel is allowed to ask questions that are relevant, answerable and designed to elicit the evidence or statements of facts, and the witnesses are supposed to answer these questions appropriately and truthfully, often with a ‘Yes’ or ‘No’; and the counsel not engaged in questioning is allowed to make objections when he/she feels that inappropriate or irrelevant evidence is being offered or rules are being violated, and it is for the judge to decide whether the objections are valid or not.

So if we go by these rules of evidence, there seem to be two players, the counsel for prosecution and the counsel for defence, and in the end, one wins and the other loses. Unfortunately, there are no draws in this game. The decision is made by the judge or the jury. The jury cannot actively participate in the court proceedings. However, it is up to the counsel for prosecution to prove the defendant is, as it is often said in legal terminology, ‘guilty beyond a reasonable doubt’, which brings up the issue of the credibility of the witnesses. We shall consider this aspect of the credibility of witness testimony and attempts to undermine it by the counsels in more detail later. To sum up then, what happens in the courtroom is a game played by the two counsels, who are the primary players. Witnesses know relatively

¹⁵ Drew, Paul (1992) Contested evidence in courtroom cross-examination: the case of a trial for rape, in Paul Drew and John Heritage (eds.), *Talk at work: Interaction in institutional settings*, Cambridge: Cambridge University Press, pp. 470-520.

very little about their own contributions, especially how they are being interpreted, what effect they will have on the jury or the judge, or even on the outcome of the trial. This is so in spite of the fact that the entire process of negotiation of justice crucially rests on the evidence of the witnesses.

It must be noted at this point that in most two party conversations, it has often been observed that superiors in such interactions talk more, hesitate less, interrupt more, control the resumption of talk, control the introduction of new topics, etc., and in the courtroom examination, the counsels seem to do all that, and a lot more. They control to a large extent even the responses of the witnesses. Witnesses tend to acknowledge this coerciveness in their copying of the question in their answers. If the counsels are not able to control the witnesses' responses, they tend to undermine and often damage – even destroy – the witnesses' credibility, and very few witnesses are clever or experienced enough to minimize the effects of such attempts while they are being questioned.

Courtroom examination generally consists of direct examination or what is also called 'examination in chief', cross-examination, re-examination, and also a possible examination by the judge for clarification, if required. Direct examination is often viewed as a procedure intended to secure the trust of the court. To facilitate this, the counsel for witness often gives his or her own witness an opportunity to give an uninterrupted narrative account of events, even though leading questions are generally not allowed. In cross-examination, on the other hand, witnesses are invariably controlled by the counsel, and all forms of coercive questioning strategies are used without any hesitation, unless they are seen as eliciting irrelevant and inappropriate testimony. Cross-examination thus is regarded as a crucial weapon in the armoury of the counsel not only to test the accuracy of evidence revealed in direct examination but also, and perhaps more importantly, to challenge the testimony as well as the credibility of the witness¹⁶.

Taking into account the background of this institutional framework for this kind of unequal interaction in the courtroom, let us now examine the nature, function and status of witness cross-examination in international commercial arbitration practice.

7. Cross-examination in arbitration

The best-known purpose of cross-examination is to test the credibility of the witness. But there can be a number of other purposes as well: for example, to provide a more complete story than the edited one presented during direct examination, to explore weakness in the logic of the opponent's case, and to gain concessions about facts¹⁷, thereby making them as irrefutable as possible. Cross-examination thus is seen as a strategically powerful resource in litigation as well as in arbitration. A Supreme Court judge once described successful cross-examination as a process of 'oozing' the desired testimony out of the witness 'drop by drop'¹⁸. It is generally believed that, like cross-examination in litigation, cross-examination in

¹⁶ Du Cann, R. (1964) *The art of the advocate*. Harmondsworth: Penguin.

¹⁷ Cymrot Mark (2007) Cross-Examination in International Arbitration, in *Dispute Resolution Journal*, 62 (1), pp. 52-65.

¹⁸ The judge, quoted in Cymrot (2007:54), has claimed, 'Under the pressure of a strong cross-examination, the truth oozed out of this witness, drop by drop. [...] For small drops to accumulate into the intended impression, counsel must have patience, a well thought out plan, and the skills to control an adverse witness'.

international commercial arbitration seeks to destroy the credibility of witnesses. As Michael E. Schneider¹⁹ points out:

Cross-examination, as it is generally practiced in the courts of common law countries, seeks to destroy the witness' credibility, to make the witness confirm propositions of the examiner and often to achieve both these objectives. [...] While counsels in international arbitration often do not apply these techniques in the same manner, their principal objectives generally remain the same.

As a consequence, arbitrators, especially from the common law tradition feel that, despite the divergent practices across different jurisdictions, good cross-examination techniques are becoming increasingly important. Colin Ong²⁰, speaking about the importance of cross-examination in international commercial arbitration, claims:

Due to the emphasis on the written word, good cross-examination techniques are now even more important in assisting counsels to tip the balance between winning and losing a case. [...] Despite the divergence in theories as to the meaning or function of cross-examination, it is now almost universally accepted that the main purpose of cross-examination is to weaken or discredit the evidence that has been given by opposing witnesses.

One of the major differences between courtroom trials and arbitration trials is that the courtroom setting is invariably very formal: the judge wears formal robes, and witnesses are separated and systematically constrained on the witness stand. The counsels can freely move about to make the witnesses uncomfortable. All these institutionalised features of the courtroom context are deliberately introduced to indicate the seriousness of purpose of courtroom trials. In comparison, arbitration trials often take place in less formal settings which may not encourage a rigorous cross-examination²¹. Moreover, business people are likely to be more comfortable in relatively informally organised conference room settings, in which the positioning of the witness in relation to the counsel is less intimidating. However, when it comes to the use of strategies in cross-examination, they tend to remain more or less the same, especially in common law jurisdictions. This raises another important issue: that is, to what extent the legal, arbitration, and business communities have shared perspectives on some of the challenges we have discussed above.

As mentioned earlier, the use of written statements in place of direct testimony is often a foreign concept to common law counsels, who are trained to rely upon oral testimony for the presentation of evidence²². In contrast, the civil law judicial system does not put as much evidentiary weight on oral testimony. This jurisdictional or cultural background plays an important role in witness examination in international commercial arbitration, especially in cross-examination, which becomes an additional potential source of conflict. Under the common law system, especially the American system, cross-examination is considered an important aspect of the trial, as it provides a testing ground for oral evidence, whether in the law court or in International Commercial Arbitration. The real trust in and credibility of the

¹⁹ Michael E. Schneider (2009) Twenty-one theses about witness testimony in international arbitration and cross-examination, Geneva, 27 January 2009, p. 2, at <http://www.lalive.ch/documents/Conference_paper.pdf>.

²⁰ Ong, Colin Y. C. (2007) *The Art of Advocacy in International Arbitration*. Paper from the IBA Annual Conference in Singapore (15 October 2007).

²¹ See Drew *supra* note 15.

²² Newman (1999), cited in Talerico and Behrendt, 2002:15.

testimony is essentially established in the cross-examination of a particular witness. On the other hand, arbitrators trained in the civil law tradition do not regard oral testimony favourably. It is sometimes seen as ‘a process of trickery to confuse witnesses’. Newman²³ points out:

The Civil Law system considers the concept of oral testimony with scepticism, and cross-examination with animosity. [...] Within the European context, ‘American and English cross-examination is viewed as a process of trickery designed to confuse witnesses rather than to elicit vital information.

David Wagoner²⁴, an experienced arbitrator believes that as in litigation, in arbitration the witnesses are also prepared to testify, and some practitioners believe that it is a fair game:

In the major cases rightly or wrongly, the key witnesses are prepared to testify, and that’s accepted now in the international arbitration, it’s accepted in litigation. That doesn’t mean you tell them how to testify, but you tell them what the issues are so you get them thinking about the issues, what the alternatives are, and then you get them to testify. And that’s fair game I think. So in general, I would say there’s less cross-examination in international arbitration, but who’s going to do it? In my Swiss case, the chair did it all, just as a judge in Switzerland would do, or in Germany. In the U.S. they never do it, almost never.

Since arbitration tribunals have been given considerable flexibility in almost all jurisdictions to decide on procedural matters in consultation with the disputing parties, it is possible for them to rule in favour of or against direct testimony in the form of written statements. A tribunal from a common law jurisdiction might go for oral testimony, whereas one from civil law may choose written statements instead. Whatever the context, one might consider oral face-to-face direct examination of witnesses to elicit more accurate and truthful witness testimony as opposed to written witness statements, which are more likely to offer a carefully drafted testimony by the legal counsel rather than truthful and genuine testimony by a witness. It is difficult to preserve the integrity of true witness testimony if legal counsels are involved in the process.

Cross-examination can be time-consuming in that it can focus on trivial inconsistencies sometimes at the expense of the real issue under consideration, and may even overshadow the role of the arbitrator. On the other hand, cross-examination can expose a lying witness, weakness in logic, or inaccuracy in facts that may not surface when the only means of challenging veracity is by an affidavit or testimony from another witness²⁵. Although international commercial arbitration most commonly turns on issues of contractual interpretation as to which written documents provide the most reliable evidence, oral testimony and the credibility of witnesses can still be very useful.

8. Harmonisation of jurisdictional traditions and cultures

Having highlighted some of the main features of witness-examination in litigation and arbitration, let us discuss the extent to which the present-day cross-examination practice in international arbitration reflects harmonization of different legal traditions. In the civil law

²³ Ibid.

²⁴ David Wagner, an experienced arbitrator, in a specialist interview for this project.

²⁵ See Drew *supra* note 15.

tradition, the judge often conducts testimony, and counsels come in marginally at the end; however, counsels from common law are often shocked by the fact that they are not allowed to cross-examine witnesses. As Lowenfeld²⁶ argues:

The [civil law] model would have the judge do the questioning, with the lawyers making suggestions or filling in at the end, and some arbitrators model their role on that of the judge in their home country. I have seen [common law] counsel surprised and shocked that they were not expected to conduct the examination of their witnesses and the cross-examination of those of their opponents.

A similar view is expressed by Lazareff²⁷; when speaking about the use of written evidence instead of oral testimony in arbitration, he points out:

It remains, nevertheless, a fact [...] that the English and the American are more inclined to rely on the testimony of witnesses than their sceptical Continental colleagues who are more apt to rely on contemporary documentary evidence. This difference in underlying attitude explains why total harmonisation cannot be achieved by simply instituting a unified set of procedures.

Cross-examination in international arbitration, in a similar manner, has attracted opposing views. As arbitration trials are viewed as more informal than litigation trials, both the arbitrator and the legal counsel can ask witnesses questions in a friendly environment. It is also possible that direct examination and cross-examination are not distinct phases, as is often the case in litigation, especially in common law practice. Moreover, arbitrators have the final discretion to allow cross-examination in arbitration trials; they also have the freedom to devise innovative ways of making sure that the witness testimony is accurate and credible. An excellent example of this kind of innovative approach that has been reported in arbitration literature is the case of *IBM v. Fujitsu*, in which IBM brought a claim against Fujitsu that it had copied its mainframe operating system software. The arbitrators appointed by the two parties agreed to function as neutral arbitrators and also made the two parties agree to go without a third arbitrator. Instead, the two arbitrators, with the consent of the parties, decided to hire a professor of computer science to give them the disciplinary knowledge they thought was crucial for the case, which also made it possible for them to avoid the need for any witness cross-examination in reaching a just and amicable award.

Concerning the issue of arbitration as an alternative to litigation, a very experienced and well-established professor and arbitration practitioner²⁸, in a one-to-one interview for this study, points out:

²⁶ Lowenfeld, Andreas F. (1999:24) 'International Arbitration as Omelette: What Goes into the Mix', in Stefan N. Frommel and Barry A.K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*. The Hague: Kluwer Law International, pp. 19-30

²⁷ Lazareff, Serge (1999:35) 'International Arbitration: Towards a Common Procedural Approach', in Stefan N. Frommel, and Barry A.K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*. The Hague: Kluwer Law International, 31-38.

²⁸ Several interviews of experienced and well-established international arbitrators were conducted by the international project mentioned in note 1 above in order to study their varying perspectives on different aspects of international commercial arbitration practice, especially focusing on issues, challenges, and opportunities for the future development of the institution of arbitration. Some of these comments and perspectives are kept anonymous to preserve the confidentiality of the interviewees.

Well, I don't necessarily agree to that; they often refer to arbitration as an alternative dispute resolution method. [...] I don't think so. What is alternative to litigation and arbitration is mediation and conciliation and negotiation, and there are a number of other methods. Arbitration is not an alternative, it is a part of that process that makes firm and binding decisions. When I am teaching arbitration law, I never tell my students that it is an alternative. It is not, in my opinion. Of course, you have to be clear as to what an alternative means.

He continues:

If you come to think about arbitration and litigation, they have so many characteristics which are actually similar or even the same, so that it is actually not possible to say that one is an alternative to the other. Talking about the actors involved in arbitration, there are counsels, of course, and there are the arbitrators. The counsel really acts as an advocate, except, of course that you sit down, which is very, very important, that you sit down [at] the table in a businesslike type of environment, but otherwise you behave as a counsel would. Your job is to ensure your side to win. You will develop legal arguments, you will tell the arbitrators as to why your side should win, based on law and practice and so on. And therefore the counsel behaves very much like a counsel in litigation.

Having discussed arguments from both sides, one tends to reassert what Cymrot²⁹ mentioned earlier, when he pointed out that the formality of the courtroom setting, where one finds the judge in formal robes, the witnesses separated in different stands, and the counsels relatively free to move around, often unnerves witnesses. These formal features of the courtroom setting are deliberately designed to intimidate witnesses and to instill in them the seriousness of court procedures. Business stakeholders in commercial arbitration, on the other hand, Cymrot claims, feel comfortable in conference rooms, where arbitration proceedings often take place. These conference rooms are relatively less formal, and the positioning of witness at the same time is less nerve-racking. However, the strategies of cross-examination used in international commercial arbitration remain more or less the same, thus confirming the impression that there are no major differences in witness examination in the two contexts, i.e., litigation and arbitration.

9. Concluding remarks

We have in this paper attempted to outline some of the fundamental issues arising from the mixture of processes and procedures of witness examination in the supposedly informal and non-judicial setting of international commercial arbitration trials, which have been viewed as a site of contention across a number of different forces, which are essentially intercultural, interdisciplinary, inter-jurisdictional, and most importantly inter-professional practices. The paper is based on the assumption that international commercial arbitration practice has its own integrity, with its own professional culture, which is distinct from that of its close cousin litigation. There is also an implicit assumption that, unlike litigation, which is essentially jurisdictional in nature, international commercial arbitration as professional practice is a harmonization of various jurisdictional characteristics which should be visible in all aspects of arbitration practice, including witness examination. However, based on the current practices and perspectives of the members of the arbitration community, this paper claims that though such a harmonization is intensely desirable, it is unlikely to take effect any time

²⁹ Cymrot *supra*, note 17, p. 55.

in near future primarily because of the involvement of members of the litigation community from different jurisdictions, most notably from the common law and civil law jurisdictions; these members are so deeply rooted in their individual legal cultures and jurisdictional practices that they find it difficult to switch their hats when they operate in arbitration. The essential consequence of this is that commercial arbitration practices are increasingly coming closer to litigation in all respects, including witness examination. The idea of discovery and direct oral testimony, which is so familiar to litigators from common law jurisdictions, invariably creeps in when the arbitration tribunal is dominated by members of the common law community. On the other hand, these very practices are underplayed and even completely ignored when the tribunal is dominated by specialists from civil law jurisdictions.

The practice of international commercial arbitration remains contentious, and there is no independent way of establishing the processes and procedures as the doors to any kind of critical inquiry are intensely guarded and most often completely closed by the invocation of a general duty of privacy and confidentiality, which is taken as given, rather than negotiable, in all arbitration procedures. Unlike courtroom practices and proceedings, which are open to the public, and court judgments, which are readily available in published form, arbitration proceedings are held in private, and the procedural details of the trials and their outcomes, including the arbitration awards, are confidential. Privacy sometimes helps firms keep trade secrets and financial dealings confidential from competitors and the general public, but the parties never hesitate to bring the dispute and even arbitration decisions into the public domain when they see specific advantages from such publicity³⁰.

Redfern and Hunter³¹, two very well-established international commercial arbitrators, point out that investigating the practice of international commercial arbitration is like peering into the dark. Very few arbitration awards are published, and very few procedural decisions are ever made available. Information mainly comes from tapping the experience of the principal arbitral institutions or by looking at individual cases that come before the courts, either as the result of enforcement proceedings or because an arbitral award is challenged by the losing party. It therefore brings a veil of secrecy and lack of transparency to the whole process of arbitration in international commercial contexts, which, in the long run, is likely to encourage the vested business interests of the participants, be they lawyers, arbitrators, or corporate stakeholders, and will certainly be detrimental to the development of international commercial arbitration as an institution with its own independent culture and integrity in practice.

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³⁰ See Corona, Isabel (2011) *World Englishes*, Vol. 30, No.1, pp. 129-140.

³¹ Redfern, Alan and Martin Hunter (1991) *Law and Practice of International Commercial Arbitration*, 2nd ed., London: Sweet and Maxwell, xv.

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Developments in the Discourse of Conflict Resolution

MAURIZIO GOTTI¹

In the last few decades, Alternative Dispute Resolution (ADR) – in the forms of arbitration, conciliation and mediation – has been increasingly adopted in trade and commerce to resolve conflicts. As this method of settling commercial disputes is commonly considered an efficient, economical and effective alternative to litigation, the language used in arbitration documents is usually deemed to differ from that of litigation texts. However, in recent years there has been a narrowing between the two practices as litigation processes and procedures have increasingly been seen to influence arbitration practices. Moreover, the advent of new computer technologies has promoted procedures to resolve disputes totally, or partly, on line. This new phenomenon is known by the acronym ‘ODR’ (Online Dispute Resolution).

Drawing on documentary data, the first part of the paper investigates the extent to which the integrity of arbitration discourse is maintained, pointing out phenomena of contamination from litigation practices and exploring the motivations for such an interdiscursive process. The second part of the presentation analyses the evolution from ADR to ODR, providing examples of this computer-mediated practice both in Italy and the United States. In particular, the various phases of a typical procedure are analysed so as to highlight the great potentialities of this innovative tool. The new role of the mediator is also discussed, highlighting the fact that the adoption of the traditional model of non-virtual mediation in an online context can give rise to a few problems, at least given the present state of computer technology.

1. Introduction

In the last few decades, with the growing process of globalisation of trade and commerce, Alternative Dispute Resolution (ADR) has become more and more common as an alternative to litigation for settling commercial and other disputes without resorting to ordinary justice. Many factors have inspired the origin and spread of these alternative procedures, basically relying on the desire to provide a new tool to defend the rights of all those subjects that, mainly for economic reasons, could not afford expensive and long court proceedings. In certain countries, the fundamental reason was substantially the crisis of ordinary justice that was not able to provide effective and timely solutions to controversies. In general, the internationalisation of commercial transactions and the slow and time-consuming development of court cases and the elevated costs of traditional justice have led the market and the operators themselves to rely on alternative systems deemed to be more economical, faster and more efficient.

Arbitration, conciliation and mediation are typical examples of ADR processes which have proved to be very successful and are now employed in many countries, where they have become an integral part of the judicial system.² Arbitration, the classic dispute resolution system for companies, represents a strong alternative to litigation. This procedure results in

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² See Berger, Klaus P. (2006) *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*. The Hague: Kluwer Law International.

an arbitration award that is both binding and enforceable. Yet, as formal arbitration often mirrors litigation in both time and expense, commercial mediation, which instead implies a negotiated agreement between the parties, has become a more attractive ADR option. In this procedure agreement is reached by the parties through the work of a neutral party, the mediator, who helps them analyze the true interests involved in the dispute. He/she also identifies the differences implied in the parties' respective positions, leading them towards a resolution of the dispute without imposing any decision.

The terms 'mediation' and 'conciliation' are often used as synonyms for the same concept, that is, informal cooperation towards the solution of a controversy thanks to the neutral participation of a third party. In reality, mediation and conciliation have their own fields of application deriving from the specific characteristics of these two instruments, the techniques and tactics they employ, and from the professional preparation of the experts working in each field. The term 'conciliation' should be employed for civil, commercial and employment matters, whereas the term 'mediation' is better suited for procedures involving family disputes as well as social matters.

2. The spread of arbitration

In the last few decades, all over the world arbitration has become more and more common as a legal instrument for the settling of commercial disputes. The very wide acceptance of this adjudging procedure has been promoted by the growing internationalisation of commercial exchanges, which involves an ever-increasing number of trade disputes. The popularity of arbitration can be explained by the many advantages that it offers compared to litigation, the main one being that the arbitrator is usually an expert in the field of the dispute, which thus ensures that the entire procedure can be conducted without the intervention of lawyers or other representatives, resulting in major gains in speed and cost-saving. Other advantages that have contributed to the diffusion of arbitration proceedings are the fact that the parties can choose the arbitrator themselves and can either represent themselves or be represented by a person of their choice; moreover, many disputes can be resolved on paper without a hearing, as the procedure is private, self-contained and final. Another aspect that makes this procedure attractive is that it should be financially advantageous.³

The high recourse to international arbitration has given rise to a widely felt need for greater harmonisation of the procedures followed,⁴ which has led to the elaboration of the UNCITRAL Model Law (UML)⁵, to be used as a model by most of the member countries to produce their own individual statutory provisions for commercial arbitration. Indeed, this

³ For a more complete specification of the advantages of arbitration over litigation, see Bernstein, Ronald and Wood, Derek (1993) *Handbook of Arbitration Practice*. London: Sweet & Maxwell, 3-4 and Sanders, Pieter (1999) *Quo Vadis Arbitration? Sixty Years of Arbitration Practice*. The Hague: Kluwer Law International, pp. 2-6.

⁴ Indeed, in this process of harmonization, arbitration has taken an early leading role, as "historically, [this process] is one of the earliest examples of an attempt to adapt independent national legal systems to the relentless progress of international commerce." (Cremades, Bernardo M. (1998) *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, *Arbitration International* 14/2, p. 158.

⁵ The Model Law (United Nations document A/40/17, Annex I) was adopted on 21 June 1985 by the Commission on International Trade Law (UNCITRAL) and is available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

model has been adopted by a large number of countries.⁶ The elaboration of this Model Law, however, has not guaranteed complete uniformity among the various national legislations, as the different countries have used this model in different ways, depending – as we have previously stated – upon their national requirements, concerns, cultures, legal systems, languages, and other constraints. Indeed, in the process of adoption of this model, the English language text of the UNCITRAL has often had to be translated into the local languages, a procedure which has implied not only the adaptation of the original discourse to the typical features and resources of the national tongues, but also its adjustment to the cultural needs and legal constraints of each specific country.⁷

2.1. Arbitration in Italy

Due to its origins, arbitration is more widespread in common law countries.⁸ In Italy it remained marginal until quite recently, when European Community influence and the shortcomings of traditional justice systems forced legislators in 1994 to update the Code of Civil Procedure, introducing for the first time a section on international arbitration, in line with the indications of the main recent European and United Nations conventions. Under Italian law a distinction is made between standard arbitration (*arbitrato rituale*) and non-standard arbitration (*arbitrato irrituale*).⁹ The former exists when an arbitrator acts in compliance with the Code of Civil Procedure, rendering an award (*lodo*) which has the same effect as a judicial sentence; if filed at the local court house, it becomes effective by decree. The latter exists only within the contractual agreement between the parties and is peculiar to Italian law; it allows those involved to avoid publicity and means that arbitrators can avoid taxation on their fees. As regards the award itself, the arbitrators can base their decision either on law (*arbitrato di diritto*) or on equity (*arbitrato secondo equità*). In the former case they

⁶ Legislation based on the UNCITRAL text has been enacted in many countries, including Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, the Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Kenya, Lithuania, the Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, the Republic of Korea, the Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine, Zimbabwe and some of the states in the USA (California, Connecticut, Florida, Oregon and Texas).

⁷ This process of adoption and adaptation of the UML has been the object of analysis of an international research project entitled *Generic Integrity in Legislative Discourse in Multilingual and Multicultural Contexts* (<http://gild.mmc.cityu.edu.hk/>). The project, led by Prof. Vijay Bhatia of the City University of Hong Kong, has investigated the linguistic and discursive properties of a multilingual corpus of international arbitration laws drawn from a number of different countries, cultures, and socio-political backgrounds, written in different languages, and used within and across a variety of legal systems. Some of the results of the project are presented in Bhatia, Vijay K., Candlin, Christopher N., Engberg, Jan and Trosborg, Anna (eds.) (2003) *Multilingual and Multicultural Contexts of Legislation: An International Perspective*. Frankfurt am Main: Peter Lang; Bhatia, Vijay K., Candlin, Christopher N. and Gotti, Maurizio (eds.) (2003) *Legal Discourse in Multilingual and Multicultural Contexts: Arbitration Texts in Europe*. Bern: Peter Lang; Bhatia, Vijay K., Candlin, Christopher N. and Engberg, Jan (eds.) (2008) *Legal Discourse across Cultures and Systems*. Hong Kong: Hong Kong University Press.

⁸ Cf. Fuld, Hans Smit and Pechota, Vratislav (eds.) (2002) *World Arbitration Reporter*. Huntington, NY: Juris Publishing.

⁹ Cf. Fazzalari, Elio (1997) *L'arbitrato*. Turin: UTET; La China, Sergio (1999) *L'arbitrato*. Milan: Giuffrè; Bernardini, Piero and Giardina, Andrea (eds.) (2000) *Codice dell'arbitrato*. Milan: Giuffrè.

are bound to apply written legislation; in the latter they are authorised by the parties to derogate from legislation wherever its application contrasts with the common sense of justice. Finally there is a distinction between negotiated arbitration (*arbitrato ad hoc*), which is carried out according to the provisions agreed by the parties in the arbitration clause, and official arbitration (*arbitrato amministrato*), which takes place under the control of an institutional body according to its guidelines.

The 1994 law introduced several changes to previous Italian legislative provisions and custom, motivated in particular by the development of international trade. The term ‘international arbitration’ itself originally referred to disputes between sovereign states but has now moved to the realm of private litigation; indeed, the provision is extended in Article 832 of the law to instances “where a substantial part of the obligations arising out of the relationship to which the dispute refers must be performed abroad”.

Italy relies not only on privately-appointed arbitrators for the implementation of awards, but also on a range of public agencies, generally operating within local chambers of commerce. These agencies offer members involved in small controversies a set of guidelines or regulations to be followed and provide arbitrators. They are at the forefront of the movement towards arbitration and conciliation in business disputes, whether domestic or international. The number of awards rendered each year in Italy is still lower than court judgments. Plausible reasons include the unwillingness of lawyers to relinquish a lucrative option (ordinary justice) in favour of a more cost-effective one, the varying quality and reliability of arbitrators, and – as pointed out earlier – the relative novelty of this practice. Italy has been neglected for a long time as a seat of international arbitration because the law concerning arbitration lacked specific provisions which could make awards certain and unchangeable by limiting the number of recourses.¹⁰ According to law, Italian chambers of commerce are entitled to set up special arbitration chambers with the purpose of resolving disputes between parties.

In spite of the innovative characteristics of the 1994 Italian Arbitration Law, the recognition of potential conflicts between it and other parts of the Code of Civil Procedure have led to the drafting of Law 80/2005 delegating the Government to carry out further reform of arbitration legislation. This reform took place in 2006 with Legislative Decree 40. Since then, the local chambers of commerce, within which arbitral courts have been constituted, have strongly invited the parties not only to adopt a standard arbitration procedure, but also to allow arbitral chambers to appoint legal experts as arbitrators.¹¹ The reason is that the majority of awards delivered up to 2006 had been challenged before the Court of Appeal on legal grounds. The consequence of the fact that parties are strongly recommended to have recourse to standard arbitration under the control of legal experts as arbitrators is that arbitration practices are likely to develop in the same way as litigation proceedings.

¹⁰ Cf. Ceccon, Roberto (2000) La Corte Arbitrale di Venezia, una nuova istituzione per attrarre l’arbitrato internazionale in Italia. In *Le prospettive dell’arbitrato interno ed internazionale: il Regolamento della Corte Arbitrale di Venezia*. Turin: Giappichelli, pp. 7-12.

¹¹ In theory, any professional can be a member of a Board of Arbitrators of a local arbitration chamber. This is possible provided that the would-be arbitrator complies with certain requirements as established by the law, such as, for example, having at least three years of experience in legal and financial matters and having been appointed as an arbitrator at least three times. In practice, only legal specialists are appointed as *arbitrators* in an arbitration procedure, whereas all the other experts are appointed as *consultants*.

3. The influence of litigation practices on arbitration discourse

Recent studies have pointed out great changes taking place in arbitration procedures, highlighting in particular its ‘colonisation’ by litigation. In this context, Nariman, one of the most distinguished scholars in the field, remarks that “modern International Commercial Arbitration [...] has become almost indistinguishable from litigation, which it was at one time intended to supplant”.¹² It is in this context that commercial arbitration has attracted pejorative descriptions such as ‘arbitigation’, or the ‘judicialisation’ of arbitration. Marriott¹³ also complains about the unfortunate influence of litigation techniques on arbitration, which has led to increases in the cost of settling disputes, thus damaging the arbitration process.

Indeed, although, in principle, the basis of arbitration is the free will of the parties to agree to resolve their disputes through arbitration, in practice, parties do not hesitate to opt for litigation when the outcome does not favour them. To better protect their interests, the parties often have recourse to legal experts as arbitrators, which has the effect of making arbitration similar to litigation, thus encouraging the importation of typical litigation processes and procedures into arbitration practices. This in turn leads to an increasing mixture of discourses as arbitration becomes, as it were, ‘colonised’ by litigation practices, threatening the integrity of arbitration practice to resolve disputes outside the courts, and thus contrary to the spirit of arbitration as a non-legal practice.

This process of colonisation is also visible in the Italian context. The recent reform (Legislative Decree 40/2006) clearly specifies that in case issues are not deemed arbitrable by the arbitrators, the arbitration proceedings are terminated and, consequently, parties have to involve the courts in arbitration proceedings in order to have a final decision.¹⁴ As a consequence, parties tend to favour the appointment of arbitrators with a legal background, usually lawyers. This also derives from the assumption that the decision of a member of the legal profession will carry more weight than that of a non-lawyer. In any case, this notion seems to have become entrenched, and the tacit convention of appointing lawyers appears to be well-established.

The Code of Civil Procedure (Section 829) indicates a list of circumstances in which an arbitral award can be challenged. Among other cases this happens when:

- the appointment of the arbitrator is invalid;
- the award contradicts either another award or a court decision that has already become *res judicata*;
- relevant legal rules are not applied in the correct way.

It is clearly important, therefore, that arbitrators should have a solid legal background in order to ensure their familiarity with legal procedures and avoid incorrect practices that may make the award challengeable or annulable. This is one of the main reasons why, in the vast majority of cases, the arbitrator is also a lawyer.

¹² Nariman, Fali S. (2000) The Spirit of Arbitration: The Tenth Annual Goff Lecture. *Arbitration International* 16/3, p. 262.

¹³ Marriott, Arthur (2000) Less is More: Directing Arbitration Procedures. *Arbitration International* 16/3, p. 354.

¹⁴ Cf. Cutolo, Daniele and Esposito, Antonio (2007) The Reform of the Italian Arbitration Law. The Challenging of Arbitrators and the Setting of Time Limits. *Journal of International Arbitration* 24/1, pp. 49-62.

Nonetheless, one of the fundamental principles upon which arbitration is based is that arbitrators can be appointed on the basis of their expertise in the subject that has given rise to the dispute. This is particularly important in cases where the nature of the disagreement calls for very specific technical or specialised competence. As Italian law does not specify what kinds of professionals may be appointed as arbitrators, the role can potentially be assumed by any professional, but, in more practical terms, arbitrators belong to a limited number of categories: for example, lawyers, accountants, university professors and researchers, architects, chemists and engineers. Allowing the arbitrator to be appointed from within the relevant profession can obviously be advantageous to both parties, because an expert arbitrator can circumvent the need for external consultancy, thereby reducing expenditures of time and money. In spite of these benefits, lawyers remain the preferred category from which arbitrators are chosen.

Nonetheless, the role of arbitrator continues to be commonly described as a ‘second job’, because arbitrators usually remain active in their original professions. This emerged particularly during our informal interviews with a few practitioners, who identified the varying nature of the work as a key reason for this phenomenon; this also depends on the intermittent use of this type of procedure, and the differing portfolio of expertise, experience or qualifications that may be required by the circumstances of individual cases.

3.1. *The language of awards*

To better understand how and to what extent language forms/functions correlate to the ‘colonisation’ of arbitration discourse, I will focus on the lexico-semantic elements of the arbitration texts examined and on the linguistic expression of their rhetorical-pragmatic strategies.¹⁵ In particular, I will examine whether key linguistic features of legal language¹⁶ are also present in the texts taken into consideration. For this purpose, a corpus has been compiled consisting of 22 arbitration awards written in Italian, available in the archives of various chambers of arbitration in Italy, specifically in Piedmont, Bergamo, and Reggio-Emilia. These awards are mainly concerned with disputes that have arisen in business and private contexts.

In theory, arbitration exists to provide conflicting parties with a means of resolving their dispute(s) without resorting to legal action, with the associated time and financial costs of ‘lawyering up’. This procedure also allows the parties to keep matters within their own professional sphere: when dealing with a dispute over a business contract, for example, it is

¹⁵ The analysis presented here is part of an international research project entitled *International Commercial Arbitration Practices: A Discourse Analytical Study* led by Prof. Vijay Bhatia of the City University of Hong Kong. For further details of this project, see the webpage at <<http://enweb.cityu.edu.hk/arbitrationpractice/>>. Some of the results of the project are presented in Bhatia, Vijay K., Candlin, Christopher N. and Gotti, Maurizio (eds.) (2010) *The Discourses of Dispute Resolution*. Bern: Peter Lang.

¹⁶ Cf. Bowers, Frederick (1989) *Linguistic Aspects of Legislative Expression*. Vancouver: University of British Columbia Press; Solan, Lawrence M. (1993) *The Language of Judges*. Chicago: The University of Chicago Press; Bhatia, Vijay K. (1994) Cognitive Structuring in Legislative Provisions. In Gibbons, J. (ed.): *Language and the Law*, London: Longman, pp.136-155; Tiersma, Peter M. (1999) *Legal Language*. Chicago: The University of Chicago Press.

obviously beneficial to both parties to keep the dialogue as comprehensible as possible, avoiding the notorious complexities associated with legalese. One might hypothesise, therefore, that the type of language used in the final decision would display linguistic characteristics that correspond to the language of business, rather than the law. Nevertheless, in order to better consolidate the legal importance and validity of arbitral awards, lexical choices are often derived from, and retain, the characteristics of standard legal language.

In writing awards, arbitrators seem to display a certain level of awareness of the importance of their linguistic choices. The lexical and stylistic differences between various arbitrators are nearly imperceptible; in these kinds of texts the personal style is subordinate to the need to respect the textual conventions that belong to the tradition of arbitration. It is not possible to explore new writing styles; it is important to write within a certain traditional and accredited style. Indeed, chambers of commerce organise training courses for both new and experienced arbitrators in order to guarantee uniformity and homogeneity in the procedure. The analysis of our corpus has shown a very standardised layout and a set of commonly adopted linguistic expressions. The general frame of the award is often identical, and standard clauses are used throughout. This not only allows the drafter to make further savings in drafting time and costs, but also ensures that the clauses used are precise and correct.

3.1.1. Adopting the legal style

In spite of the fact that arbitration is a procedure that is simpler and quicker than full litigation, the language used in awards still presents the complexity that is typical of legal language. The linguistic differences between awards written by lawyers and non-lawyers are extremely subtle; lawyers comprise the vast majority of arbitrators, and other practitioners choose to adopt the same style in order to ensure the homogeneity of the genre. The professional identity of the arbitrator is often hidden behind a very impersonal style, which is a feature of awards as well as of other legal documents. The use of impersonal subjects offers a clear indication of the minor role that individual identity plays in these kinds of texts, which conforms to some implicit criteria of impersonality that must be respected. Consequently, the first person personal pronouns *I* and *We* are never used in awards. The more impersonal expressions *L'arbitro* [The arbitrator] or *il Collegio arbitrale* [the Arbitration Board or Arbitration Panel] (or, simply, *il collegio* [the Board or Panel]) are always used in awards. Furthermore, impersonal structures – a typical element of legal language¹⁷ – are constantly present in the corpus:

- (1) Si ritiene opportuno decidere. (RE3: 3)
[It is considered appropriate to decide.]

Similarly, passive forms are adopted in order to emphasise the result of the action, instead of the role of the agent, as in the following example:

- (2) La domanda [...] non può essere accolta. (RE3: 7)
[The request [...] cannot be accepted.]

It is interesting to note, however, that while the personal identity of the agent is obscured, the profession of the arbitrator is often made evident in the opening of the award with the abbreviation *Avv.*, the abbreviation of *Avvocato* [Lawyer] as in “Arbitro unico *Avv.*” [Sole

¹⁷ Cf. Williams, Christopher (2005) *Traditions and Change in Legal English*. Bern: Peter Lang, pp. 36-38.

Arbitrator Lawyer]. This strategy belongs to the Italian tradition of emphasising the professional category to which a person belongs. This element is also present in the signature. Similarly, in an award written by an accountant, the arbitrator's profession is clearly stated at the very beginning of the text:

- (3) Il sottoscritto, Dottore Commercialista arbitro unico per la soluzione della controversia insorta tra:
- Società – Procedente (o Parte Procedente)
 - ditta individuale – Convenuto (o Parte Convenuta). (RE10: 1)
- [The undersigned, qualified business and accounting consultant, Sole Arbitrator for the settlement of the dispute that has arisen between:
- Company – claimant (or claimant party)
 - Individual company – defendant (defendant party).]

As regards lexical choices, one of the features that characterises the language used by legal practitioners is the use of Latinisms,¹⁸ a lexical choice that contributes significantly to the complexity of the language. Latinisms are a typical element of legal language and are widely used in order to specify particular legal terms with a precise meaning; at the same time they also contribute to the overall sense of formality and traditionalism. The corpus presents a high number of Latinisms, such as *Ex tunc* / *Inadimplenti non est adimplendum* / *Inter partes* / *Petitum* / *Causa petendi* / *Expressis verbis* / *Compensatio lucri cum damno*. The use of Latinisms occurs most frequently in awards written by lawyers, or when the Board comprises members of the legal profession, but it is also present in texts written by non-lawyers, with expressions such as *una tantum* [one-off] (used by accountants) or *rectius* and *petitum* (used by engineers).

Another lexical aspect that characterises the corpus is the presence of words which display a high level of formality and constitute a prerogative of legal language. For example, in the following quotation we find the expression *all'uopo* [for this reason] which is typical of legal language:

- (4) All'uopo va evidenziato che la società convenuta non ha in alcun modo asserito l'inimputabilità del proprio inadempimento al fine di evitare la risoluzione di diritto del contratto di compravendita. (RE1: 6)
- [For this reason it must be underlined that the defendant company has in no way established its immunity in fulfilling its duties in order to avoid the legal annulment of the sales contract.]

Even the terms used to define the people involved in the dispute, *attore* and *convenuto* [*claimant* and *defendant*], assume a meaning that is specifically related to legal language. Similarly, specific legal acronyms are widely used in Italian awards, such as *PQM* (*Per Questi Motivi* [for these reasons]), used to introduce a standard section of an award. This is an obvious term for legal practitioners and most arbitrators use it, often without writing it out in full, but it may be unknown to non-experts.

In spite of being deliberately written so as to conform to a well-established format and adopt features typical of legal language, awards sometimes contain minor elements that are suggestive of a particular professional identity derived from the arbitrator's background. For

¹⁸ Cf. Mellinkoff, David (1963) *The Language of the Law*. Boston: Little Brown & Co., for English; Mortara Garavelli, Bice (2001) *Le parole e la giustizia*. Torino: Einaudi, for Italian.

example, the practice of writing figures in both numerals and letters is a strategy that is used exclusively by accountants in the corpus analysed, a clear sign of professional allegiance:

- (5) il Contratto prevede un canone d'uso pluriennale indivisibile di € 15.000,00 (quindicimila/00), oltre ad iva, meglio individuato nell'allegato D1 al contratto, corrispondente ad un canone annuo di €. 2.500,00 (duemilacinquecento/00) più iva, da pagare in 4 rate trimestrali da €.625,00 (seicentoventicinque/00), sempre oltre iva. Oltre a tale canone il Contratto prevede anche il pagamento di una 'quota di adesione' una tantum di €. 3.000,00 (tremila/00), oltre ad iva. (RE10: 1)

[The contract includes an indivisible rent of €15,000.00 (fifteen thousand/00), plus VAT, better identified in Appendix D1 to the contract, corresponding to an annual rent of €2,500.00 (two thousand five hundred /00) plus VAT, to be paid in four quarterly instalments of €625.00 (six hundred and twenty-five/ 00), plus VAT. In addition to the rent, the contract includes the payment of a one-off 'membership fee' at the sum of € 3,000.00 (three thousand/00), plus VAT.

As regards awards written by engineers, it is interesting to note a certain use of specific technical terms and acronyms related to the world of Information Technology (*CDN*, *ISP*, *I.P.*). This kind of lexicon belongs to the professional background of these arbitrators and is also a necessity deriving from the need to use the most appropriate and unambiguous terms in an award. Another peculiarity of awards written by engineers is the use of mathematical formulae, as in the following example, where the formula is used to calculate the number of working days needed to carry out the work:

- (6) Al fine di valutare i giorni lavorativi necessari ad eseguire le opere in variante, sia di natura civile che impiantistica, si opera secondo lo schema indicato nell'espressione seguente: $TV = \sum_i (D_i + V_i + R_i - P_i)$. (B6: 18)

[The days that are necessary to carry out the variations, both of civil and plant engineering structure, are calculated according to the following formula: $TV = \sum_i (D_i + V_i + R_i - P_i)$.]

The corpus also presents an award written by a surveyor concerning a dispute deriving from re-surfacing the courtyard of a block of flats. The professional expertise is identifiable here as well, thanks to features such as the use of technical terms that refer to the process of re-surfacing, as well as the techniques and tools involved.

3.1.2. Making legal references

Another typical element that characterises a lawyerly style is the constant citation of other legal documents. Indeed reference is often made to private documents relating to the dispute and/or public documents. Statutes, norms and rules of the legal system that are applicable to the dispute are also constantly mentioned. In the following example the contract from which the dispute originated and the Code of Civil Procedure are clearly cited:

- (7) il contratto di compravendita del 19 dicembre 1998, siccome integrato dall'accordo transattivo dell'1-3 dicembre 1999, deve essere dichiarato risoluto di diritto con effetto retroattivo, ai sensi e per gli effetti dell'art. 1457 Cod. civ. (RE1: 6)

[The Sales Contract of 19 December 1998, as completed by the Agreement of Sale dated 1-3 December 1999, must be declared legally invalid, and applied retro-actively under the terms of Section 1457 of the Civil Code.]

It is not surprising that the most frequently quoted legal text in the awards analysed is the Code of Civil Procedure, the main legal text used to rule the world of arbitration in Italy.

Another text often referred to is the Arbitral Code applied by the Chamber of Commerce involved in the proceedings. References to legal documents are particularly present in awards where the arbitrator is a lawyer, because they represent a sort of juridical and linguistic convention that gives the document a greater degree of legal force. Legal references are clearly used to emphasise the legal validity of the decisions made by the arbitrator and reflect a lawyer's knowledge of the legal rules and norms that are applicable.

3.2. *The discourse of proceedings*

The influence of litigation on arbitration practices can also be detected in oral proceedings. This is particularly visible in those cases in which arbitrators belong to a legal profession. In order to analyse this issue, a few examples, drawn from real cases, will be examined in this section. The data analysed derive from five arbitration proceedings held in Italy between 2004 and 2008 concerning business-related disputes.¹⁹ The events analysed took place in an office, a setting completely different from a courtroom trial. Although the setting and atmosphere of the arbitration proceedings are friendlier than in court, they remain formal, as the arbitrators fear that an informal attitude might reduce the degree of detachment which is required by the situation and thus hinder their willingness to show great independence and impartiality. The role played by the arbitrator to guarantee compliance with the rules of the whole procedure is crucial, and is very similar to the role played by a judge in court. Indeed, it is not unusual for arbitrators to remind participants of the need to proceed in an orderly way:

- (8) A²⁰: un momento. Adesso noi dobbiamo procedere con ordine
[A: one moment. Now we must proceed in an orderly way]

Although the atmosphere is friendlier than in court, arbitrators express their power by allowing or refusing specific questions or objections. For example, in the following extract, although one lawyer considers the question asked by the other party irrelevant, the arbitrator asks the speaker to answer it as he thinks that this information may be useful for a better understanding of the situation:

- (9) DL: Ritengo che la domanda sia ininfluyente [...]
A: Però siccome qui siamo in un interrogatorio libero che serve per chiarire i fatti, io piuttosto pregherei l'avv. PL1 di chiarire più esattamente qual è il punto che vuol fare evidenziare.
[DL: I think the question is irrelevant
A: But, as this is an informal examination whose aim is to clarify the facts, I'd ask Ms. PL1 to clarify more precisely what the point she would like to underline is.]

¹⁹ The cases analysed here are part of a study of arbitration discourse carried out by the Bergamo Unit (led by the present writer) of the international research team working on the project presented in note 15. The analysis is based on the official transcripts of the arbitral panel sent to the parties' counsels. The examples reported here are drawn from Anesa, Patrizia (2009) *Language and Power in Arbitration: the Italian Context*. Paper presented at the 4th CERLIS Conference on Researching Language and the Law (Bergamo, 18-20 June 2009) and Maci, Stefania (2009) *Arbitration in Action: the Display of Arbitrators' Neutrality in Witness Hearings*. Paper presented at the 4th CERLIS Conference (see above). Dr. Patrizia Anesa and Dr. Stefania Maci are members of the Bergamo Unit.

²⁰ A: arbitrator (sole arbitrator or president of the panel) / AB: arbitrator (member of the panel) / D: defendant / DL: defendant's lawyer / P: plaintiff / PL: plaintiff's lawyer.

Moreover, it is part of the arbitrators' duties to make sure that questions are answered adequately and to correct participants when they do not seem to report events faithfully:

- (10) A: no dopo nel *²¹
P: scusi mi ero perso. Questo è precedente ha ragione.
[A: no, later, in *
P: sorry, I was lost. This was before, you are right.]

In arbitration proceedings arbitrators play a very important role as they are the ones who assign the allocation of turns, clearly selecting the next speaker by calling him/her by name:

- (11) A: Chiedo ora al dott. P se vuole precisare quando è giunto a conoscenza dell'attività che il sig. D svolgeva.
[A: Now I'd like to ask Mr. P if he would like to specify when he learnt about Mr. D's activity.]

In order to guarantee impartiality and neutrality, arbitrators maintain a certain level of distance and highlight the authority that they can exert. This is the reason why the participants are expected to ask the arbitrators for permission to take their turn:

- (12) DL: io avevo solo da fare dei quesiti per precisare l'oggetto delle prime domande. Li facciamo adesso o dopo?
A: assolutamente sì, io direi di seguito, se voi siete d'accordo.
[DL: I wanted to ask some questions regarding the subject-matter of the first questions. Shall we ask them now or later?
A: Absolutely. I would say now, if you agree.]

Another similarity with trial proceedings can be seen in those cases in which the parties interact directly without asking the arbitrator for permission to take their turns; in such cases, the latter immediately intervenes, pointing out that this is not the procedure to be followed:

- (13) DL: * disponeva di una propria rete di agenti?
P: no, non disponeva di una propria rete di agenti
DL: di agenti per la vendita [...]?
P: No, [...]
A: Ecco, io chiedo ai colleghi però, per il buon andamento, che le domande le rivolgete al collegio, dopodiché il collegio valuta se darvi corso oppure no, e dopo la persona risponde. Quindi prego, collega, se ha delle altre domande a chiarimento da chiedere su questo fatto dell'attività.
DL: grazie Presidente. Se può chiedere qual era la forma contrattuale [...]
[DL: did * have their own network of agents?
P: no, they didn't have their own network of agents
DL: sales agents [...]?
P: No, [...]
A: Well, for the good running of the proceedings I'll ask the colleagues, though, to address their questions to the panel, then the panel decides whether to accept them or not, and then the person answers. So, please, my colleagues, if you have any more questions about this point.
DL: thank you, President. If you can ask what the contractual form was [...]]

Indeed, the typical turn-taking sequence is similar to that used in court:²² it starts with a party's request to the chair to intervene in the interrogation; the chair then addresses the

²¹ An asterisk indicates that sensitive data has been deleted for purposes of confidentiality.

question to the other party, without repeating the question but simply asking the party to answer it:

- (14) A: Bene, qualche chiarimento?
DL: Sì, Presidente. Se vogliamo chiedere al dott. D se in questa sua attività ha utilizzato materiale o qualsiasi altro elemento proveniente da o comunque appartenente a *
A: Prego, il dott. D risponda
D: allora, [...]
[A: Good, any questions?
DL: Yes, President. We would like to ask Mr. D if he has used any material or other element coming from or belonging to * for his business
A: Mr. D, please answer
D: Well, [...]]

The similarity between a trial and arbitration proceedings is sometimes explicitly underlined by the arbitrator, who makes a direct reference to procedures commonly used in court. In the following extract the arbitrator clearly refers to the principle on which the conduction of the hearing is based, i.e., the right of cross-examination, which guarantees that both parties have an equal possibility to take their turn:

- (15) A: Allora adesso, per diritto di contraddittorio, chiederei a * di riproporre la domanda di prima.
[A: Now, owing to the right of cross-examination, I would ask * to ask the previous question again.]

As Atkinson and Drew remark, this procedure is typical of court examinations: “Whereas in conversation the competition among possible next speakers to self-select can inhibit long turns, in examination that pressure is relaxed, given that each speaker is assured of a next turn.”²³

As we can see, these instances confirm a great similarity between the role of the arbitrator and that of the judge in court. Transcripts of proceedings frequently show cases in which arbitrators signal their belonging to the legal profession, often underlying the membership of the same professional community to which the parties’ lawyers also belong. This expression of commonality of experience is visible in the following quotation, where the arbitrator confesses his limited competence in technical matters, which he considers typical of legal professionals:

- (16) A: questi documenti francamente sono di quelli che sono in lingua greca per noi arbitri e avvocati, quindi bisognerà poi rivederli [...]
[A: frankly, these documents belong to that category of papers which are all Greek to us arbitrators and lawyers, and therefore they need to be examined again [...]]

In this quotation, solidarity is increased by the adoption of the first plural personal pronoun in the expression *per noi arbitri e avvocati* [“to us arbitrators and lawyers”] used to underline the same kind of technical background. In other cases the belonging to a common

²² Cf. Goodrich, Peter (1988) Modalities of Annunciation: An Introduction to Courtroom Speech. In Kevelson, R. (ed.): *Law and Semiotics* Vol. 2. New York, NY: Plenum Press, pp.143-165.

²³ Atkinson, J. Maxwell and Drew, Paul (1979) Order in Court: *The Organisation of Verbal Interaction in Judicial Settings*. London: Macmillan, p. 66.

professional community sharing the same legal competence is explicitly emphasized by the arbitrator:

(17) A: Questo non per anticipare nessun giudizio, ma perché siamo tra avvocati e quindi è inutile fare come il giudice che sta muto ecc. La mia opinione è, a meno che poi voi mi dimostrate che è sbagliata, che l'insegnamento più recente della Cassazione sembrerebbe non applicare neppure all'Arbitrato rituale queste scansioni dolenti del processo civile.

[A: what I am going to say does not anticipate any judgment, but since we are among lawyers and therefore there is no point in behaving like a judge who doesn't open her/his mouth, etc. My opinion is – unless you can demonstrate that it's wrong – that it may seem that even the most recent lesson learnt from the Court of Cassation does not apply these deceitful interpretations of the civil process.]

This insistence on commonality is adopted by the arbitrators in order to promote the establishment of a more cooperative context in which their work with the counsels can be carried out smoothly and guarantee the achievement of a successful outcome in a friendly atmosphere.

4. From ADR to ODR

The advent of computer technologies has favoured the development of procedures to resolve disputes totally, or partly, on line. This new phenomenon, which has spread widely in the United States and in the last few years also in Europe, is known by the acronym 'ODR' (Online Dispute Resolution). The first experiments were carried out in the United States, at first within universities and nonprofit organizations. Subsequently the new models of online resolution of controversies have been widely diffused in all sectors of the market and particularly in the virtual one. Today, in fact, there are several ODR services offered all over the world, usually with great success. For example, SquareTrade – an American company that manages the procedures of resolution of quarrels on behalf of eBay – in the first five years of this millennium managed more than a million and a half disputes, resolving over 200,000.²⁴

ODR has proved to respond positively to the needs of medium-small disputes, such as those in B2B (business to business) and B2C (business to consumer) transactions over the Internet. As e-commerce transactions are spreading quickly, with each of them potentially triggering a dispute,²⁵ its growth greatly depends on the possibility to provide consumers with easy access to justice, also taking advantage of the opportunities provided by the online environment.

Besides being the easiest and most innovative way of resolving problems deriving from transactions generated on the World Wide Web, ODR is also becoming popular in resolving off-line disputes. The reason is that the online dispute resolution service is simple and easy to carry out as it allows users to cancel barriers of time and space, offering them the possibility to communicate easily. In its relatively brief history the ODR system has already been applied not only to the B2B and B2C markets, but also to C2C (consumer to consumer)

²⁴ Cf. Maggipinto, Andrea (2006) Un alleato dell'E-commerce. *Computer BUSINESS Review Italy* March, pp.3-8.

²⁵ Cf. Hart, Christine (1999) Online Dispute Resolution and Avoidance in Electronic Commerce. Draft Report. <<http://www.law.ualberta.ca/alri/ulc/current/hart.htm>> (20.02.2010).

transactions.²⁶ All these are environments where both consumers and businesses need faster and more reliable instruments to solve disputes.

The main functions performed by ODR are the following:

- a. *Assisted negotiation* – Two parties exchange monetary proposals, following an automatic system offered by a provider of ODR services. In this case no neutral party, meant to help the participants solve the controversy, is present.
- b. *Online conciliation or mediation* – The participants communicate by e-mail or on a chat line, in the presence of a third party, the mediator, who helps them reach an agreement. This model is the one which most faithfully resembles the traditional form of face-to-face mediation.
- c. *Online arbitration* – The participants rely on the decisions of an arbitrator, who not only helps them reach an agreement, but also produces an award. This procedure is carried out exchanging all the relative documents over the Internet. In essence, if online mediation is based on the dialogue between the participants, in online arbitration the parties mainly exchange documents online.

The latest versions of online mediation enable the mediator and all other mediation parties to use their computers, as well as a means of audio and visual communication and a broadband Internet connection, to request and participate seamlessly in live, synchronous audio/visual online mediation proceedings. These proceedings occur before professional mediators who are ‘on duty’ during normal business hours. Integrated video and audio connections enable all participants to view synchronously any evidentiary materials, documents and audio/video presentations online. A person desiring to commence synchronous online mediation must connect his or her computer and monitor equipped with a Web cam to the ODR service provider and then access the online mediation request form. After agreeing to the terms and conditions of the service, the applicant authorizes payment by a major credit card for mediation fees, and then inputs detailed information about the mediation requested.

Upon approval of the request, the service provider notifies the ‘on duty’ mediator, who promptly informs the mediation parties of the imminent synchronous audio/visual online session. On the date and time arranged, the parties and the mediator connect themselves to the online mediation provider website and insert the code number of the mediation case, as well as their passwords and usernames. At the start of the session the mediator introduces himself/herself and asks the parties to do the same; afterwards, each party will be asked to give his/her own version of the facts. The mediator may then ask for further explanations and subsequently will identify the controversial matters, and draft a resolution proposal. All participants can see and hear each other synchronously and take part in simultaneous audio communication. This method thus uses a main virtual ‘conference room’, as well as multiple, additional, separate virtual ‘caucus rooms’ where the mediator may meet separately with any participant to facilitate negotiations. This shuttling to ‘caucus rooms’ and re-joining in the ‘conference room’ can be done as many times as necessary without interrupting the synchronous audio/visual online mediation connection. As happens in traditional mediation, the virtual system guarantees confidentiality in the procedure, assuring privacy in the negotiation and inaccessibility of all communications by third parties.

²⁶ Cf. Del Ninno, Alessandro (2008) Procedure alternative di risoluzione delle controversie: conciliazione ed arbitrato on-line.
<http://www.leggiweb.it/articoli/A5061696/Conciliazioneedarbitratoonline.html> (20.02.2010).

If an agreement is reached, the mediator sends a draft of the mediation agreement online. This can be examined on the spot by the parties, who can thus edit it live. Thus a final mediation agreement is stipulated and signed. Thanks to electronic signatures, there is no need to print and exchange documents by fax. This last operation is necessary to make the online agreement binding, thus conferring on it the nature of a real contract enforceable by law.

4.1. ODR in Italy

In Italy, although the number of people relying on ODR is still low, its diffusion is constantly growing. In the last few years this phenomenon has become more and more popular. In particular, in the years 2000-2003 there was a rapid growth of online sites set up for promoting the resolution of disputes on line through the ODR system. When it appeared, some people considered ODR too innovative, destined to disappear in a short time; others believed it was suitable only for certain instances. However, despite this criticism, ODR has developed constantly, gaining more and more attention from Italian users. Nonetheless, although it is considered a faster and cheaper tool able to overcome geographical barriers, Italian firms still seem to prefer traditional mediation and arbitration practices. Experts think this is mainly due to cultural reasons and to the fact that ODR requires a certain familiarity with long-distance communication instruments.²⁷

One of the main ODR systems in Italy is the one developed by the Milan Arbitration Chamber, called *RisolviOnline* (see website at <www.risolvionline.it>).²⁸ The procedure is similar to the one presented above. To start it, the participants must fill in the form on the provider's webpage. This form can also be submitted by the lawyer representing a consumer or a firm. There are no limits of value: all controversies can be submitted to the service, independent of their economic value. The party that intends to promote the attempt at conciliation compiles and sends the submission form online. Besides pointing out personal data, the claimant must also briefly describe the controversial matter from his or her point of view, adding any necessary attachments and describing the nature and the value of the controversy. At the beginning of the mediation process, the claimant must also indicate his or her credit card number, because the procedure fee must be paid in advance.

After having received the form by e-mail, the provider contacts the counterpart. As online mediation is voluntary in nature, in case the counterpart does not agree to participate, the mediation attempt will not take place. In case of acceptance, a mediator is named, a time and date for a virtual meeting is set and a reserved communication line is created, on which the whole procedure will develop. On the date and time arranged, the participants and the mediator connect themselves to the *RisolviOnline* website and insert the code of the mediation case, the passwords and the usernames assigned to them. Once the virtual contact between the parties and the mediator is established, the procedure reproduces the traditional pattern of nonvirtual conciliation. The mediator introduces himself or herself and asks the

²⁷ Cf. Katsh, Ethan / Leah, Wing (2006) Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future. In: Symposium on Enhancing Worldwide Understanding through Online Dispute Resolution. *The University Of Toledo Law Review* 38/1, pp.19-46.

²⁸ Other ODR systems created by Italian chambers of arbitrations are *Concilia-online* (<www.conciliaonline.net>, used by the chambers of Tuscany and Piedmont and many others) and *WebCuria* (<www.curiamercatorum.com>, used in Treviso).

parties to do the same; afterwards, each party will be asked to give his or her own version of the facts. The mediator may then ask for further explanations and will subsequently outline the controversial matters and draft a resolution proposal. The system is predisposed in such a way as to allow the parties to choose the type of negotiation that they prefer: an exclusive conversation with the mediator (using the available ‘reply’ command) or all the participants (using the command ‘reply to all’). At the end of the meeting, if the result is positive, the mediator sends the participants the Online Mediation Agreement by mail. Two copies of the Agreement must be printed, signed and sent to *RisolviOnline* by fax (the digital signature system is still not very widespread in Italy). The service keeps a copy of the document and makes sure that each participant receives a copy signed by the other party.

The service provided by the Arbitration Chamber of Milan has proved to be very successful and has favoured international commercial relations.²⁹ Indeed, 45% of *RisolviOnline* mediation requests have been initiated by foreign parties, thus demonstrating the international scope of this ODR instrument. A comparison of the figures of recent years (see Figure 1) shows a great development, with 117 new requests for online mediation services filed in 2007.³⁰ This is an impressive result when compared to the 16 requests filed in 2003. The most frequent matters involved in the disputes have been online auctions, travel/tourism, and the purchase of hardware/software.

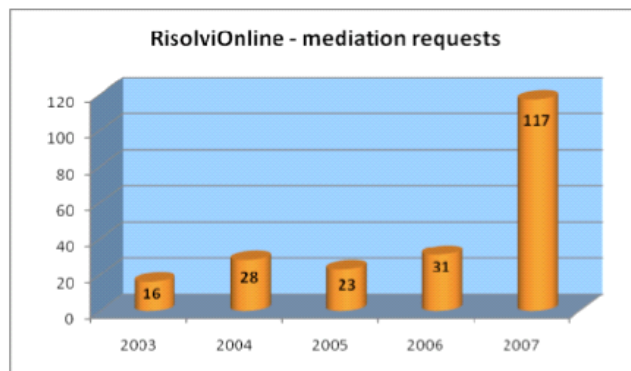


Figure 1. *RisolviOnline* mediation requests (2003-2007).

4.2. The language of ODR documents

The ODR procedure has been defined as an ‘open model’³¹ because it aims to favour a direct exchange of communication between participants; the mediator’s duty consists in helping parties discuss openly and find – through dialogue – a satisfactory solution to their dispute. In spite of the fact that mediation on line takes place in a friendly atmosphere and that the mediator tries to build a relaxed and cooperative atmosphere, avoiding legal jargon and

²⁹ Cf. Sali, Rinaldo (2009) Crossing Dispute and Information Technology: The Experience of *RisolviOnline*. <<http://odrworkshop.info/papers2005/sali2005notincl.pdf>> (20.02.2010).

³⁰ Cf. Regazzoni, Roberta (2009) *RisolviOnline: Online Mediation from a Very Practical Point of View*. Regazzoni, Roberta, 2009, In Poblet, M. (ed.): *Expanding the Horizons of ODR*, Proceedings of the 5th International Workshop on Online Dispute Resolution, <<http://ftp.informatik.rwth-aachen.de/Publications/CEUR-WS/Vol-430/Proceedings.pdf>> (20.02.2010).

³¹ Sali, Rinaldo (2003) *RisolviOnline Experience: A New ODR Approach for Consumers and Companies*. Proceedings of the UNECE Forum on ODR 2003, p. 3.

conflictual tones, it is interesting to note that the documents that are drawn up by the mediator often contain clear traces of ‘legalese’. Look, for example, at the standard opening formula of an ODR mediation agreement:

- (18) It is hereby stipulated, by and between the parties, that this matter is deemed settled pursuant to the following terms and conditions:

The agreement form starts with the typical legal expression *It is hereby stipulated*, which underlines its performative value by means of the adverb *hereby*.³² The sentence then continues with the doublet *by and between the parties*, again a typical feature of legal discourse;³³ a few words later another doublet – very frequent in legal documents – occurs: *terms and conditions*. The same sentence contains the formal verb *deemed* (commonly found in legal texts)³⁴ and the expression *pursuant to*, which is also part of legal terminology.

The conciliation agreement used by the Italian *RisolviOnline* system also contains sentences which are full of legal expressions. For example, look at the following paragraph:

- (19) Dopo ampia e approfondita discussione, le parti hanno deciso di conciliare la loro controversia alle seguenti condizioni... Le parti dichiarano di nulla avere più a pretendere l’una dall’altra in relazione all’oggetto della controversia in oggetto.
[After a lengthy and detailed discussion, the parties have decided to conciliate their dispute on the following conditions...The parties declare that they have nothing more to claim from each other in relation to the object of the dispute at hand.]

Here, too, we find the presence of common legal features such as doublets (*ampia e approfondita* [lengthy and detailed]), specific terminology (*conciliare* [conciliate], *controversia* [dispute], *parti* [parties], *pretendere* [claim]), and formal expressions (*dichiarano* [declare], *in relazione a* [in relation to], *l’oggetto della controversia* [the object of the dispute], *in oggetto* [at hand]). Furthermore, from a stylistic point of view the second sentence presents the archaic expression *di nulla avere più a pretendere* [to have nothing more to claim] based on the anticipation of the direct object (*nulla* [nothing]) before the verb (*avere* [to have]), which is found only in a very formal style such as that which is typical of legal documents.

4.3. The communicative effectiveness of online mediation

The ODR system offers several advantages: it allows participants who are not able or do not want to meet in person to communicate rapidly without incurring excessive costs. The system also allows the supplier of the service to name experienced and prepared mediators without worrying about travel distances and expenses, and without having to rent a facility in which to conduct the mediation proceedings.³⁵ International commercial relations are favoured,

³² Cf. Kurzon, Dennis (1986) *It is Hereby Performed...: Explorations in Legal Speech Acts*. Amsterdam: Benjamins.

³³ Cf. Hiltunen, Risto (1990) *Chapters on Legal English: Aspects Past and Present of the Language of the Law*. Helsinki: Suomalainen Tiedekatemia.

³⁴ Cf. Crystal, David and Davy, Derek (1969) *Investigating English Style*. London: Longman.

³⁵ Cf. Bordone, Robert C. (1998) Electronic Online Dispute Resolution: A Systems Approach – Potential Problems and a Proposal. *Harvard Negotiation Law Review* 175/3, pp. 190-191.

since the resolution of a controversy between international parties is not slowed down or impeded by long distances. As lawyers' fees are perhaps the greatest expense in traditional litigation, and even sometimes in traditional mediation, in cyber-mediation parties are able to save a large amount of money, as hiring a lawyer is often unnecessary.³⁶ Moreover, taking part in cyber-mediation is very convenient, as the parties are able to engage in the negotiation when they are available. The mediator can also contact either or both of the parties privately, without affecting the flow of the mediation. The idle time that disputants experience is similarly reduced because, in contrast to traditional mediation, the mediator can devote time to one party without wasting the time of the other party. In addition, many of the cyber-mediation providers have fully automated websites that are available all-day long, every day of the year. Parties can therefore proceed to negotiate the settlement of disputes immediately, rather than waiting for a long time to go to trial. The cost of the service is also proportional to the value of the controversy. Although a payment is necessary to start the mediating process, if the counterpart refuses to participate, the sum is refunded entirely.

The system nevertheless has some drawbacks when compared to traditional mediation. Virtual communication – at least in its present state – is not very 'communicative' from an emotional and nonverbal point of view.³⁷ Negotiations are certainly more effective when parties are able to communicate freely facing one another. For example, helping parties to listen and understand concerns, empathise with each other, vent feelings and confront emotions is considered an important art in mediation. Substituting e-mail for dialogue, for example, makes it difficult to give any weight to emotion in mediation.³⁸ Additionally, communication online does not express the variable tone, pitch and volume of the participants and cannot convey personality traits or physical cues. It is therefore more difficult to evaluate the flexibility of a particular party, or the strength of a party's feelings or confidence on a particular issue.³⁹ Consequently, some authors have argued that the lack of personal presence in cyber-mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties:

The online medium, at least the e-mail environment, makes it difficult for the mediator to manage or temper the tone of the interactions without sounding controlling and judgmental. The mediator, at least in the beginning, is a disembodied voice and cannot use her own physical 'personhood' to set the parties at ease and create an environment for sustained problem-solving. Similarly, absent the physical presence of the disputants, the mediator has difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes.⁴⁰

Experts in this sector agree in considering this model inadequate and believe that new efforts to improve the level of virtual communication are necessary. Some improvement can certainly derive from a greater diffusion of video and audio communication systems (web

³⁶ Cf. Lan, Hang (2001) Online Dispute Resolution Systems: The Future of Cyberspace Law. *Santa Clara Law Review* 41, pp. 837-855.

³⁷ Cf. Conley Tyler, Melissa and Raines, S. (2006) The Human Face of Online Dispute Resolution (Introduction to Special Issue). *Conflict Resolution Quarterly* 23/3, 333-342.

³⁸ Cf. Davis, Benjamin G. (ed.) (2006) Symposium on Enhancing Worldwide Understanding through Online Dispute Resolution. *The University Of Toledo Law Review* 38/1, pp. 1-10.

³⁹ Cf. Hattotuwa, Sanjana (2006) Transforming Landscapes: Forging New ODR Systems with a Human Face. *Conflict Resolution Quarterly* 23/3, pp.371-382.

⁴⁰ Katsh, Ethan, Rifkin, Janet and Gaitenby, Alan (2000) E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'eBay Law'. *Ohio State Journal on Dispute Resolution* 15, p. 714.

cams) that make long-distance visual communication between the participants and the mediator possible. Another important issue is concern over the protection of confidential material in ODR. While traditional mediation does not necessarily create a physical record, online mediation creates an electronic record. This could potentially enable a party to easily print out and distribute e-mail communications without the knowledge of the other party. This may hinder the development of open and honest exchanges in cyber-mediation. Finally, the familiarity of users with IT technologies is fundamental when the Internet becomes the main vehicle through which mediation takes place.

In spite of the great possibilities offered by modern technology, some people prefer asynchronous communication systems such as email to synchronous systems such as chat as this gives them more time to think about the proposals, requests or objections received before writing their replies and carefully editing them. Indeed, there are several benefits that stem from the asynchronous nature of e-mail communication; messages are not transmitted live, but can be written and sent later. Other advantages are pointed out by Melamed:⁴¹

Experienced mediators are well aware of the benefits of asynchrony. This is a big part of the reason that many mediators 'caucus' (meet separately) with participants. Mediators want to slow the process down and assist participants to craft more capable contributions. This concept of slowing the process down and allowing participants to safely craft their contributions is at the heart of caucusing. Surely, the Internet works capably as an extension of individual party caucus and is remarkably convenient and affordable. Internet communications take less time to read and clients do not hear a clicking of the billing meter. When the Internet is utilized for caucus, the non-caucusing participant does not need to sit in the waiting room or library growing resentful at being ignored.

Asynchronous communication is particularly appreciated by participants who are non-native speakers of English as it provides them with more time to analyze the texts received and solve all the linguistic and conceptual problems related to their interpretation. If language constitutes a problem, so may culture in general. Indeed, the success of mediation between participants from different countries greatly relies not only on the mediator's professional preparation but also on his or her awareness of the particular negotiation conventions adopted by different business and cultural communities.

5. Conclusions

As can be seen in the analysis above, arbitration texts show several instances of influence from litigation, as they clearly display a high level of formality, conform to a standard format and present linguistic features that belong to the legal tradition. This 'colonisation' of arbitration texts by the language of litigation is confirmed by the presence of those same elements in awards written by arbitrators with non-legal professional backgrounds. Even when the arbitrator is not a lawyer, he/she will tend to produce texts that follow closely the traditional legal style. This may appear paradoxical, as the aim of the arbitration procedure is to simplify the process of resolving a dispute and, therefore, one might expect linguistic choices to be made with the objective of creating a document that is less complex than other forms of dispute resolution (most notably, of course, litigation). However, the advantages of

⁴¹ Melamed, James (2009) Divorce Mediation and the Internet.
<http://www.utahbar.org/cle/annualconvention/materials/rethinking_odr.pdf> (20.02.2010).

using the tried-and-tested style typical of legal documents are so self-evident that they have led to increasing adoption and consolidation of the traditional linguistic features that characterise 'legalese' even within arbitration awards.

Moreover, the recent strong moves towards the use of the Internet, which have promoted procedures to resolve disputes totally, or partly, on line, have confirmed that large samples of legal discourse are also present in the texts used in these virtual procedures. Although cyber-mediation is likely to become more popular and better suited to resolving disputes as technology advances, the present reality has also shown that the new role of the mediator has proved to be more critical as the reproduction of the traditional model online has been found to meet some difficulties mainly due to the present state of computer technology.

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Online US *Agreement to Mediate* forms: exploring discursive and generic features

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This paper investigates discourse features in the professional genre constructed in US *Agreement to Mediate* forms appearing on the CADRE website. These forms are currently used in US states to settle disputes between schools and parents of children with disabilities. Drawing on qualitative and quantitative analysis, this study identifies similarities and differences in the sample forms dealing with the same content and purpose by considering the language use in the genre. Findings suggest that there are similarities as well as slight differences in the discourse practices under scrutiny. The latter reflect how genre producers exploit agreement forms in line with individual responses to rhetorical actions in the conventionalized setting. It is thus argued that *Agreement to Mediate* forms provide an unstable notion of generic integrity in “the world of reality” (Bhatia 2004: 18).

1. Introduction

Alternative dispute resolution processes (ADRs) have been widespread in many areas of law for years and have attracted interdisciplinary interest among linguists and legal scholars. Among scholars of linguistics, major studies of ADRs, notably arbitration, appearing in collected volumes (Bhatia, Candlin, Gotti 2003; Bhatia, Candlin, Engberg 2008), have provided valuable insights and perspectives on the legal language of arbitration by focusing on the generic and discourse patterns used in different texts in national and international contexts. The differences in the legal cultures and systems examined have revealed important linguistic issues in terms of professional discourse and communication practices behind the adjudicative process of arbitration, the most widely used extrajudicial form of alternative dispute resolution.

However, mediation, as a consensual process, provides a valuable alternative form of dispute resolution. As the most traditional ADR option used in a variety of legal areas, such as employment and divorce, mediation is an informal, confidential, and voluntary process in which disputing parties may find a mutually agreeable solution with the help of a neutral mediator, who is not a decision-maker like a judge or arbitrator in adjudicative processes (litigation or arbitration). This rationale for mediation has caught on in the area of special education in some US states, where it is enshrined in federal law in the Individuals with Disabilities Educational Act (IDEA) and encouraged by the National Center on Dispute Resolution in Special Education (CADRE). In those states mediation is available to parents and school personnel to resolve disputes involving the educational needs of students with disabilities, and either the parents or the school personnel may request mediation by completing an *Agreement to Mediate* form in an attempt to resolve the dispute.

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In providing a memorandum to IDEA, the Committee on Education and the Workforce of the US House of Representatives (17 February 2005) defined mediation as:

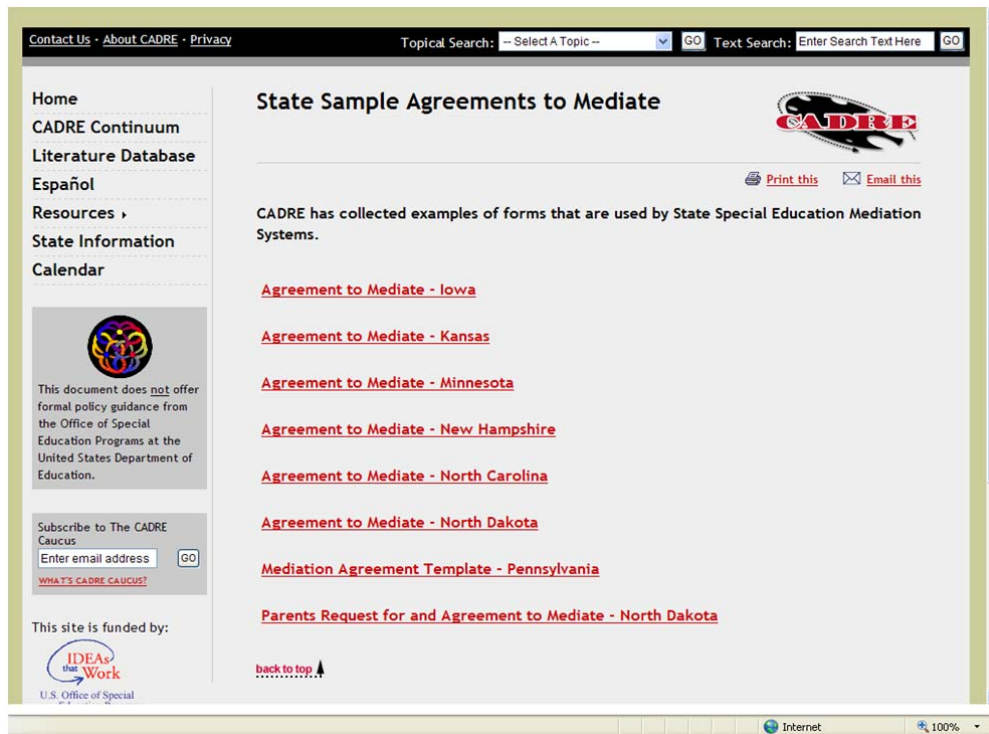
[...] an attempt to bring about a peaceful settlement or compromise between parties to a dispute through the objective intervention of a neutral party. Mediation is an opportunity for parents and school officials to sit down with an independent mediator and discuss a problem, issue, concern, or complaint in order to resolve the problem amicably without going to due process. (p. 13)

Against this background, the analysis in this paper explores discursive features in the genre of US *Agreement to Mediate* forms collected by CADRE and used in different states. Specifically, the analysis focuses on the genre as shaped by the rhetorical context (Miller 1984, 1994; Berkenkotter and Huckin 1995) and the conventionalized communicative purpose (Swales 1990, 2004; Bhatia 1993, 2004). The study identifies similarities and differences in the sample forms dealing with the same content and purpose by showing the significant lexico-grammatical and discoursal features that make the genre operative by genre producers in those states. Although the similarities in the use of lexico-grammatical and rhetorical resources identify the professional genre as being conventionalized and standardized, constraints on the allowable use of such resources suggest that the genre is unstable among genre producers.

2. Materials and Method

2.1. *The data: nature and purpose of the forms*

The written data used in this study were taken from eight *Agreement to Mediate* forms collected by the National Center on Dispute Resolution in Special Education (CADRE), which is funded by the US Department of Education Office of Special Education Programs. Agreement forms—of which only a small number are published by CADRE on its website (as of 10 March 2010), where they appear under the link “State Sample Agreements to Mediate”—are operative in various US states, namely, Iowa, Kansas, Minnesota, New Hampshire, North Carolina, North Dakota, and Pennsylvania:



Personal communication (by email) with CADRE's direction service informed this author of its mission, which is to increase the nation's capacity to effectively resolve special education disputes by reducing the use of expensive adversarial processes. The Center's major emphasis is on encouraging the use of mediation and other collaborative processes as strategies for resolving disagreements between parents and schools about children's educational programs and support services. As such, CADRE supports parents, educators, administrators, attorneys and advocates to benefit from the full continuum of dispute resolution options that can prevent and resolve conflict, and ultimately lead to informed partnerships that focus on results for children and youth. CADRE members do so also by developing their own Mediation Ground Rules.

However, as a result of personal communication with CADRE members, it was possible for this author also to establish the written source of the agreement forms: they were drafted by the dispute resolution/mediation units within their respective state education agencies in those states starting early in 2000. These credentials allow the agreements to be identified as a genre in professional practice used to achieve professional objectives. Indeed, these objectives can be seen in agreement forms currently being used by family members and/or educators in those states in their process of requesting mediation as a mechanism to resolve a dispute amicably, generally under federal special education law. Prior to the requesting of a form in any state, the mediator typically informs the parties how mediation works and asks the parties to confirm their agreement to mediate by signing an Agreement to Mediate form. This procedure results in technology-based modes of communication in the genre since the parties can print the agreement form from a state website, complete it, and mail or fax it, although many states allow an individual to request mediation over the telephone as well.

In this context, the ‘professional’ nature of the genre provides for the operative term being simply ‘agreement’ rather than the more formal ‘contract’, on account of agreement forms containing no ‘contractual terms’ that would give rise to a contractual obligation, breach of which could give rise to litigation. The operative term therefore leads the forms to resemble documents briefly outlining the terms and details of agreement relevant to undertake mediation, and are based on the parties’ will to mediate, which is enabled by the external sources of CADRE’s Mediation Ground Rules and IDEA 2004 as well. Thus, although agreement forms are not truly contractual in nature, they are indeed the first stage in moving towards a legally binding mediation agreement.

The notion of stage is relevant to understand that the forms under scrutiny do not stand alone in the mediation process and procedure. As a matter of fact, they are intended to be commencement points for the oral arguments that will be brought up later by the parties, and which are to be found in the structured mediation session. This session typically begins with the mediator describing the mediation procedure and then asking the parties—the parents and the school personnel—to clarify the problem by explaining their viewpoints about the issues in the complaint. If the parties resolve their dispute through the mediation session, they enter into a written, legally binding agreement, witnessed by the mediator, which is enforceable in any state or federal court. In this way, the parties can avoid due process hearings conducted by an administrative law judge (ALJ) of the Office of Administrative Hearings (OAH) and can provide immediate assistance to the child by addressing his or her needs.

Table 1 shows the overall short textual format of agreement forms selected for examination. In general, agreement forms are kept fairly uniform across the states, as measured quantitatively by the total number of words, number of sentences, and sentence length in individual texts. Text length is in itself determined by the inherently communicative purpose of the forms, although a quantitative exception arises in the Pennsylvania form, which is the shortest one in terms of word length for reasons that will become clear below.

<i>US Agreements to Mediate forms: state sample forms</i>	<i>Word length (tokens)</i>	<i>Sentences</i>	<i>Number of words per sentence: minimum – maximum</i>
IOWA	199	7	17-31
KANSAS	231	9	12-38
MINNESOTA	304	13	11-33
NEW HAMPSHIRE	331	12	19-37
NORTH CAROLINA	302	12	9-32
NORTH DAKOTA a	410	14	10-38
NORTH DAKOTA b	280	10	13-31
PENNSYLVANIA	62	1	35
Total	2,119	78	

Table 1. State sample *Agreement to Mediate* forms: text length in terms of the total number of words, number of sentences and sentence length.

2.2. Identifying the Agreement to Mediate genre by “discursive procedures”

In a context where the nature and purpose of data selection essentially define the ways in which the agreement forms are drafted by dispute resolution practitioners for the parties, the genre may be described in terms of a variety of “discursive procedures”, as claimed by Bhatia (2004). According to Bhatia, discursive procedures describe:

[...] the procedural aspects of genre construction, such as ‘who’ contributes ‘what’ to the construction and interpretation of specific generic actions; ‘participatory mechanisms’ which indicate ‘at what stage’ and ‘by which means’ does one participate in the genre construction and interpretation activities; and ‘contributing genres’ which allow one to choose the appropriate and relevant generic knowledge and information to make the genre in question possible.²

In this theoretical context, and as claimed by Bhatia, the identity of the genre also accounts for “a distinctly rich intertextual and interdiscursive patterning”.³

To illustrate such procedural aspects in the use and construction of Agreement to Mediate forms, the *who* and *what* mechanisms are immediately identified by the mediation units within the respective state education agencies in the states examined here. In these units, the members, as genre producers, are gathered into a professional “discourse community”⁴ that shares goals or purposes, using the organizational patterns of the genre to achieve these goals. However, in so far as they are responding to CADRE’s social objective of encouraging the full continuum of dispute resolution options, it is predictable that these members may also have an interest in a common set of concerns, values, goals, and practices, as defined by CADRE’s members, with whom they would therefore operate within “communities of practices”⁵ consisting of the three interrelated terms of “mutual engagement”, “joint enterprise” and “shared repertoire”.⁶ The expert community also accounts for the *stage* of participatory mechanisms since the content they produce in the resulting forms attempts to background and foreground, via interdiscursive links, the oral discussions between the parties and the mediator in the mediation session to follow. Finally, the label attached to *means* is relevant to recognize the final important participatory response by the federal special education law, known as the Individuals with Disabilities Educational Act 2004 (IDEA).⁷ Originally enacted in 1975, this statute serves as the ‘contributing genre’ by which the content of agreement forms is mostly expressed and the entire mediation process is regulated. This legislative genre therefore contributes towards intertextual patterning in the agreement forms being studied.

² Bhatia, Vijay (2004) *Worlds of Written Discourse*. London: Continuum (p. 128, original emphasis).

³ See *supra* note 1, p. 129.

⁴ Swales, John (1990) *Genre Analysis: English in Academic and Research Settings*. Cambridge: Cambridge University Press; Bhatia, Vijay (1993) *Analysing Genre: Language Use in Professional Settings*. London: Longman.

⁵ Wenger, Etienne (1998) *Communities of Practice: Learning, Meaning, and Identity*. Cambridge: Cambridge University Press.

⁶ *Supra* note (1998: pp. 72-73). These terms would, however, depart from the common notion of a discourse community which uses a specific genre to pursue its goals.

⁷ The following is a link to the statute that references mediation:

<http://www.directionservice.org/cadre/stat_prtb2004.cfm>.

2.3. Methodological procedure

In an attempt to combine the written data with theoretical approaches to discourse and genre, the research examined the genre of agreement forms by relating them to the notions of “large scale typification of rhetorical action”⁸, the repertoires of “situationally appropriate responses to recurrent situations”⁹, or appropriateness of communicative purposes¹⁰ for the intended audience.

On these grounds, the analysis focused on the use of lexico-grammatical and discoursal resources that make the Agreement to Mediate forms either similar or different in the specific rhetorical action and communicative purpose among genre producers, in their professional goal of making such forms operative for the intended audience. While drawing on the contribution of other analytical tools as well, the qualitative and quantitative investigation provided the following significant descriptions of the genre: the organizational structure, content, and layout; personal forms; modal verbs; verb tenses; syntax; and lexis. Quantitative data were obtained via ordinary computer scanning and manually analysed for specific linguistic items.

3. Results and Discussion

3.1. Organizational structure and content

A glance at the organizational structure and content in the agreements reveals how genre producers in different states achieve their social communicative purpose of allowing the intended audience to request an Agreement to Mediate form.

The data in five of the agreement forms (i.e., Iowa, Kansas, Minnesota, New Hampshire, and North Carolina) present similarities in both content and structure, and give expression to the same purpose in conventionalized and standardized products. Headed as AGREEMENT TO MEDIATE, these forms sequentially state various principles and procedures which are stepping stones to mediation, such as “oral discussions held in the mediation session remain confidential”, as derived intertextually from IDEA 2004, concluding with the signatures of all parties involved. As such, the forms do not contain contentious matters between the parties, as would conventionally be the case with other form-styled documents in areas of civil law, such as English ‘statements of case’ in civil claims. Thus, in the case of the Kansas and Minnesota forms, reported in full as sample texts 1 and 2 in the Appendix, mediation’s fundamental principles and procedures are drafted in declarative statements that amount to enumerated ‘terms of agreement’ by which the parties, identified as the parents and school personnel, state that they understand and accept the resolution of their dispute, preparing the basis for the parties’ participation in the mediation session, where the needs and interests of

⁸ Miller, Carolyn (1994) Genre as social action. In Freedman, A. and Medway, P. (eds.): *Genre and the New Rhetoric*. London: Taylor and Francis, p. 37.

⁹ Berkenkotter, Carol and Huckin, Thomas (1995) *Genre Knowledge in Disciplinary Communication: Cognition, Culture, Power*. Hillsdale, N.J.: Erlbaum, p. ix.

¹⁰ Swales, John (1990) *Genre Analysis: English in Academic and Research Settings*. Cambridge: Cambridge University Press; Swales, John (2004) *Research Genres: Explorations and Applications*. Cambridge: Cambridge University Press; Bhatia, Vijay (1993) *Analysing Genre: Language Use in Professional Settings*. London: Longman; Bhatia, Vijay (2004) *Worlds of Written Discourse*. London/New York: Continuum.

the child will be discussed under the guidance of a skilled mediator. The state forms end with the signature of the parties and the mediator as evidence of their Agreement to Mediate according to the terms of the form; the signatures, however, function as a declaration of understanding of the participatory process arrived at in the contextual circumstances.

Despite these regularities in the rhetorical situation and purpose, variation in structure and content can be observed in the two North Dakota agreement forms, which are presented as full sample texts 3 and 4 in the Appendix. Here, the convention style and format in which the application forms are drafted differs completely from the previously examined agreement forms. In particular, the 'Mediation Issue(s) of Parents' and 'Mediation Issue(s) of School' sections allow the parties to use blank spaces in which to describe the main issues of the conflict that raised the need to request mediation. In this context, the other previously examined agreement forms lack a 'Summary of Agreement' section with a blank space, which is found in sample 3 (one of the North Dakota forms) alone. This form is headed MEDIATION AGREEMENT as distinct from PARENT REQUEST FOR AND AGREEMENT TO MEDIATE in sample 4 of the other North Dakota form, although the function of the words PARENT REQUEST FOR is implied in other forms, where it is omitted. The distinction in the heading allows sample 3 to come across as a "hybrid" generic form incorporating both functions under the above headings, and to similarly achieve a "mix" of communicative purposes.¹¹ Like the other forms examined earlier, sample 3 communicates the parties' understanding of the dynamics and principles of the mediation process stated under a 'Terms of Agreement' section in the form-style framework, and drafted using second- and third-person pronouns rather than first-person pronouns, as discussed below. In addition to committing the parties to mediation, the sample form communicates the resolution that is expected to be reached by the parties following the mediation session by including a 'Summary Agreement' section. By intuition, this section brings into focus the mediator's potentially passive role as a 'scribe' who simply records agreement points as directed by the parties following the session. Thus, we can see that sample 3 is more permeable in its 'wider' conventional boundaries, serving also as a written, legally binding agreement ending the mediation session. The North Dakota forms invariably end with personal names and other references that signal declarative actions of closure by all parties to the agreement, thus sharing similarity in structure with the other agreement forms selected as data.

Interestingly, however, the Pennsylvania form (sample text 5 in the Appendix), which has the same heading, MEDIATION AGREEMENT, as the North Dakota sample 3, not only provides an exception to the expert manipulation of the hybrid structure identified in the North Dakota form, but also distances itself from the purpose shared by the other forms selected. It therefore gives rise to a new rhetorical situation and purpose realized outside the specific genre of Agreement to Mediate forms. The opening statement, textualized as *We, the undersigned, having participated in a mediation session on...*, makes it clear that the form gives expression to a different communicative purpose by locating the mediation session as the conclusion rather than commencement point of the oral arguments for which an Agreement to Mediate form is supposed to prepare the ground. Thus, unlike the 'broader' North Dakota text, the Pennsylvania form reasonably stands as a final written agreement within its 'narrower' conventional boundaries, binding the parties through the mediator and presumably becoming enforceable in court, as under the federal law. While this binding status

¹¹ Fairclough, Norman (1993) Critical Discourse Analysis and the Marketization of Public Discourse: The Universities. *Discourse and Society*. Sage: London; Bhatia, Vijay K. (1997) Power and Politics of Genre. *World Englishes*.

may be gleaned from an explicit performative act¹² in the first-person plural followed by performative verbs occurring with ‘hereby’, the legal adverbial of performativity (*We, the undersigned, ... hereby abide by and fulfill...*) in active simple present tense, the performative action of the opening statement is left for the parties to further define in a blank space and to attest to by signing the agreement.

The question now arises as to the rhetorical effectiveness of the North Dakota form in sample 3 and the Pennsylvania form for the parties in those states seeking to obtain a purposeful Agreement to Mediate form to be mailed or faxed. In a context where mediation units and CADRE’s members are assumed to be held together as communities of practice created with the goal of providing interacting parties with a domain of knowledge online, it is likely that these parties will be faced with inhomogeneous and misleading web content developed by CADRE’s members, whose practice is to incorporate all forms without distinguishing among them, on their institutional website, where the forms appear under the general heading “State Sample Agreements to Mediate”.

3.2. Printing techniques: further variation

Variation also arises from individual house styles for printing agreement forms, as measured by the use of font type and size, bold type and capital letters, as well as the referencing system.

Where referencing is concerned, Minnesota uses “Case No. _____”, Kansas uses “**Reference Number**” in bold, while North Carolina uses “Case # _____” and “Case Name: _____”. Although this administrative-style referencing system is omitted elsewhere in the data, most presumably for reasons of personal taste by the text producers, it adds a feature of formality to the forms while still adhering to the customary manner of presenting a document of this kind in a user-friendly, communicative environment. Unlike other forms, this system is compounded by the use of an identifiable commissioner’s name, which appears on the New Hampshire form, contributing a formal element to the document.

3.2.1. *We, The parties* orientations

Despite the allowable regularities of content and structure in expert writing practices, the rhetorical situations provide different micro-level norms by which genre producers manifest the presence of the participants in agreement texts.

As Table 2 shows, the incidence of personal subject / object pronouns and possessive adjectives is proportionally higher than that of the third-person plural *the parties* in subject position. The preference for personal forms realized by pronouns and adjectives¹³ indicates that the agreement forms have a considerable effect on the notion of the “subjectivity”¹⁴ of

¹² Austin, John (1962) *How to Do Things with Words*. Cambridge: Harvard University Press.

¹³ Ivanič, Roz (1998) *Writing and Identity. The Discoursal Construction of Identity in Academic Writing*. Amsterdam: John Benjamins; Kuo, Chih-Hua (1999) The Use of Personal Pronouns: Role Relationships in Scientific Journal Articles. *English for Specific Purposes* 18/2, pp. 121-138; Harwood, Nigel (2005) ‘We do not seem to have a theory... The theory I present here attempts to fill this gap’: inclusive and exclusive pronouns in academic writing. *Applied Linguistics* 26, pp. 343-375; Hyland, Ken (2005) *Metadiscourse*. London: Continuum, p. 53.

¹⁴ Benveniste, Emile (1971) *Problems in General Linguistics*. Coral Gables, FL: University of Miami Press.

the speaking subject, or the notion of “locutionary subjectivism”¹⁵ based on Benveniste’s analysis, or even the cognitive and affective aspects of the notion of “involvement”¹⁶ since:

[...] when an individual becomes engaged in an activity, whether shared or not, it is possible for him to become caught by it, carried away by it, engrossed in it – to be, as we say, spontaneously involved in it.¹⁷

By positioning the speaking parties as consciously experiencing subjects of engagement in the propositions to which they give voice when requesting an Agreement to Mediate form, personal forms allow the genre to establish a strong sense of ‘belonging’ to the parties in subjective identity-forging aspects of mediation discourse, and similarly allow the language of agreement forms to become a ‘living’ instrument in such a discourse.

IOWA				<i>we</i> :7	<i>us</i> :1				<i>your</i> :2
KANSAS				<i>we</i> :3	<i>us</i> :1				
MINNESOTA	<i>I</i> :14			<i>we</i> :4	<i>us</i> :1		<i>our</i> :1		
NEW HAMPSHIRE	<i>I</i> :25					<i>my</i> :2			
NORTH CAROLINA		<i>the parties</i> :6							
NORTH DAKOTA s.3		<i>the parties</i> :9				<i>my</i> :1		<i>you</i> :2	
NORTH DAKOTA s.4			<i>I/We</i> :8					<i>you</i> :2	
PENNSYLVANIA				<i>we</i> :1					
TOTAL	<i>I</i> :39	<i>the parties</i> :15	<i>I/We</i> :8	<i>we</i> :15	<i>us</i> :3	<i>my</i> : 3	<i>our</i> : 1	<i>you</i> :4	<i>your</i> :2

Table 2. Distribution of personal pronouns, possessive adjectives and *the parties* references in the data.

Let us consider the following examples:

(1) **NEW HAMPSHIRE**

1. *I* understand that the mediation is VOLUNTARY, and that *I* have chosen mediation as an alternative to an Impartial Due Process Hearing. [...]

6. *I* agree that *I* will enter into mediation session(s) in good faith and that all mediation proposals will be made in good faith.

¹⁵ Lyons, John (1982) Deixis and Subjectivity: *loquor ergo sum*. In Jarvella, R. and Klein, V. (eds.): *Speech, Place and Action: Studies in Deixis and Related Topics*. Chichester and New York, pp. 101-124.

¹⁶ Goffman, Erving (1961) *Encounters: Two Studies in the Sociology of Interaction*. Indianapolis: Bobbs-Merill.

¹⁷ *Supra* note 9 (1961: 35).

(2) **IOWA**

1. *We* will participate in a preappeal/mediation conference conducted according to the Administrative Rules of the Iowa Department of Education, Bureau of Children, Family and Community Services with _____ as the mediator. [...]
5. *We* will not blame the mediator or try to obtain compensation or reimbursement from the mediator for anything connected to the preappeal process – including the mediation agreement we reach.

(3) **MINNESOTA**

1. *I* understand *we* are here to find a solution to *our* dispute and that this is most likely to occur if *I* share information openly.
2. *I* understand that the mediator is here to help *us* see both sides, think about solutions, and write up an agreement. [...]
6. If *we* reach a written agreement, *I* agree to follow it.
7. *I* understand that what *we* talk about in mediation is confidential. *I* agree *I* will not ask to use any meeting notes or any other papers from mediation if there is a hearing later.

In the examples above, where the exclusive first-person pronoun “I” creates a strong individual voice of the subject, the inclusive “we” pronoun naturally creates a strong solidarity and collaborative partnership among the subjects in the mediation process. Particularly in (3), where we notice the immediate shift from an individual voice to a collaborative ‘we’ construction, the semantic referent and pragmatic function of the pronominal forms provide the rhetorical framework in which a ‘resolutive coordination paradigm’, as introduced by this author in this discussion, is established interactionally ‘between the parties and the mediator’ via the spatial deictic ‘here’ (*I understand we are here to find a solution ...*). The locative adverb forwards the proposition the parties have in their minds in a context where the mediator is relatively backgrounded on the surface of the text. In the subsequent statement in (3), however, the mediator’s role is foregrounded in the ‘mentally framed’ spatial deictic system of the proposition, which is now determined by the idea of ‘closeness’ of the mediator, as conveyed by proximal ‘here’ (functioning, however, as a kind of temporal ‘now’), and given a most prominent relation to the nominative singular ‘I’ pronoun, which takes the ‘us’ object form in the collaborative ‘we’ framework. In these contexts, the perception gained from the collaborative ‘we’ pronoun also establishes the communal identity of the parties, who have common needs and interests in having their dispute successfully resolved.

Communal identity is also achieved by the use of personal pronouns and the *if*-clause structure, as shown in example (3). Although this use is found in only two marginal instances in the data, it leads the individual voice of the subject in the “I” pronoun to commit, by accepting, to the content of the subordinate clause with the collaborative ‘we’ pronoun, thus allowing the ‘we’ speaking subjects to present an epistemic stance in the conditional instance.

However, as shown in Table 2 in regard to the North Dakota form (sample 4), other drafting opportunities are available to genre producers; here the combined use of *I/We* pronouns is preferred:

(4) **NORTH DAKOTA**

- I/We* request mediation in the matter of _____ (child/student’s initials) to try to reach an agreement on some or all of the issues regarding the educational services for the child/student. *I/We* have read and understand the written materials describing mediation services and have been fully informed that.... *I/We* also understand that the mediator is not providing counseling or therapy services.

At first sight, the intention of the expert producers may suggest that the use of the combined *I/We* construction is joint in its effect, since it allows the party in its own distant reading space to circle the corresponding pronominal form, as is typical of an application-style document of this nature. However, this combined use is only apparent on the surface of the text and is therefore misleading, since it does not provide a shorthand method of stating exclusive *I* and inclusive *we* in the corresponding statements, as we have seen elsewhere, but merely expresses the exclusive nature of the referent. Exclusiveness is measured by the heading *PARENT REQUEST AND AGREEMENT TO MEDIATE* (*my italics*), and is further reinforced by the form which, oddly, requires the signature of only one side in the controversy, identified as ‘Parent(s)’ and/or ‘Guardians’, and thus does not involve the other party. As a result, a further element of instability is allowed for by expert producers in that state.

By contrast, different opportunities arise in the North Carolina and North Dakota forms (sample 3). Here, genre producers constrain the use of personal forms for speaking subjects to changing rhetorical conventions through the lexical item *the parties* used in third person (plural) subject position. Thus, we read:

- (5) **NORTH CAROLINA**
1. *The parties* agree to participate voluntarily in mediation in an effort to resolve the issues to this dispute. Any agreement reached...
2. *The parties* agree that all matters discussed during the mediation are confidential, unless otherwise discoverable, and cannot be used....

- (6) **NORTH DAKOTA**
Terms of Agreement: (use additional pages if necessary) *The parties* understand that mediation is an agreement-reaching process in which the mediator assists the parties in reaching agreement in a collaborative and informed manner. It is understood that the mediator has no power to decide disputed issues for the parties. *The parties* understand that mediation is not a substitute for independent legal advice. *The parties* may secure...

In these instances, in which first-person subjects are not directly engaged, the illocutionary force of the statements allows the lexical item *the parties* to perform the required action, by foregrounding again unambiguously the collaborative notion of mediation in a future time frame. This item has a clear effect of distancing the explicit personal tenor expressed elsewhere through *I* or *we* person deixis, and gives third-person statements a flavor of conventionally drafted legal agreements, possibly under the interchangeable headings of ‘Memorandum of Understanding’ or ‘Memorandum of Agreement’.

The example in (6) is illustrative of further constraints on the use of *the parties* in subject position, which is avoided in place of the ‘understand’ transitive verb taking a clause as object in a short passive structure in three instances across the forms (North Carolina: 2, North Dakota: 1):

- (7) **NORTH CAROLINA**
If the issues are not resolved through mediation, it is understood by the parties that the issues may be transferred to the state complaint investigation process or to a due process hearing.

Unlike the example in (6), where *the parties* is deleted but implicitly understood by the pragmatic context, in example (7) *the parties*’ commitment to and responsibility for related issues is explicit, since the clause maintains the *by* phrase and, most importantly, presents

acceptance of something as an agreed fact, or otherwise presents acceptance as a condition for these agents. Unlike *I* or *We* constructions, the examples have the effect of impersonal and objective statements, where naturally “agentless actions serve to distance the writer or speaker from the texts”.¹⁸

Finally, the interpersonal use of *you* and *your* second-person pronouns completes the current stock. These pronominal items are found in the final two sections of the application form-style of the North Dakota forms (4 occ.), and less so, in this style, in the Iowa form (2 occ.), as reported in Table 2.

The rhetorical picture of these forms appears as follows:

(8) NORTH DAKOTA	
Parties: Each of <i>you</i> understands the preference for a limited number of participants at the meeting. At this time...	
_____	_____
Parent(s)/Guardian(s)	School District Representative(s)

Terms of Agreement:	
Each of <i>you</i> should be aware that the length of the mediation is unknown. Please reserve the remainder of the day for the mediation.	
<u>The parties</u> should understand that as mediator, <u>my</u> duty is to help the parents and the school district reach an agreement on the future placement and educational program for this child/student. ...	

(9) IOWA
5. We will not blame the mediator or try to obtain compensation...
PLEASE SIGN YOUR NAME AND PRINT YOUR TITLE LEGIBLY

Viewed in Hyland’s analytical tool of interactional metadiscourse¹⁹, the use of reader pronouns *you* and *your* as “engagement markers” in the author’s terminology²⁰ signals the expectations of genre producers of allowing the designated mediator to address the parties directly and, similarly, secure cooperation from them. Unlike the speaking subjects in *I* and *we* person deixis, which present their settlement positions to the mediator, who attempts to resolve disputes by facilitating discussions in the mediation session, the *you* and *your* pronouns in the examples above are controlled by the mediator in his/her role as discourse participant. The latter now guides the parties, who become the readers of the agreement forms by focusing their attention on the principles and procedure necessary to reach an agreement that is acceptable to all participants.

¹⁸ Reilly, Judy et al. (2005) Acquiring Perspective in English: the Development of Stance. *Journal of Pragmatics*, p. 191.

¹⁹ See *supra* note 7.

²⁰ See *supra* note 7.

Reader pronouns, as used here, add informality and intimacy to the texts, serving the inherently informal character of mediation, where interaction takes place in a user-friendly environment of technology-based communication modes. Indeed, example (8) focuses on the notion of cooperation with the mediator as a ‘facilitator’. Here the possessive form *my* powerfully intrudes into the text to indicate that the discourse participant casts him/herself in a role of responsibility, which is necessary to build trust in the parties and commitment to the process of mediation. As part of this responsibility, the collaborative relationship between the speaker and the audience is reinforced by *should*, the modal of necessity²¹, by which the mediator directs the parties to undertake a certain action in *you* or *the parties* orientations.

3.4. Modal meanings

As has become increasingly clear throughout the examples given above, genre producers also allow the speaking parties to stand in relation to their propositions by the use of modal auxiliary verbs. Here the communicative functions performed by modal verbs were considered since the terms of agreement in the data are rarely marked for modality patterns.

Table 3 below shows the occurrences of central modal verbs recorded in our data, where most of the modal meanings are conveyed by WILL, followed in frequency by MAY and CAN down to SHALL and SHOULD. Modal meanings are enacted in the proportionally higher number of instances of the ‘*I/we+agree/understand that-clause*’ structure (a total of 25) as well as in the much lower proportion of ‘*I+modal+main verb*’ structure (a total of 4). In addition to first-person subjects, modal meanings occur with human/non-human subjects (singular and plural) in active and passive constructions.

IOWA	CAN:2			WILL:4	
KANSAS	CAN:2			WILL:2	
MINNESOTA	MAY:2			WILL:5	
NEW HAMPSHIRE	SHOULD:1	MAY:6	WILL:3		
NORTH CAROLINA	SHALL:3	MAY:1	CAN:1	WILL:4	
NORTH DAKOTA	SHOULD:2	MAY:1	CAN:1	WILL:6	
NORTH DAKOTA	MAY:1			WILL:5	
PENNSYLVANIA					
TOTAL	SHALL:3	SHOULD:3	MAY:11	CAN:6	WILL:29

Table 3. Central modal verbs in the data: occurrences.

For a start, example (10) shows the use of the modal WILL occurring rarely in the agreement forms. This use is one which retains, as a marker of futurity, the meanings of firm volition, intention, or decision:

(10)

NORTH DAKOTA: sample 4

The following is a summary of the issue(s) that *I/we will discuss* in mediation:

²¹ Biber, Douglas et al. (1999) *Longman Grammar of Spoken and Written English*. New York: Longman.

However, the majority of statements in the data allow for an interpretation of the *will* modal according to the notional values of “volition/prediction” in the (deontic) “intrinsic modality” category²², and an “event modality” in which “dynamic modality” also includes the meaning of volition.²³ Based on this assumption, and the function performed by the modal operator in the list of examples in (11), the subject’s involvement in the deontic expression of volition/intentionality to bring about the proposition expressed in the utterance becomes more explicit by means of a rational ‘promise’²⁴ voluntarily undertaken by the parties at the time of reading the *will* clauses and contemporaneously signing the Agreement to Mediate form:

(11)

IOWA

1. *We will participate* in a preappeal/mediation conference conducted according to the Administrative Rules of the Iowa Department of Education, Bureau of Children, Family and Community Services with _____ as the mediator.
2. *We will not discuss* the details of this preappeal/mediation conference with anyone as required by law. [...] *We will not blame* the mediator or try to obtain compensation or reimbursement from the mediator for anything connected to the preappeal process – including the mediation agreement we reach.

The promise-bearing function expressed by the semantics of the English modal *will* is implied in the speaker’s awareness of responsibility and probity, and therefore necessity, to act in the expected manner during mediation, as is further derived from the external sources of IDEA 2004 and the Mediation Ground Rules.²⁵ This function naturally accounts for the social expectations of the generic forms in duty-bound contexts of interpersonal relations between the parties and mediator. Thus, we are able to see the parties as making a commitment to each other and to the mediator in relation to specific issues, such as promising to act in line with the mediation principles and procedures being textualized in (11). As a result, the modal statements have the status of a (deontic) promise-bearing commitment imposed on the subjects.²⁶

The hypothesis for a deontic commitment reading of *will* modalized statements, as derived from semantic and pragmatic factors in future time-reference, is further reinforced by looking at Palmer’s (1990) description of the deontic (performative) verb *shall*, whereby “a speaker may actually ... make a promise or threat”²⁷, and later Palmer’s (2001) deontic “commissive modality”, signalled in English by the modal verb *shall*. The latter connotes (in the author’s argument) the speaker’s expressed commitment that the action will take place. Well aware of the absence of first-person *shall* in the current texts, we assume that *I will* and *We will*, denoting strong determination/volition, are the usual forms in contemporary American

²² See *supra* note 15 (1999: 485).

²³ Palmer, Frank (2001) *Mood and Modality*. Cambridge: Cambridge University Press, pp. 7-8.

²⁴ Indeed, in older studies (Jespersen 1924: 320-321), the author suggested the notion of “promissive” will (*I will go*) among other sub-categories (such as, permissive, hortative, jussive, etc.) belonging to three types of sententially analysed ‘moods’, labelled as indicative, subjunctive and imperative.

²⁵ Similarly, a glance at ‘Sample Mediation Ground Rules’, which appears in total eleven times on the CADRE website, shows that *We* subjects are followed by the *will* modal, such as 5. *We will listen respectfully and sincerely try to understand the other person’s needs and interests*:

<<http://www.directionservice.org/cadre/grs.cfm>> .

²⁶ It should be noted that the deontic promise-bearing commitment of the parties in US Agreement to Mediate forms bears similarities with the parties’ commitment to the Italian *accordi di transazione* (negotiation agreements) established by a *mediatore civile* (family mediator): Faculty law expert communication.

²⁷ Palmer, Frank (1990) *Modality and the English Modals*. London: Longman, p. 69.

English, whereas the first-person *shall* (indicating strong volition) has a much more restricted role than in other regional varieties of English²⁸. Based on this assumption, the interchangeable use of *will* in the current texts is consistent with Palmer's category of "making a promise", or a deontic commissive use (Palmer 2001) such as *shall* in similar contexts. Like *shall*, therefore, the semantics of *will* here would be combined with Searle's pragmatics of commissive speech acts of promising, as claimed by Palmer²⁹, insofar as a sincere commissive *will* in the present data goes beyond the grammaticalized means of expressing the speech act of promising ('I promise + *to/that* clause'), and becomes the basic purpose of the speaker in person deixis (*I/we*), pledging a future action described in the propositional content of the utterance.

In the list of examples below, in which the different '*I/we+agree/understand that*-clause' is used by genre producers, the terms of agreement are constructed in a commissive sense (*intentionality*), in addition to using the *permission/prohibition* types of deontic modality:

(12)

We understand that the mediator will not disclose anything about this preappeal/mediation conference that in any way identifies the parties to it. We also understand that the mediator cannot be called to testify as a witness in any future hearing [...]

IOWA

We understand that: [...]

The mediator will not make decisions regarding the special education program or services to be provided to the student. [...]

Participation in a mediation session cannot delay or waive the parties' right to proceed with a due process hearing.

KANSAS

I understand that I may stop the mediation or the mediator may stop the mediation at any point or for any reason.

NEW HAMPSHIRE

I agree that I will enter into the mediation session(s) in good faith and that all mediation proposals will be made in good faith.

NEW HAMPSHIRE

I agree that I will not subpoena the mediator to testify in any court proceedings connected with the mediation session...

NEW HAMPSHIRE

If an agreement is reached, I/we understand that the written and signed agreement may be shared with other individuals working with the child/student. I/we understand that discussions during the mediation session will be confidential and will not be used during subsequent proceedings pertaining to the child/student's case.

NORTH DAKOTA: sample 4

Here, deontic modality notions realized in *that* complement clauses are controlled by person deixis (*I/We*) followed by the verbs 'agree' (14 instances) and 'understand' (32 instances), the most frequently occurring verb forms in the data. In this study, the verbs 'agree' and 'understand'³⁰ are interpreted as assertive speech-act verbs referring to "representative

²⁸ In this context, Crystal (2006: 311) claims that "*will/won't* is generally found for *shall/shan't*" in AmE. Moreover, the extensive use of the modal 'will' in our AmE data would also be justified by the claim that it marks a gradual replacement of 'shall' in non-legal English (Gotti 2003; Leech 2003).

²⁹ Palmer, Frank (1986) *Mood and Modality*. Cambridge: Cambridge University Press, p. 97; Palmer (2001).

³⁰ We assume that the verb 'understand' (= 'I understand and accept that...') is equivalent to the verb 'agree' in the current discourse.

declarations”³¹ performed by an agentive participant³² in the discourse at hand, where the person performing the act of ‘agreeing’ or ‘understanding’ must believe the proposition he or she is expressing (assertion) upon signing the document.

The list of examples in (12) using *that* complement clauses provides an opportunity for the first-person singular subject to complete his or her assertive speech acts of ‘agreeing’ or ‘understanding’ by involving him/herself in the expression of a deontic modal meaning of the commissive type (*I agree that I will enter... / I agree that I will not subpoena...*), as seen before, or in the *may* permissive type of Palmer’s (2001) “event modality” (*I understand that I may stop the mediation...*), which describes merely potential future actions of the parties to mediation. The modal meaning of *may* suggests that the subject is permitted to carry out the action in the “dynamic modality” type because, as noted, he or she is subject to the external constraints of IDEA 2004 and the Mediation Ground Rules as the enabling sources of the proposition made.³³

Moreover, *that* complement clauses allow the first-person plural subject to complete their asserted acts in relation to a third subject (the mediator), upon whom deontic meanings are imposed by the external sources, that is, in the commissive type (e.g., *We understand that the mediator will not disclose anything...*), the prohibition type (*We also understand that the mediator cannot be called to testify...*), or the permission type of modality (*I understand that [...] the mediator may stop the mediation...*). The fairly extensive use of complement clauses may be explained by the inherently collaborative framework in which the current discourse is constructed. And this framework requires genre producers to include the appropriate propositional material in a *that* clause following the first-person subject assertive clause. This results in the realization of the subjects’ (the parties’ and the mediator’s) cooperative involvement in the event described in the complement.

The following examples show that modal meanings are enacted in third-person human/non-human subjects (singular and plural), following the convention of writing legal or *quasi*-legal documents. Exceptions to this arise in only two (underlined) instances in (14), where, as a result of the application-form style of the document, the enabling source of the propositions expressed by deontic (predictive) *will* and (obligative) *should* derives from the designated mediator, interacting metadiscursively with the parties in their role as readers.

³¹ Searle, John (1975) A Taxonomy of Illocutionary Acts. In Gunderson K. (ed.): *Language, Mind and Knowledge*. Minneapolis: University of Minnesota Press, p. 361.

³² On this point, Leech’s (1983: 204) argument is about the “blurring and overlap between speech-act and non-speech-act verbs”.

³³ In discussing the modal ‘may’ mainly in epistemic use, Facchinetti (2003) analyses this modal in its (future) deontic use in legal text-types. Future deontic use of the modal, as claimed by the author, “is projected to the future with regulations, requests, wishes, orders, and permissions”, p. 317.

(13) **AGREEMENT TO MEDIATE FORM**

1. [...] Any agreement reached *will* be reached by mutual consent. [...]
2. [...] Confidentiality, however, *will not* extend to threats of imminent physical harm or incidents of actual violence that occur during the mediation. [...]
4. Mediation sessions *will not* be tape-recorded or transcribed by the mediator or any of the participants. All information or materials provided to or created by the mediator, including all notes generated during the course of the mediation, *shall* be destroyed by the mediator after conclusion of the mediation. [...]
5. If settlement is reached by all the parties, the agreement *shall* be reduced to writing and when signed *shall* be binding upon all parties to the agreement.

NORTH CAROLINA

(14) **MEDIATION AGREEMENT**

Parties: Each of you understands the preference for a limited number of participants at the meeting. At this time, the only participants who *will* be allowed into the session, without prior consent, *will* be: [...]

Terms of Agreement

[...] The parties *may* secure such advice throughout the mediation process. The parties understand that the mediator has an obligation to work on behalf of all parties and that the mediator *cannot* render individual legal advice to any party and *will not* render therapy or arbitrate within mediation. [...] Any agreement reached *will* be reduced to writing and duplicate originals given to the parents and the district. [...]

Each of you *should* be aware that the length of the mediation is unknown.

NORTH DAKOTA: SAMPLE 3

In the realm of modal meanings, it is telling that the traditional *shall* modal, which contemporary Plain English campaigners (including those in the US) advocate avoiding in legal discourse, intrudes in only two instances of the conventionally drafted form shown in (13). Although, as yet, the data point to a much more restricted role of this modal in American English and a broader use of *will*, as noted, the formal modal clearly imparts a deontic (obligation) future meaning on statements expressed in non-human third subjects. However, a note should be made about the *shall*-modalized statement expressing a result to be expected from the parties' resolution (*If settlement is reached by all the parties, the agreement shall be reduced to writing*). This modal is replaced by *will* in similar contexts in the North Dakota form shown in (14) (*Any agreement reached will be reduced to writing*). In this case, as in others where *will* alone is used (North Carolina: 4 times, North Dakota: 4 times), American genre producers would therefore seem to make no exception to the idea of a deontic prediction of future actions or events derived from the same external sources, insofar as the stronger deontic force conveyed by *shall* is avoided in favor of the deontic prediction conveyed by *will*. The latter is now constructed in third-person subjects (human/non-human) upon whom the "authority over [the] addressee"³⁴ of the *will* modal naturally falls. The perception gained from the use of modal verbs described above is that American genre producers tend to categorize deontic predictive *will* in less formal terms than, for example, their British counterparts. This may be accounted for by their need to avoid a strong, undesired effect on the disputing parties at this stage, thus encouraging the parties to move forward in mediation.

³⁴ Leech, Geoffrey (1987) *Meaning and the English Verb*. London: Longman, p. 86.

To complete the current stock, the data show seven instances of correlative modal expressions reported in (15), in which obligatory or permissive language is used as an alternative to some central modal verbs (e.g., *is required* = ‘must’ - *is not permitted* = ‘may not’):

(15)

- Any recording of a mediation session *is not permitted*.
- [...] but neither an advocate nor an attorney *is required* for mediation.
- I understand mediated agreements *are not admissible* in a due process hearing [...]
- I understand that *I am not required* to mediate [...]
- Parties or their representatives *are not prohibited* from retaining their own notes.
- The parties understand that the mediator *has an obligation* to work on behalf of all parties [...]
- The parties should understand that as mediator, my *duty* is to help the parents [...]

3.5. Present simple vs. Present progressive forms

In addition to the proportionally higher (25) total incidence of ‘*I/we+agree/understand*’ *that* clauses’ in modalized structures, genre producers allow first-person subjects to give voice to their statements of agreement by switching from the relatively low incidence (7) of active present simple forms in a *that* clause structure (e.g., *We understand that the mediator is a specially trained impartial third party*), used to assert a fact with respect to a realistic background (indicative mood), to a similar low incidence (5) of present progressive forms used in that structure:

(16)

KANSAS

We the undersigned, have been fully informed of the mediation process and agree [...] We understand that:

1. The mediator is a specially trained impartial third party whose role is to assist us in making mutually determined decisions regarding [...]
2. The mediator *is not serving* as a legal representative, counselor, or therapist. [...]
5. Mediation discussions are confidential.

(17)

MINNESOTA

I understand that the mediator *is not acting* as a lawyer, judge, hearing officer, investigator, counselor, therapist or advocate.

(18)

NEW HAMPSHIRE

2. I understand that by VOLUNTEERING to mediate, *I am doing* so because I want to have my case settled rather than appear at an Impartial Due Process Hearing on this date.

In these examples, we assume that the prototypical value of the progressive forms is to denote an activity that ‘is’ and ‘will’ be in progress. Thus, for instance, the verb phrase in (16) allows the subject to accept that “*The mediator is not serving as a legal representative, counselor or therapist*” in the present when reading the agreement, and will continue not to do so in the expected future during the mediation session. However, the activity in progress involves an implicit reference point in the past when the parties were privately informed of the mediation procedure by the mediator, as shown by the opening statement (*We the undersigned, have been fully informed of the mediation process [...]*). Under these circumstances, the verb forms in the example above imply that, unless there are unforeseen obstacles to decisions currently being made by the subject when reading and signing the agreement, the activity will be inherently

completable within the expected time frame of the mediation session. In example (18), in which the progressive form “*I am doing so*” signals an intentional action unfolding through time, the verb phrase reinforces the subject’s intention to be actively involved in an ongoing activity, as signified by the dynamic verb. Although, at first sight, the verb phrase may result in the whole statement being awkward in the context, by virtue of the progressive form apparently adding a feature of repetition to the content already specified in the *by* clause presented in capital letters (“*by VOLUNTEERING*”), the phrase suggests a volitional expression comparable to that of the dynamic modal *will* (Palmer 2001) or bears on affective aspects of the whole statement. In the latter, the affective verb *want*³⁵ is realized in a *to* clause frame using a first-person subject.³⁶

It follows that the use of progressive forms in the examples is intended to emphasize an ongoing durative aspect of the event by conceptualizing the dynamic quality of the activities which are spread out over time, as signified by the aspect of the verb rather than the tense.³⁷

3.6. Simplicity of syntax and lexis

We have seen that Agreement to Mediate forms are evidence of what is being agreed by the parties who are led to focus on the essential items contained in such forms. This results in the forms not being as conditioned by rigid lexical choices as conventionally drafted legal agreements, which often start with ‘Whereas this [...]’ in preambles and use specialized lexis, euphemisms, and inflated language that makes the ordinary seem extraordinary.

By contrast, agreement forms tend to naturally exhibit simplicity of language in both syntax and lexis, remaining very close to the language of everyday communication. As a matter of fact, simple and compound sentence types are a prominent feature in the forms, and specialized lexis is observed only marginally when it is required by the preferences of individual genre producers. In the latter case, technical vocabulary occurs only in single instances across the documents in various parts of speech (New Hampshire: *plaintiff*: 1, *defendant*: 1, *(to) subpoena*: 1, Pennsylvania: *hereby*: 1), and the key concepts derived from the principles and procedures of mediation such as *confidentiality*, *good faith*, and *due process* are common features of such documents. Even when certain documents take on a conventional, formal guise, as is the case with the North Carolina form, efforts are made by the genre producers to paraphrase certain concepts in ordinary language, such as *threats of imminent physical harm or incidents of actual violence* instead of the conventional single concept of *duress*.

Despite the tendency towards simplicity, expert producers are not saved from certain conventions that are typical of drafting documents of a similar nature. This can be seen by the use of binomial structures realized in the higher frequency of “or” conjunctions (26), as compared to the lower number of “and” conjunctions (12), the coordinating function of which

³⁵ Biber et al. (1999).

³⁶ Prior to Palmer (2001), earlier approaches included the verb *want* in the category of boulomaic modality (Resher 1968: pp. 24-26; Simpson 1993: pp. 47-48), this modality, however, also being classified as a type of dynamic modality (Perkins 1983: 11) on account of the ‘disposition’ meaning conveyed by the verb.

³⁷ According to Comrie (1976), aspect in progressive forms is concerned with the nature of an action or event in terms of “its internal temporal constituency”, 1976: p. 3.

allows the expert producers to provide the parties with alternative choices in the specific genre of agreement forms:

(19)
discussions and offers of compromise / we jointly develop and agree / abide by the procedures and guidelines / not blame the mediator or try to obtain compensation or reimbursement / legal representative, counselor, or therapist / advice from an advocate or an attorney / special education program or services / threats of imminent physical harm or incidents of actual violence

4. Conclusion

Despite the limited amount of data, this study has examined the degree of discursive features shared by expert producers in their task of constructing the professional genre of US Agreement to Mediate forms. The use of agreement forms has been shown to serve the needs of parties who seek, by initiating mediation, to achieve resolution of their disputed issues, while also acknowledging the professional objectives of CADRE members.

The analysis of the macro-structure and content of the forms shows that in the majority of cases genre producers tend to construct texts for ordinary rhetorical situations and communicative purposes. The result is the production of “stable structural forms” (Bhatia 2004)³⁸ which provide a barometer for a recognizable standard of agreement forms, allowing references to prospective parties in their request for an Agreement to Mediate. However, subtle differences do emerge from the dynamically conventionalized rhetorical situation(s) and purpose(s) shaped in the North Dakota agreement form, which allows genre producers “to take liberties with genre conventions” (Bhatia 2004)³⁹ by exploiting the genre of the Agreement to Mediate form within its open-ended structure. Outside this structure, however, the “novel rhetorical situations” (Bhatia 2004)⁴⁰ shaped in the Pennsylvania form are the result of organisational preferences maintained online by CADRE’s members, despite the assumed commitment shared with genre producers. As with the North Dakota form, web preferences in the Pennsylvania form may have unpredictable consequences for parties seeking knowledge about an Agreement to Mediate form in that state.

Similarities and differences have also emerged from the analytical contribution of micro-level data. The extensive use of personal forms among genre producers can be said to depend upon the social purpose of the agreement forms, which place emphasis on the subjectivity of the parties in negotiating cooperative partnership positions and developing social relationships. It therefore reinforces the parties’ own participation in the construction of a ‘personalized’ genre. This way, the proportionally higher incidence of personal forms provides a consistent rhetorical mechanism that shapes the genre-specific communicative style and function in the conventionalized setting, and similarly provides the notion of agreement forms as an operative genre between the parties and the mediator in those states. Yet, the data have shown that verbalization of first-person subjects is only relatively exploitable among genre producers, who also adopt the lexical form *the parties* for its own conventional function, thus reflecting more the communicative and rhetorical style in which formal legal agreements are conventionally drafted.

³⁸ *Supra* note 9, p. 23.

³⁹ *Supra* note 9, p. 112.

⁴⁰ *Supra* note 9, p. 24.

In addition, the rationale of the genre has revealed that agreement forms are a product of the interaction between two parties willingly coming together to resolve their dispute under the guidance of a skilled mediator. Here, the incidence of commissive *will* modals in various clause structures provides the rhetorical framework in which the speaking subjects establish the ground rules by committing to each other and the mediator in relation to specific points, and similarly accounts for cultural stereotypes of American genre producers as being more direct than other English-speaking genre producers drafting documents under similar circumstances. However, the contribution of conventional third-person subjects in the lexical form *the parties* does not save the latter from the idea of an obligation being imposed on them by *will* future events.

In a context where agreement forms prepare the ground for later discussions, the speaking subjects are drawn into the durative time interval of the mediation event and are given the benefit of addressing the issues in language which is fine-tuned enough to encourage mediation between the parties. For the latter, the role of technology in permitting communication by mail or fax not only creates intimacy and familiarity that moves the mediation forward, but also anticipates the duties of the mediator as the facilitator of any final resolution, as well as the positions and attitudes of the parties expressed in a cooperative relationship.

As a result of the identified variation in the use of macro-level organisational features, varying printing techniques, and micro-level differences in the use of first- and third-person subjects, a reasonable degree of intra-generic conflicts can be said to arise in expert practices across Agreement to Mediate forms. The latter are capable of establishing a flexible concept of genre integrity in *the world of reality* (Bhatia 2004) – i.e., “the world of discourse in action”.⁴¹

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⁴¹ *Supra* note 9, p. 18.

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http://www.directionservice.org/cadre/stat_prtb2004.cfm

<http://www.agbell.org/docs/pipefile.pdf>

<http://www.directionservice.org/cadre/grs.cfm>

Appendix

Sample text 1 (Kansas):

Reference Number	
AGREEMENT TO MEDIATE - Kansas	
We, the undersigned, have been fully informed of the mediation process and agree to abide by the procedures and guidelines governing the process. We understand that:	
1. The mediator is a specially trained impartial third party whose role is to assist us in making mutually determined decisions regarding the appropriate special education program and services for: <div style="text-align: center; margin-top: 10px;">_____</div> <div style="text-align: center;">(Name of Student)</div>	
2. The mediator is not serving as a legal representative, counselor, or therapist. 3. The mediator will not make decisions regarding the special education program or services to be provided to the student. 4. The mediator cannot be called upon as a witness or consultant in any other administrative, judicial or educational process. 5. Mediation discussions are confidential. Any recording (electronic or otherwise) of a mediation session is not permitted. The only written record will be the agreement that we jointly develop and agree upon in the mediation process; and 6. Participation in a mediation session cannot delay or waive the parties' right to proceed with a due process hearing.	
Family member:	_____
	Signature
Date: _____	_____
	Type or Print Name
Education Agency Representative:	_____
	Signature
Date: _____	_____
	Type or Print Name
Please FAX and mail to: Mediation Consultant Student Support Services KS State Dept. Of Education	

Sample text 2 (Minnesota):

Minnesota Special Education Mediation Service	
Agreement to Mediate	
Case No. _____	
1. I understand we are here to find a solution to our dispute and that this is most likely to occur if I share information openly. 2. I understand that the mediator is here to help us see both sides, think about solutions, and write up an agreement. 3. I understand that I may seek advice from an advocate or an attorney, but neither an advocate nor an attorney is required for mediation. 4. I understand the mediator will not give legal or financial advice. 5. I understand that mediation may be stopped at any time by an administrator, parent or guardian, or the mediator. 6. If we reach a written agreement, I agree to follow it. 7. I understand that what we talk about in mediation is confidential. I agree I will not ask to use any meeting notes or any other papers from mediation if there is a hearing later. No one at the mediation, including the mediator, will give out information about the mediation unless we all first agree that it is all right. 8. I understand mediated agreements are not admissible in a due process hearing unless the parties agree otherwise or a party to the agreement believes the agreement is not being implemented. 9. I am aware that the mediator will not testify about the mediation in any subsequent proceedings.	
Signature – Parent/Guardian _____	Signature – School Administrator _____
Signature – Parent/Guardian _____	Signature - Participant _____
Signature – Participant _____	Signature – Mediator _____
Date _____	

Sample text 3 (North Dakota):



MEDIATION AGREEMENT
DEPARTMENT OF PUBLIC INSTRUCTION
OFFICE OF SPECIAL EDUCATION
SFN 52942 (6/20/03)

Child/Student Initials	Date of Birth	Date & Place of Mediation
Mediation Issue(s) of Parents		
Mediation Issue(s) of School		
Parties: Each of you understands the preference for a limited number of participants at the meeting. At this time, the only participants who will be allowed into the session, without prior consent, will be:		
Parent(s)/Guardian(s)		School District Representative(s)
<i>Other Participants (please indicate relationship to child/student)</i>		
<p>Terms of Agreement: (use additional pages if necessary) The parties understand that mediation is an agreement-reaching process in which the mediator assists parties in reaching agreement in a collaborative and informed manner. It is understood that the mediator has no power to decide disputed issues for the parties. The parties understand that mediation is not a substitute for independent legal advice. The parties may secure such advice throughout the mediation process. The parties understand that the mediator has an obligation to work on behalf of all parties and that the mediator cannot render individual legal advice to any party and will not render therapy or arbitrate within the mediation.</p> <p>Neither the mediator nor the mediator's records or notes will be available for further procedures such as a due process hearing. Any agreement reached will be reduced to writing and duplicate originals and duplicate originals given to the parents and the district.</p> <p>Each of you should be aware that the length of the mediation is unknown. Please reserve the remainder of the day for the mediation.</p> <p>The parties should understand that as mediator, my duty is to help the parents and the school district reach an agreement on the future placement and educational program for this child/student. While it is important and useful to review the past activities of the parties with respect to the placement and educational program of this child/student, the parties are urged to be particularly prepared to address the child/student's future placement and program. At the conclusion of mediation, all parties will discuss and agree how best and when to share the results of them mediation with other relevant parties.</p>		
Summary of Agreement		
<p>This mediation agreement is in effect for:</p> <p>_____ time specified in agreement</p> <p>_____ school year in question, or</p> <p>_____ until circumstances change as determined by the IEP team</p>		
Parent/Guardian Signature		Date

School District Representative Signature	Date
Mediator Signature	Date

Please mail to:

Department of Public Instruction
Office of Special Education
600 E Blvd Ave, Dept 201
Bismarck, ND 58505-0440

Sample text 4 (North Dakota):

PARENT REQUEST FOR AND AGREEMENT TO MEDIATE
DEPARTMENT OF PUBLIC INSTRUCTION
OFFICE OF SPECIAL EDUCATION

SFN 52940 (6/20/01)

I/We request mediation in the in the matter of _____ (child/student's initials) to try to reach an agreement on some or all of the issues regarding educational services for the child/student. I/We have read and understand the written materials describing mediation services and have been fully informed that the mediator is not providing the parent(s), the school district, or the child/student with legal representation. I/We also understand that the mediator is not providing counseling or therapy services.

I/We choose to pursue mediation to try to reach an agreement on some or all of the issues regarding the child/students' educational program. I/We understand that the mediation process will involve the mediator, acting as a neutral third party, to help develop an agreement that is mutually satisfactory.

If an agreement is reached, I/we understand that the written and signed agreement may be shared with other individuals working with the child/student. I/We understand that discussions during the mediation session will be confidential and will not be used during subsequent proceedings pertaining to the child/student's case.

The following is a summary of the issue(s) that I/we will discuss in mediation: (use the back side of this sheet if more room is needed)

Please identify the other party(ies) that you want to meet with for mediation.

Name	Position

Please identify the other party(ies) who will attend the mediation with you.

Name	Position

Parent(s)/Guardian(s) Name(s)	Child/Student Name	Date of Birth
Address	Telephone Number	
School District Name		
Parent Signature	Date	

Mail to:
Department of Public Instruction
Office of Special Education
600 E Blvd Ave, Dept 201
Bismarck, ND 58505-0440

Sample text 5 (Pennsylvania):

<p><i>Office for Dispute Resolution</i> MEDIATION AGREEMENT</p> <p>We, the undersigned, having participated in a mediation session on _____ regarding _____ and being satisfied that the provisions of the resolution of our dispute are fair and reasonable, hereby agree to abide by and fulfill the following:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>		
Mediator _____	Parent/Guardian _____	
Mediator _____	Parent/Guardian _____	
Case Number _____	School Representative _____	
<div style="display: flex; justify-content: space-between;">ODR – White CopySCHOOL – Canary CopyPARENT7GUARDIAN – Pink Copy</div>		

A Comparative Register Perspective on Turkish Legislative Language¹

IŞIL ÖZYILDIRIM²

Register studies have underlined the fact that the distribution of grammatical structures is different across various text types. The reason for this variation is that where the field of activity differs, there are characteristic and also statistically consistent differences in the frequencies of grammatical patterns. Legislative language is claimed to be a significantly different variety in terms of its communicative purpose and linguistic properties. However, a comparative register perspective is needed in order to understand the linguistic characteristics of any individual register. Thus, the aims of this study are 1) to determine the discoursal features of Turkish legislative language, and 2) to compare these features with five other registers: scientific research articles, newspaper feature articles, television commercials, men's/women's magazines, and stand-up comedy shows. The Turkish Criminal Code is used as the corpus of the legal register. Each text type in the study consisted of approximately 30,000 words. For the purposes of analysis and comparison, 'the multi-dimensional approach' developed by Douglas Biber (1988) is used. The study is limited to analyzing the second dimension 'narrative versus non-narrative discourse'. The lexico-grammatical categories presented in this dimension are counted for each text type and the results are statistically evaluated. The findings of the study indicate that legislative language in Turkish has a highly non-narrative discourse type. When all the text types are compared in terms of this dimension, it is found that legislative language has the highest frequency of the features of non-narrative discourse, followed by scientific research articles, men's/women's magazines, newspaper feature articles, and television commercials, in that order. Among the text types analyzed in the corpus, the most narrative discourse is found to be stand-up comedy shows.

1. Introduction

Legal discourse has become a topic of interest to social scientists, linguists, and sociolinguists since the 1970s. As Danet states, "while language is central to all human affairs, it is particularly critical in the law. Physicians work with physical substances and entities; in contrast, the work of lawyers and judges is symbolic and abstract. In a most basic sense, law would not exist without language"³

Danet⁴ classifies the types of language use in legal settings in terms of two criteria: 1) the modes of language use (written or spoken); and 2) the degree of formality of the style used, distinguishing between frozen, formal, consultative and casual styles. Thus, various kinds of documents, such as contracts or wills, are formulaic, frozen written uses of legal language, whereas formal written genres include such types as statutes, lawyers' briefs, etc. Marriage ceremonies or witnesses' oaths are examples of frozen spoken types, whereas formal spoken styles include the interrogation of witnesses by lawyers. Finally, casual legal discourse that is

¹ This study has been carried out as part of a larger project funded by Hacettepe University, Scientific Research Division, Ankara.

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³ Danet, B. (1985) Legal Discourse. In Van Dijk, T. A. (ed.): *Handbook of Discourse Analysis* 1. London: Academic Press, 273-289 (p. 273).

⁴ See *supra* note 3 (p. 277).

characterized by a high degree of informality might include lobby conferences between judges and attorneys or lawyer-lawyer conversations.

In this regard, as a formal and written register, legislative language differs significantly from most other varieties not only in terms of its communicative purpose, but also in the way it is created.

2. Background to the study

2.1. Register analysis

One of the earliest approaches to the description of varieties in language use is termed ‘register analysis’. Ferguson, taking a sociolinguistic perspective, defines register as “a communication situation that recurs regularly in a society in terms of participants, setting, communicative purpose and so forth”⁵. Thus, it tends to develop identifying markers of language structure and language use that are different from those that appear in the language of other communication situations.

The roots of register studies can be traced back to the situational, social and descriptive analyses carried out by anthropological linguists such as Boas, Sapir, Malinowski, Whorf and Firth. However, Halliday’s approach to language is considered the basis of register analysis⁶.

In his approach to register, Halliday (1978, quoted in Leckie-Terry)⁷ uses the term ‘register’ to encapsulate the relationship between texts and social processes. For example, people participating in recurrent communication situations tend to make certain lexico-grammatical choices. The result of the combination of choices is what is recognized by the community as a particular register. Thus, a register is defined as a language variety viewed with respect to its context of use. Based on this assumption of register, it can be stated that “register analysis focuses mainly on the identification of statistically significant lexico-grammatical features of a linguistic variety”⁸.

Atkinson and Biber⁹ provide a detailed description of register studies as follows:

- 1) Register studies involve descriptive analysis of actually occurring discourse;
- 2) Register studies aim to characterize language varieties, rather than either the linguistic style of individuals or specific linguistic structures;
- 3) Register studies present formal linguistic characterization of language varieties and analyze the functional or conventional relationships between form and situation.

Biber¹⁰ states that typical register studies involve three components:

⁵ Ferguson, C. A. (1994) Dialect, Register and Genre: Working Assumptions about Conventionalization. In Biber, D. and Finegan, E. (eds.): *Sociolinguistic Perspectives on Register*. Oxford: Oxford University Press (p. 20).

⁶ Biber, D., Finegan, E. (1994) Introduction. Situating register in Sociolinguistics. In Biber, D. and Finegan, E. (eds.): *Sociolinguistic Perspectives on Register*. Oxford: Oxford University Press (p. 2).

⁷ Leckie-Terry, H. (1993) The Specification of a Text: Register, Genre and Language Teaching. In Ghadessy, M. (ed.): *Register Analysis: Theory and Practice*. London: Taylor and Francis (p. 30).

⁸ Bhatia, V. K. (1993) *Analysing Genre: Language Use in Professional Settings*. London: Longman (p. 5).

⁹ Atkinson, D., Biber, D. (1994) Register: A Review of Empirical Research. In Biber, D. and Finegan, E. (eds.): *Sociolinguistic Perspectives on Register*. Oxford: Oxford University Press (p. 352).

- 1) description of the situational characteristics of a register,
- 2) description of the linguistic characteristics,
- 3) analysis of the functional associations between the situational and linguistic features.

Register studies have also underlined the fact that the distribution of grammatical structures is different across various text types. The reason for this variation among different text types is, as Lemke¹¹ explains, where the field of activity differs, there are characteristic (and also statistically consistent) differences in the frequencies of grammatical patterns which, in turn, reflect differences in communicative purposes.

Register studies can also be grouped into such categories as 1) single register versus register comparisons, 2) synchronic versus diachronic register studies, and 3) speech versus writing¹².

The present study aims at investigating the discursual features of a single register, namely, legislative language in Turkish, by comparing and contrasting this register with five other registers, which, in turn, will provide a better understanding of the legislative language.

2.2. The multidimensional approach

There are many studies that describe the situational and linguistic characteristics of registers. One of them which is used in the current study is the multidimensional approach (MD). The MD approach to register variation was developed by the American linguist Douglas Biber¹³ to provide comprehensive descriptions of the patterns of register variation in a language. Biber and Conrad¹⁴ state that MD analysis includes two major components: 1) identification of the underlying linguistic parameters or dimensions of variation by using computer-based text corpora and computational tools, and 2) specification of the linguistic similarities and differences among registers with respect to those dimensions through the use of statistical techniques.

Both the theoretical assumptions and major components of the MD approach indicate that there are three key terms of the approach: linguistic co-occurrence, dimension and multiple dimensions. The first of these terms, linguistic co-occurrence, is considered as central in the MD approach since a register is characterized by a set of co-occurring linguistic features. Dimension, on the other hand, involves a group of linguistic features which co-occur with markedly high frequency in texts. Thus, dimension is used to analyze linguistic co-occurrence. However, not a single dimension but multiple dimensions are used in the MD approach.

¹⁰ Biber, D. (1994) An Analytical Framework for Register Studies. In Biber, D. and Finegan, E. (eds.): *Sociolinguistic Perspectives on Register*. Oxford: Oxford University Press (p. 33).

¹¹ Lemke, J. L. (1995) *Textual Politics: Discourse and Social Dynamics*. London: Taylor and Francis (p. 27).

¹² See *supra* note 9 (p. 352).

¹³ Biber, D. (1988) *Variation Across Speech and Writing*. Cambridge: Cambridge University Press.

¹⁴ Biber, D., Conrad, S. (2001) Register Variation: A Corpus Approach. In Schiffrin, D., Tannen, D. and Hamilton, H. (eds.): *The Handbook of Discourse Analysis*. Oxford: Blackwell Publishers (p.184).

The first example of the MD approach is Biber's¹⁵ own study. In this study, various spoken and written registers in English are compared along the following six dimensions of linguistic variation:

- 1) involved discourse versus informational discourse,
- 2) narrative concerns versus non-narrative concerns,
- 3) situation-dependent reference versus explicit reference,
- 4) overt expression of persuasion,
- 5) abstract discourse versus non-abstract discourse,
- 6) on-line information production.

Various other register studies in English have been carried out using MD analysis. For example, Atkinson¹⁶ studied the historical evolution of medical research writing in English in terms of the four dimensions proposed by Biber. Conrad, in his two works^{17 18}, applied the MD model of variation in English to compare professional research articles, university-level textbooks, and university student papers in biology and history. Reppen^{19 20} used the MD approach to study spoken and written registers used by elementary school students in English.

The MD approach has also been used to investigate the patterns of register variation in languages other than English. For instance, Biber and Hared²¹ investigated register variation in Somali using three dimensions. Kim and Biber²² compared written registers to spoken registers in Korean along with six dimensions. Kessapidu²³ analyzed the persuasion patterns of Greek business letters in terms of five dimensions of the MD approach.

¹⁵ See *supra* note 13.

¹⁶ Atkinson, D. (1992) The Evolution of Medical Research Writing from 1735 to 1985: The Case of the Edinburgh Medical Journal. *Applied Linguistics* 12 (4), 337-374.

¹⁷ Conrad, S. (1996a) Academic Discourse in Two Disciplines: Professional Writing and Student Development in Biology and History, Unpublished Ph.D. Dissertation, Northern Arizona University.

¹⁸ Conrad, S. (1996b) Investigating Academic Texts with Corpus-based Techniques: An Example from Biology. *Linguistics and Education* 8, 299-326.

¹⁹ Reppen, R. (1994) Variation in Elementary Student Language: A Multidimensional Perspective, Unpublished Ph.D. Dissertation, Northern Arizona University.

²⁰ Reppen, R. (1995) A Multi-dimensional Comparison of Spoken and Written Registers Produced by and for Students. In Brita, W., Tanskanen, S.K. and Hiltunen, R. (eds.): *Organizations in Discourse* (Proceedings from the Turku Conference). University of Turku, Turku, Finland, 477-486.

²¹ Biber, D., Hared, M. (1994) Linguistic Correlates of the Transition to Literacy in Somali: Language Adaptation in Six Press Registers. In Biber, D. and Finegan, E. (eds.): *Sociolinguistic Perspectives on Register*. Oxford: Oxford University Press, 182-216.

²² Kim, Y.J., Biber, D. (1994) A Corpus-Based Analysis of Register Variation in Korean. In Biber, D. and Finegan, E. (eds.): *Sociolinguistic Perspectives on Register*. Oxford: Oxford University Press, 157-161.

²³ Kessapidu, S. (1997) A Critical Linguistic Approach to a Corpus of Business Letters in Greek. *Discourse and Society* 8, 479-500.

3. Aim and method

3.1. Aims of the study

As stated by Biber and Conrad²⁴, with respect to traditional, lexical and grammatical investigations, it turns out that functional descriptions based on texts without regard for register variation are inadequate and often misleading: for register descriptions, a comparative register perspective provides the baseline needed to understand the linguistic characteristics of any individual register. Thus, the aims of this study are:

- 1) to determine the discorsal features of Turkish legislative language in terms of Dimension 2 “narrative versus non-narrative discourse” by analyzing the functional associations between the situational and lexico-grammatical features,
- 2) to compare these features with those of five other registers: namely, scientific research articles, newspaper feature articles, television commercials, men’s/women’s magazines and stand-up comedy shows.

The hypothesis is that legislative language will have the highest frequency of non-narrative discourse among the registers studied.

3.2. Method of the study

This study employs the multidimensional approach developed by D. Biber²⁵ to describe the lexico-grammatical and discorsal features of Turkish legislative language. Considering the limitations of this particular study, only the second dimension “narrative versus non-narrative production” is used as the method of analysis. Dimension 2 can be considered as distinguishing narrative discourse from non-narrative discourse organizations. It might also be considered as distinguishing between active, event-oriented discourse and more static, descriptive or expository types of discourse.

The lexico-grammatical patterns of ‘narrative versus non-narrative discourse’ are combined from the studies of Biber²⁶, Biber and Hared²⁷, Kim and Biber²⁸, and Biber and Conrad²⁹ and adapted to Turkish with some modifications. Thus, Dimension 2 in Turkish includes seven lexico-grammatical patterns as indicated in Table 1:

²⁴ See *supra* note 14 (p. 176).

²⁵ See *supra* note 13.

²⁶ See *supra* note 13.

²⁷ See *supra* note 21.

²⁸ See *supra* note 22.

²⁹ See *supra* note 14.

Narrative versus non-narrative discourse
Positive features: narrative discourse
Past tense
3rd person pronouns
Public verbs
Adverbs of time
Synthetic negation
Negative features: non-narrative discourse
Present tense
Adjectives

Table 1. Positive and negative features of Dimension 2 in Turkish

There are two groups of features in Dimension 2, labelled “positive” and “negative”. The positive features represent discourse with a narrative purpose. These features mark a primary focus on the temporal succession of past events. The negative features, on the other hand, are the markers of non-narrative concerns³⁰. Furthermore, the two groups have a complementary relationship. That is, if a text has frequent occurrences of the positive group of features, it will have markedly fewer occurrences of the negative group, and vice versa.

In this study, both microscopic and macroscopic approaches are used. As stated by Kim and Biber³¹, a microscopic approach focuses on the discourse functions of individual linguistic features in particular registers, while a macroscopic approach seeks to define the overall parameters of variation among registers. Microscopic and macroscopic analyses have complementary strengths in that microscopic analysis can pinpoint the exact communicative functions of individual linguistic features in particular registers, but it does not provide the basis for overall generalizations concerning differences among registers. In contrast, macroscopic analysis focuses on the overall patterns of variation among registers, building on previous microanalyses to interpret those patterns in functional terms.

3.2.1. *Corpus of the study*

The corpus contains the following text types in Turkish: 1) legislative texts, 2) newspaper feature articles, 3) scientific research articles, 4) television commercials, 5) men’s/women’s magazines, and 6) stand-up comedy shows. Thus, the corpus contains four written and two spoken texts.

The spoken texts in the corpus were first tape-recorded and then transcribed into written language in accordance with our interests in this particular study. Thus, in the transcription process, some characteristic features of oral language such as the varying pronunciations of a sound by different participants, phonetic details of a speaker’s accent, voice quality, hesitations, false starts and the like were ignored.

Each text type in the study consisted of approximately 30,000 words. The Turkish Criminal Code was used as the corpus of the legislative language. Scientific research articles were

³⁰ See *supra* note 13 (p.109).

³¹ See *supra* note 22 (p.157).

collected from three broad areas: social sciences, engineering and medicine. The corpus of the newspaper feature articles was composed of articles from four different Turkish daily newspapers. Men's/women's magazines included texts from four different Turkish magazines (two for men and two for women). The corpus of the stand-up comedy shows was composed of texts of two famous Turkish entertainers. Television commercials, on the other hand, were collected from various Turkish television channels. The whole corpus consisted of approximately 180,000 words and was collected between the years 2006-2008.

3.2.2. Data analysis

The data obtained from six different text types were analyzed in terms of the seven lexico-grammatical patterns identified for Dimension 2. Since there were no pre-existing corpora, texts were collected and entered into the computer. However, as there is no tagging program available for Turkish, most of the lexico-grammatical features were counted by hand; the values are presented in terms of frequency and percentage for each register. Then, a chi-square analysis was carried out to make comparisons among registers in terms of the positive and negative features of Dimension 2.

4. The discursial features of Turkish legislative language: A register perspective

Considering the general characteristics of Turkish legislative language, it is possible to say that Turkish legislative language exhibits the characteristic features of a highly formal language.

The studies carried out concerning Turkish legislative language^{32 33 34 35} indicate that legislative language in Turkish has a special discourse type which is full of technical legal terms that can only be understood by the members of the specialist community, borrowed and archaic words and expressions taken mainly from Arabic and Persian, common terms with uncommon legal meanings, long and complicated sentences, coordination, nominalizations, passives, etc.

Biber³⁶ states that typical register studies involve three components: 1) description of the situational characteristics of a register, 2) description of the linguistic characteristics, and 3) analysis of the functional associations between the situational and linguistic features. Thus, in our analysis of the discursial features of Turkish legislative language, these components will be considered as the general framework of analysis.

³² Özyıldırım, I. (1999a) Türk Yasa Dili (Turkish Legislative Language). *Journal of Faculty of Letters* 16 (1), Hacettepe University, 89-114.

³³ Özyıldırım, I. (1999b) Türk Ceza Kanunu: Yasal Sözeylemlerin Çözümlemesi (The Turkish Criminal Code: An Analysis of the Speech Acts in Legislative Discourse). *Journal of Faculty of Letters* 16 (2), Hacettepe University, 95-107.

³⁴ Özyıldırım, I. (2001) Yasa Metinlerinde Ad Öbekleri ve İşlevleri Üzerine (NP Structures and Their Functions in Legislative Texts). *Journal of Faculty of Letters* 18(1), Hacettepe University, 73-81.

³⁵ Özyıldırım, I. (2002) Yasa Dilinin Söylem Özellikleri (The Discursial Features of Legislative Language). *Journal of Linguistics and Its Applications* 3-4, 119-137.

³⁶ See *supra* note 10 (p. 33).

4.1. Description of the situational characteristics of Turkish legislative language

4.1.1. Communicative purpose

Danet states that “the study of legal discourse is concerned with the nature, functions and consequences of language use in the negotiation of social order”³⁷. Like other legal systems, Turkish laws have two primary functions: 1) the ordering of human relations, and 2) the restoration of social order when it breaks down. As Danet³⁸ further argues, with regard to the ordering function, there are two complementary tasks. Firstly, law defines relations and tells us which activities are permitted and which are not. Secondly, it also provides recipes for creating relations where none existed before (e.g., marriage ceremonies). These are, respectively, the regulative and facilitative functions of law. Restoration of social order, on the other hand, is concerned with the ways language usage affects both substantive and procedural justice in the disposition of cases of conflict whether between one citizen and another, as in the case of civil law, or between the individual and the state, as in the case of criminal law.

In the light of these basic functions, it is possible to say that laws impose obligations, prohibit actions, confer rights and grant permission. Thus, the general function of this writing is directive. Furthermore, as Bhatia³⁹ states, these prohibitions, obligations and rights should be presented as precisely, clearly and unambiguously as linguistic resources permit because of the human capacity to wriggle out of obligations and to stretch rights to unexpected limits.

4.1.2. Physical relation between addressor and addressee

Legislative language is typically produced by writers who are separated in space (and time) from their readers, resulting in a greater reliance on the linguistic channel alone to communicate meaning. Furthermore, in most other written varieties, the author is both the originator and the writer of the text. However, in legislative language, the draftsman of the National Assembly is only the writer of the legislative act. Moreover, legislative writing is prepared for ordinary citizens, but the real readers are usually lawyers and judges, who are responsible for interpreting legislative texts for ordinary citizens. In other words, the reader and the recipient are not the same person in legislative language. Thus, it is possible to say that these unique contextual factors help to create a distance between ordinary citizens and the legislative text.

4.1.3. Production circumstances

As a written mode, legislative writing, like the other written modes, provides extensive opportunity for careful, deliberate production; written texts can be revised and edited repeatedly before they are considered complete.

Spoken language, on the other hand, is typically produced spontaneously, with speakers formulating words and expressions as they think of ideas.

³⁷ See *supra* note 3 (p. 273).

³⁸ See *supra* note 3 (p. 274).

³⁹ See *supra* note 8 (p. 102).

4.2. Description of the lexico-grammatical features of Turkish legislative language in terms of Dimension 2

This section includes the statistical analysis and description of the individual items identified for Dimension 2, together with related discussions connecting the situational and linguistic features. The frequency and percentage of the use of the seven lexico-grammatical features identified for Dimension 2 in the Turkish Criminal Code are presented in the following table:

Dimension 2: Narrative versus non-narrative discourse		
Positive features: Narrative discourse		
	Frequency	Percentage
Past tense	126	0.3%
3rd person personal pronouns	0	0%
Public verbs	42	0.1%
Adverbs of time	66	0.2%
Synthetic negation	12	0.03%
Negative features: Non-narrative discourse		
Present tense	2024	6.3%
Adjectives	1395	4.3%

Table 2. Frequency and percentage of the lexico-grammatical features in legislative language for Dimension 2 (n = 32,000)

When the Turkish Criminal Code is analyzed in terms of the positive features of Dimension 2, it is possible to say that the narrative features of this dimension occur very rarely or not at all in legislative writing.

As stated by Biber⁴⁰ past tense forms are usually taken as the primary surface marker of narrative since they describe past events and mark the temporal succession of narrative discourse. However, the use of past tense forms is very rare in the Turkish Criminal Code. Of the total words used in the Code, only 0.3% are past tense forms. The use of the past tense is observed only in the ‘Notes’ sections of the Code, which contain references to changes in the articles in the past. Except for these occurrences, the past tense is not observed at all in the articles of the Criminal Code. The absence of the past tense in legislative language is due to the fact that the past tense is used in explaining sequential events in the past. However, legislative language is concerned with statements of rights and obligations that refer to all times.

Third person personal pronouns⁴¹ are also one of the characteristic features of narrative discourse. Third person pronouns mark reference to animate, typically human referents apart from the speaker and addressee. Biber⁴² states that third person personal pronouns co-occur

⁴⁰ See *supra* note 13 (p. 223).

⁴¹ Third person personal pronouns are *she, he, they, her, him, them, his, their, himself, herself, themselves* (plus contracted forms) by Biber. However, *it* is considered an ‘impersonal pronoun’. See *supra* note 13 (p. 225).

⁴² See *supra* note 13 (p. 224).

frequently with the past tense as a marker of narrative, reported style. In the Turkish Criminal Code, there are no examples of third person pronouns (0%). The absence of this feature is due to the fact that legislative language is concerned with the presentation of expository information, which has few verbs and few animate referents. Furthermore, third person pronouns also require interaction among the participants of a particular text type. However, in legislative language, there is no interaction between the sender and the receiver.

Public verbs also function as markers of indirect, reported speech and are grouped with other narrative marking features. Public verbs involve actions that can be observed publicly. Thus, they are primarily speech act verbs such as ‘say’, ‘explain’, ‘report’ and ‘declare’ which are commonly used to introduce indirect statements⁴³. The use of public verbs in the Turkish Criminal Code is very rare; indicating that legislative language mainly depends on direct statements and has non-narrative characteristics.

Adverbs of time indicate the temporal order of events. As indicated by Kim and Biber⁴⁴, in narrative discourse types, they are mainly used together with past tense forms in order to focus on the temporal succession of past events. Adverbs of time also occur with very low frequency in the Turkish Criminal Code, indicating that there are very few references to time in legislative language. The percentage of adverbs of time in the Turkish Criminal Code is 0.2%.

The last positive feature of a narrative discourse type is synthetic negation (neither, nor /no + Quantifier / Adjective / Noun). Biber⁴⁵ states that synthetic negation is used in denials and rejections in the reported reasoning processes of narrative participants. Furthermore, synthetic negation is considered to be more literary than analytic negation (‘not’) because of its stronger emphatic force; thus, it is preferred in literary narratives. The percentage of the use of synthetic negation in the Turkish Criminal Code is 0.03%. This extremely low percentage indicates that there is no indication of emphatic usages in Turkish legislative language.

As a result, when the Turkish Criminal Code is considered in terms of the overall positive features of Dimension 2, it can be said that Turkish legislative language does not exhibit these narrative features since the typical functions of these features do not fit the typical communicative characteristics of this register. Among the six registers in the corpus of this study, legislative language has the lowest frequency of positive features. This finding is consistent with the findings of Biber⁴⁶ that official documents have low scores on Dimension 2. Thus, it is possible to say that legislative language is not a narrative discourse type.

Considering the negative features of Dimension 2, it can be said that legislative language exhibits these features in very high frequencies. Dimension 2 is marked by two negative features: the present tense and attributive adjectives.

The present tense has by far the largest negative score in this dimension. Present tense verbs deal with topics and actions of immediate relevance. They are also used to focus on the information being presented and remove focus from any temporal sequencing. The Turkish Criminal Code is characterized by a heavy reliance on static present tense forms. The

⁴³ See *supra* note 13 (p. 242).

⁴⁴ See *supra* note 22 (p. 171).

⁴⁵ See *supra* note 13 (p. 245).

⁴⁶ See *supra* note 13 (p. 135).

percentage of the use of present tense forms in the Turkish Criminal Code is 6.3%. Furthermore, all the present tense forms identified in the Code are in the simple present. The high percentage of simple present tense forms in legislative language might be explained by the functions of this form. The simple present tense in Turkish refers to all times and is used in expressing generic facts, universal truths and permanent generalizations⁴⁷. These functions fit the communicative function of legislative discourse.

Adjectives are also important markers of non-narrative discourse. In the corpus of this study, 4.3% of the total words are adjectives. In the Turkish Criminal Code, they are mainly used to expand and elaborate the information about legislative sentences. Biber⁴⁸ states that the co-occurrence of attributive adjectives and present tense verbs apparently reflects the more frequent use of elaborated nominal referents in non-narrative types of discourse than in narrative discourse.

As a result, when the overall negative features of Dimension 2 are considered in terms of the Turkish Criminal Code, it is possible to say that legislative language is markedly non-narrative in orientation. These negative features are used to provide static descriptions and explanations, emphasizing the logical, rather than the temporal, relations among clauses. However, these lexico-grammatical features are distributed in different ways across registers.

4.3. Register comparisons

In addition to the descriptions of a single register, a corpus-based approach enables comparative analyses of register variation. One advantage of a comparative register perspective is to understand the linguistic characteristics of a particular register relative to a representative range of registers in the language. As Biber and Conrad⁴⁹ state, most grammatical features are distributed in very different ways across registers. These overall distributional patterns correspond to the differing circumstances of production, purposes and levels of formality found across registers.

This section focuses on the relative frequency of co-occurring linguistic features across registers. To illustrate, consider the comparison of the six registers in our corpus for Dimension 2 in Table 3:

⁴⁷ Kornfilt, J. (1997) *Turkish*. London: Routledge (p. 336).

⁴⁸ See *supra* note 13 (p. 109).

⁴⁹ See *supra* note 14 (p. 179).

		Frequency		
Registers		Positive features (Narrative production)	Negative features (Non-narrative production)	Total
Legislative language	n	246	3419	3665
	%	6.7	93.3	100
Scientific research articles	n	1018	3897	4915
	%	20.7	79.3	100
Men's/women's magazines	n	1745	3409	5154
	%	33.9	66.1	100
Newspaper feature articles	n	1735	2573	4308
	%	40.3	59.7	100
Television commercials	n	2203	1214	3417
	%	64.5	35.5	100
Stand-up comedy shows	n	2164	1044	3208
	%	67.5	32.5	100
Total	n	9111	15556	24667
	%	36.9	63.1	100

$$\chi^2=4429.4 \text{ } p<0.001$$

Table 3. Comparison of the positive and negative features in six registers for Dimension 2

When all the registers in our corpus are compared for Dimension 2, legislative language is identified as the register that makes the most frequent use of the negative group of features and, conversely, the least frequent use of the positive features. As stated by Biber⁵⁰, genres with high scores in Dimension 2 are characterized by frequent occurrences of the past tense, third person pronouns, public verbs, adverbs of time, and synthetic negation, together with markedly infrequent occurrences of present tense verbs and attributive adjectives. Genres with low scores in Dimension 2 have the opposite characteristics. The highest positive frequencies of this dimension are observed in fictional genres such as novels and folktales.

Legislative language, which has the highest negative feature score among all the registers in the corpus, is associated most notably with non-narrative concerns. These non-narrative purposes include the presentation of expository information which contains few verbs and few animate referents. Of the total lexico-grammatical features used in the Turkish Criminal Code, 93.3% are negative. The score for positive features is only 6.7%. Thus, it is possible to say that legislative discourse is nominal and expository, presenting a straightforward and concise packaging of information, rather than verbal and narrative.

Legislative language is followed by scientific research articles in terms of the use of the negative features of Dimension 2. Of the total features used in the scientific research articles, 79.3% are negative. The score for positive features is 20.7%. These results indicate that scientific research articles also deal with non-narrative concerns. However, as stated by

⁵⁰ See *supra* note 13 (pp. 135-136).

Hyland⁵¹, the construction of academic facts is achieved partly by establishing a narrative context for the work through citation. This process eventually increases the marked values of Dimension 2.

The third largest negative score belongs to the men's/women's magazines. Men's/women's magazines, which fall into the category of popular writing, include various periodical articles, interviews with famous people such as movie stars and singers, and have descriptive, argumentative and narrative sections. Of the total number of lexico-grammatical features in this register, 66.1% are negative and 33.9% are positive. Thus, it is possible to say that men's/women's magazines have intermediate values, indicating both narrative and non-narrative concerns.

Newspaper feature articles tend to be more argumentative, dealing with a wide range of topics such as international relations, domestic politics, etc., than the other registers in the corpus. The negative feature score of this register is 59.7%; the positive score is 40.3%. This score is the highest positive score among all the written registers in the corpus since this register also reports events. Thus, it can be said that newspaper feature articles combine narrative and non-narrative features.

The last two registers are the oral registers of the corpus, and they have relatively more narrative concerns. Thus, they present fewer occurrences of the negative features of Dimension 2, combined with higher occurrences of the positive features such as the use of the past tense, third person pronouns, adverbs of time, public verbs, and synthetic negation.

Among the registers analyzed in this study, the fourth register in terms of the use of negative features is television commercials. Of the total number of lexico-grammatical features used in this register, 64.5 % are positive and 35.5 % are negative. These characterizations indicate that narration plays an important role in television commercials.

The most narrative register in the corpus was found to be stand-up comedy shows. This register has the lowest negative score (32.5 %) and the highest positive score (67.5 %) among the registers studied. These scores indicate a narrative discourse type when compared with the other registers in the corpus since this register is based on telling amusing stories. However, as stated by Biber⁵² (1988: 134), the largest narrative scores in Dimension 2 are observed in fiction genres. Thus, it can be expected that genres like stories, novels, and folktales, which are not included in this corpus, will contain even more features of narrative discourse and have higher positive scores.

5. Conclusion

For the purposes of this study, it can be concluded that legislative language is a special register rarely equalled by any other variety of Turkish. It has special lexico-grammatical features that reflect its high degree of non-narrative focus. Within this framework, it is possible to say that legislative discourse is highly nominal, impersonal, formal, static and informational rather than verbal and narrative.

⁵¹ Hyland, K. (1999) Academic Attribution: Citation and the Construction of Disciplinary Knowledge. *Applied Linguistics* 20/3, 341-367 (p. 342).

⁵² See *supra* note 13 (p. 134).

This study also shows that comparisons among registers play an important role in any thorough description of a language. The register comparisons presented in this study indicate that legislative language has the highest negative score and the lowest positive score in terms of the features of Biber's Dimension 2 'narrative versus non-narrative discourse'. In other words, legislative language is the only register included in the present study with extreme non-narrative characteristics.

In a paper of this nature, it is impossible to give complete accounts and interpretations of register analysis. Thus, this study is by no means complete. In order to give complete accounts of a register, other dimensions should also be studied. Moreover, this study compared only six registers. Various other oral and written registers need to be analysed for more comprehensive accounts of register variation in language.

Nevertheless, this study provides a glimpse into the value of corpus-based investigations for increasing our understanding of language use. In addition, not only our understanding of discourse but our understanding of language acquisition and issues within educational linguistics can benefit from the analysis of register variation. Finally, such analyses will also provide a framework for additional cross-linguistic investigations, eventually allowing for the identification of universal tendencies.

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II LEGAL CULTURAL DIVERSITY

Cross-references in Court Decisions: A Study in Comparative Legal Linguistics

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As a rule, lawyers are concerned with the content of court decisions. Researchers may focus on the structural properties of the texts: the length, sentence structure and register of language, as well as the terminology used by the authors. Researchers may also investigate the characteristics of court decisions from the point of view of information retrieval and information management: tables of contents, indices, lists of sources referred to, lists of abbreviations and other documents which are included in or annexed to the judgments. In taking this latter perspective, one important aspect is the intertextuality of judgments. In this paper, the intertextuality of court decisions is studied comparatively: how frequently and in what way do courts of law in different jurisdictions refer to other legal texts, especially scholarly legal literature in their decisions?

1. Intertextuality of court decisions

An examination of the structure of a court decision reveals, *inter alia*, the order in which the different elements are presented, especially where the judges place the operative part of the judgment (at the beginning or end of the document or somewhere else). An analysis of sentence structures, on the other hand, clarifies to what extent the language of the judges is stereotypical and formulaic and petrified phrases are used. As far as legal terminology is concerned, it is particularly interesting to see how many archaisms, abbreviations and words of foreign origin (notably Latin expressions) are used in court decisions. It is also useful to examine the frequency of cryptic or misleading names of institutions in judicial documents. Sometimes, the names of various law courts and legal professions are entirely mystifying from the point of view of the general public.² Researchers may also investigate the characteristics of court decisions from the point of view of information retrieval and management: tables of contents, indices, lists of sources referred to, tables of abbreviations, and so forth that are attached to judgments.

From a comparative point of view, there are important differences as far as the style of judicial decisions and their various elements is concerned.³ In the present paper, one key question concerning judicial style will be examined: How frequently and in what way do courts of law refer to other legal texts, notably legal scholars (legal literature)⁴, in their decisions? In linguistic terms, the paper focuses on the intertextuality of judgments.

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² These kinds of names are particularly numerous in the judiciary of England, where old traditions are still respected: *Queen's Bench*, *Master of the Rolls*, *puisne judge*, etc.

³ An overview of the recent development of legal language in various countries is given (in Spanish) in Mattila 2009. Legal terminology is discussed in Mattila 2011.

⁴ Most legal literature is written by academic scholars. Therefore, the terms "legal literature" and "legal scholars" are used alternatively in this paper. In a more precise usage of language these should be separated: part of legal literature is produced by legal practitioners. On the other hand, the term "academic legal writing" is also used in this article.

The present paper first presents the general aspects of judicial style, and particularly the use of external references, in three leading European legal cultures: Germany, France and England. These legal cultures have strongly influenced judicial style around the world, and judicial documents from these countries are numerous in cross-border enforcement of judgments as well. Following this, the study is enlarged to cover some other legal cultures in Europe and overseas.

2. German legal culture

2.1. Style of judicial decisions

In general, German court decisions are stylistically uniform. They are characterized by abstract language. This clearly appears in a classical guide to court style (Sattelmacher 1955): “*Das Urteil ist ein Staatsakt. Der Richter spricht als Organ des Staates.*” (“A judgment is a State act. The judge speaks as an organ of the State”).⁵ The style of German judgments is formal, without any personal overtones. German judges never use the first person singular when writing, and no dissenting opinions are attached to judgments (except in decisions of the Constitutional Court).⁶

As for the structure of German court decisions, the operative part of the judgment is placed at the very beginning of the document (immediately after the number of the decision and information on the parties and other relevant matters). Only after this do the judges present the facts of the case and the reasons for the decision. The claims of the plaintiff and the arguments of the defendant are presented as a kind of mirror image, one after the other: i.e., they are immediately juxtaposed in the text of the document (the so-called *Urteilsstil*).⁷

The positions taken by academic scholars have an important influence on German judges, even in cases where there is a precedent which is contrary to the position of the scholars. If this precedent has been widely criticized in legal literature, a new judgment may be given in accordance with the position taken by academic scholars. This is especially notable in cases where a majority of the scholars take a clear standpoint, the so-called *herrschende Meinung* (‘dominant opinion’).

Therefore, German judges often refer, in addition to legislation, precedents and *travaux législatifs*,⁸ to academic writing: legal scholars are widely cited in court decisions. In effect, it can be argued that a German judge writes the grounds for his or her decisions, in addition to the parties and fellow judges, for the whole legal science community as well. Court decisions are, so to say, contributions to a continuous dialogue between legal science and the application of the law by jurisdictions. This is also the reason why the grounds for a German court decision resemble a scientific essay.⁹

⁵ Wetter 1960, pp. 34 and 144.

⁶ Lashöfer 1992, pp. 86-87.

⁷ Arntz 2001, pp. 297-298.

⁸ A typical expression which refers to *travaux préparatoires* in German judgments is “*nach der Begründung des Gesetzentwurfs*”. Abbreviations are common in these references.

⁹ Markesinis *et al.* 1997, p. 9.

2.2. Explanatory factors

The influential position of legal science in German court practice can be explained by the legal history of Germany at the end of the Middle Ages and at the beginning of modern times.¹⁰ Towards the end of the Middle Ages, the German-speaking lands of Central Europe were fragmented into small kingdoms and principalities (even though the Holy Roman Empire still existed in principle). This was a clear obstacle to cross-border commerce, creating a strong need for legal unification. This need, together with ideological reasons and the growth of the universities, led to the reception of Roman law in German-speaking Central Europe.

The growing reception of Roman law deeply influenced the German legal system, which acquired an abstract and conceptual nature. The application of law which earlier required, first of all, experience of life and a sense of justice became a technical skill for which one had to be especially trained. Judges became professionals. Learned people replaced those who were academically uneducated, and career lawyers replaced lay people. The application of law was no longer based on inherited wisdom and rules of life; it was now founded on the authority of *Corpus Juris Civilis* and its binding force.¹¹

When the use of Roman law spread into law courts, local judges began to ask for the opinions of legal scholars since these were the only people who knew the sources of Roman law in Latin. The documents of the cases to be decided were sent to universities. This was called, in German, *Aktenversendung*. Hence, one can say that the German faculties of law played the role of appellate courts in the 16th and 17th centuries. The procedure before the court that sent the documents was, for the most part, only ostensible. At a more general level, *Aktenversendung* signified that the status of the lower law courts was reduced, while that of the universities rose.

2.3. Frequency of references to legal authors

Due to this development, academic scholars gradually became key figures in German legal culture with considerable authority in practical lawyering. This tradition still continues, and it appears externally in court decisions in the form of frequent references to the opinions of legal scholars.¹² These references constitute a typical feature of German judicial documents¹³ (see Example 1 of the Appendix).

¹⁰ See, e.g., Mattila 2006, pp. 161-164 and the sources mentioned therein.

¹¹ *Corpus Iuris Civilis* is the most influential codification of laws in European history. The codification was ordered by Emperor Justinian the Great in Byzantium in the 530s. This codification conserved the fundamental achievements of Roman legal science. The most important part of *Corpus Iuris Civilis* is the *Digest* (or *Pandects*), based on the writings of classical Roman jurists.

¹² In this respect, the period of National Socialism signified a temporary change: German judgments only seldom included references to academic legal writing. Since the end of World War II, these references have again become more frequent. See Forster 1996, pp. 130-131.

¹³ For instance, in a decision of the German Supreme Court given a decade ago on whether a claim fell under the statute of limitations, one can find 24 references to legal authors. See *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 142/2000, n:o 4.

In effect, it has been said that German court decisions are characterized by “doctrinal word abundance”. They give the impression that the writer of the document is a legal scholar lecturing to his or her students or a superior speaking to subordinates.¹⁴

This frequency of references to legal scholars may easily be demonstrated, e.g., by searching for certain key words in the data bank of the German Supreme Court (*Bundesgerichtshof*), which includes all the decisions of this jurisdiction from the year 2000 on. One typical feature of German legal culture is the publication of massive works of commentary (*Großkommentare*) where the authors present and analyze the legislation that is in force in various branches of law.¹⁵ When the writer of this article searched (in October 2009) in this data bank for references to legal scholars using the word *[k]ommentar*, the number of hits was almost one thousand (during a single decade). Furthermore, one must remember that the word *[k]ommentar* does not appear in all references to legal authors.¹⁶

3. French legal culture

3.1. Style of judicial decisions

In France, a judicial decision is written in an inflexible formula where the grounds of the decision are scarce and formal. In these grounds, the judges refer almost exclusively to statutory provisions to support the decision.

Each set of grounds constitutes a paragraph and begins with certain key words which vary according to the law court in question. In the case of the Supreme Court (*Cour de cassation*) and courts of first instance, these words are *attendu que*, but in the case of administrative courts and certain courts of appeal the expression *considérant que* is used. Both mean ‘considering that’. Each new ground in a set of grounds begins after a semi-column with the word *que* (‘that’). The operative part of the judgment is always preceded by the words *PAR CES MOTIFS* (‘with these grounds’), written in capital letters.

Judgments of the Supreme Court in which a petition of appeal is dismissed normally include three paragraphs beginning with the word *attendu*. The first *attendu* presents the facts of the case and the decision of the appellate court, the second one describes the reasons given by the appellant, and in the third *attendu* the Supreme Court rejects these reasons (*mais attendu que*). When the Supreme Court quashes the decision of a lower court, it refers to the statutory provisions that support its standpoint. These paragraphs begin with the words *vu la loi (...), vu les articles (...)*.¹⁷

¹⁴ Lashöfer 1992, 81-84.

¹⁵ These are normally cited using an abbreviated name: e.g., *Karlsruher Kommentar*, *Münchener Kommentar*, etc.

¹⁶ When the writer of this article did a search using the word *[L]iteratur*, the number of hits was greater than that permitted by the system (= 1000 documents).

¹⁷ See, e.g., Mattila 2006, pp. 84-85.

3.2. Explanatory factors

As stated above, a French court decision is formulaic, and the judges refer almost exclusively to written law to support their decision. There are historical reasons for this. Before the Great Revolution, the French superior courts of law had a great deal of discretionary power in cases that were politically important, and this often provoked conflicts with the rulers. In consequence, the powers of the courts of law, notably in relationship with the legislature, were reduced during the Revolution. There was a need to emphasize that court decisions are dictated solely by statutory provisions, legislative rules. A fiction was created according to which judicial decision-making is a mechanical operation of reasoning: the decision of the court is directly deduced from written law with almost mathematical precision. The jurisdictions had to cite the law, and only the law, as their authority. In terms of this fiction, it is logical that no dissenting opinions were mentioned.¹⁸

Despite some moderate reforms, the way French judges write their judgments has largely been retained as it was. One of the factors behind this conservatism is the professional training of the judges. Judges, especially in the case of general courts, rarely have much experience working in other legal fields. A young lawyer who has a diploma from a law faculty and who is going to become a judge in a general court of law applies for admission to a special judicial academy (*École nationale de la magistrature*, ENM). After finishing the academic studies, he or she is appointed as a judge and, in normal cases, gradually advances through the ranks of the judiciary.

3.3. The real importance of legal literature in the application of law

It is important to know that there is a vast gulf between the external form of a French court decision and the real importance of legal literature in judicial decision-making in France. The external appearance of a court decision is only – as has been said – the tip of the iceberg. A judge *rapporteur* of a French law court, whose task it is to prepare the case for decision, goes through all relevant case law and legal literature on the topic in question. In the consideration of the court, on the basis of the report of the judge *rapporteur*, every type of argument arises – not only arguments founded on statutory law. Furthermore, it is customary in France that a judge or legal scholar writes a so-called *note* concerning important precedents of the Supreme Court. This *note* presents the complete range of argumentation in the case and the importance of the precedent from the point of view of the French legal order. In effect, it has been said that the court decision and the note published on it form a functional whole. This system explains why it is still possible to maintain the tradition of scarce and formal grounds in court decisions taken as such.¹⁹

One must also remember that the data bank of the French Supreme Court includes, as for plenum decisions and decisions of mixed chambers, not only the decision itself, but also the report of the judge *rapporteur* and the proposition of the advocate general. These documents are electronically linked with the decision. In the report of the judge *rapporteur*, one finds a description of the facts of the case and a crystallization of the legal questions which the court should answer. All relevant sources of law are discussed in this report. The report often contains a special section entitled *doctrine* ('legal literature', 'legal science') or *doctrine et*

¹⁸ Troper & Grzegorzczuk 1997, pp. 110 and 122.

¹⁹ Lashöfer 1992, p. 60.

jurisprudence ('legal literature/science and case law').²⁰ The description of the opinions of academic scholars is often very detailed, and there are many footnotes indicating the exact pages of the relevant sources.²¹ This also applies to the reasons for the proposed decision by the advocate general: legal literature may be extensively cited.

4. English legal culture

4.1. Style of judicial decisions

A decision of an English superior jurisdiction consists essentially of individual opinions of judges called *speech* (due to the oral tradition in courts of law). The differences and similarities of the standpoints of the judges are clarified in a procedure which is relatively informal.²² Normally, unanimity, a common standpoint, is reached, at least as far as the outcome of the case is concerned (according to statistics, there are dissenting opinions in ten per cent of the cases decided).²³ The dissenting opinions are printed *in extenso*. However, it is important to know that judges of higher jurisdictions may give a speech of their own, to be printed later, even in cases where they agree with the majority of the court members on both the outcome (the decision itself) and the grounds for the decision.²⁴ As stated by Lord Hope of Craighead, this sometimes results from differences in approach: a judge thinks that the reasoning leading to the decision may be expressed in a more pertinent way than it appears in the text written by the majority. On the other hand, it is possible to think that the existence of several concurrent speeches augments the value of the decision as a precedent.²⁵

Consequently, a decision of an English superior court is a collection of individual speeches printed one after another (*seriatim*) without any attempt to fit them together structurally or stylistically. An English judge always speaks in the first person singular. Indeed, the structure and style of the speeches vary greatly. As for the techniques of argumentation, various methods are used. For instance, the judge sometimes asks rhetorical questions, and, when answering them, he or she excludes some answers by proving, by means of practical examples, that they are impossible (*reductio ad absurdum*) or flawed.²⁶

Hence, an English judge is free to choose the style of his or her speech,²⁷ and – as stated above – there are enormous possibilities for variation. The style may be rhetorical or literal,

²⁰ The term *doctrine* may also refer to an established interpretation of law courts on a certain point of law.

²¹ See the case 04-16.174 (arrêt no 263 du 10 octobre 2008), linked with a detailed report of Mme Radenne, *Conseiller rapporteur*. One part of this report is cited in Example 2 of the Appendix.

²² The chairman tries to convince the initially dissenting members of the correctness of the opinion of the majority. If necessary, the advocates of the case are asked to make their chains of argumentation clearer, so that competing alternative decisions can better be weighted in relationship with each other and a choice made between them (Goodman 2006, p. 33).

²³ Goodman 2006, *ibid*.

²⁴ Goodman 2006: 33 and Bankowski et al. 1997, pp. 317-318.

²⁵ Hope of Craighead 2005: 2.

²⁶ Lashöfer 1992, pp. 10-11 and Arntz 2001, p. 306.

²⁷ Judges are sovereign in their stylistic choices in other common-law countries as well. This may be illustrated by hyper-personal formulations of judgments, even if these are exceptional. In the United States, judgments have sometimes been given in the form of a poem or a text written in a light vein (George 2007, p. 431 *et seq.*). American judges may also permit themselves to make emotional

but colloquial language is also used as a stylistic device. Lord Rodger of Earlsferry, for instance, once used the word *guys* in his speech. The style of some judges is so characteristic of them that it may be considered as their “signature”.²⁸ Sometimes, a judge seeks to stand out by making a linguistic protest. While the Plain English Movement requires Latin-free texts, some judges have privately stated that they always make sure there is at least one Latin expression or maxim in their speeches.²⁹ The language of English superior judges is often colorful, sometimes even lyrical. Certain law lords are well-known for their eloquence, as shown by the beginning of two speeches of Lord Denning:³⁰

It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children.³¹

Broadchalke is one of the most pleasant villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt.³²

Because of these characteristics, the decisions of English superior jurisdictions tend to be reiterative and often very long.³³ The same things are repeated in the speeches included. The document in its entirety is often dozens of pages long.

4.2. Explanatory factors

The English legal system was originally developed at the end of the Middle Ages in legal proceedings before the royal court of law.³⁴ For this reason, precedents of superior jurisdictions play a central role in the system. They still form the chief pillar of the system in certain branches of law, like the law of obligations and the law of torts. That is why the basic method of an English lawyer is the opposite of that of a civil-law (Continental) lawyer. On the Continent, lawyers use the deductive method: the solution to a legal issue is deduced, so to say, from the top down. A rule of written law is applied to an individual case. On the contrary, since English lawyers focus on precedents, their method may be characterized as an inductive one or, more precisely, inductive-deductive. On the basis of earlier cases (precedents), new rules of law are inducted which, in their turn, are deductively applied into new cases.

outbursts (see Example 3 of the Appendix). It is understandable that this has been severely criticized. The Judicial Opinion Writing Handbook recommends that every judge create a high standard of style for him- or herself and obey strict self-discipline when writing judgments (George 2007, pp. 428-429).

²⁸ Hope of Craighead 2005, p. 7.

²⁹ Goodman 2006, pp. 98-99.

³⁰ Goodman 2006, pp. 68-69.

³¹ Hinz v. Berry [1970] 2 QB 40 @ 42. The case concerns a traffic accident in which Mrs. Hinz's children were injured. See Goodman 2005, p. 68.

³² Lloyds Bank Plc v. Bundy [1975] 2 QB 326 @ 334). See Goodman 2005, p. 69.

³³ This is stated, *inter alia*, by Wetter 1960, p. 33.

³⁴ The reasons for this can be found, e.g., in David & Brierley 1985 and David & Jauffret-Spinosi 2002, part 3, sec. I.I.

Consequently, English superior courts pay special attention to the grounds for a decision. These grounds are not meant only to convince the parties but also to provide a basis for the crystallization of new rules of law. Simultaneously, the presentation of extensive grounds makes the decisions longer.

On the other hand, it is not possible to understand the structure of a decision of an English superior court without taking into consideration the individualism of English judges. In the background one finds a strong self-respect developed over the course of centuries. The superior judges of Westminster were a key factor in the process of strengthening the power of the kings in the Middle Ages, representing the king himself in the application of laws. It is characteristic that the members of the superior courts of London have traditionally been received by a company of honor and canon fire when arriving in other cities.³⁵ Certainly, the social background of these judges, the strong centralization of the English court system, as well as the earlier distance between academic legal teaching and the practical application of law, have played a role in this matter.

Traditionally, English lawyers have not studied in law faculties but have acquired their professional qualifications in Inns of Court, which are a kind of legal guild.³⁶ In consequence, they have not been guided by academic legal theory. At the same time, the superior courts in England, concentrated in London, have never been very large: the number of judges in them has been limited. That is why these judges have formed a relatively isolated legal sub-profession following their own traditions. On the other hand, English judges have been appointed from among successful advocates (barristers). In effect, the legal proceedings in English superior courts have been compared to a cultivated conversation between gentlemen who all know each other very well.³⁷

4.3. *Individuality of references in court decisions*

The characteristics of the English legal system, as described above, explain why the superior judges of the country frequently refer to precedents in their decisions (statutory law is naturally referred to as well). Simultaneously, English court decisions differ greatly as far as references to other texts are concerned: the judges are extremely individualistic in this respect. Sometimes references are made to texts other than legal ones. There are law lords who like to refer rhetorically to the Bible or to famous novelists, even foreign writers like Marcel Proust. Long quotations may be taken from Shakespeare or Dickens.³⁸ For instance, the case *Commission for Racial Equality v Dutton* [1989] QB 783 CA includes a speech where the following quotation may be found:

We find this usage in Shakespeare, Othello, Act III, scene IV: where Othello says to Desdemona:

³⁵ The old rituals of English judges are described in Derriman 1955 (which also contains many illustrative photos). For instance, the book includes an interesting survey of the history of the use of wigs (pp. 90-91).

³⁶ According to David & Brierley (1985, No. 298: Role of the Universities), "It has never been the tradition for English lawyers to be educated in universities [...] Traditionally, these persons were educated in legal practice".

³⁷ Wetter 1960, pp. 32-33 and Lashöfer 1992, p. 22.

³⁸ See also the poem of Lord Tennyson cited in the Indian decision in the Appendix (Example 8).

That handkerchief
Did an Egyptian to my mother give.
She was a charmer, and could almost read
The thoughts of people.³⁹

Traditionally, contemporary legal writers are not referred to in English court decisions (only classical authors, dead a long time ago, can appear in these decisions).⁴⁰ However, a change has recently taken place in this respect. References to contemporary legal writing are more frequent today than previously. Some law lords are inclined to cite academic studies and treatises. There are judges who also make international comparisons of law in their speeches, based on foreign legal literature. Indeed, Lord Hope of Craighead has recently stated that a new sound dialogue has developed between academic legal science and courts of law. In his opinion, the use of references to legal literature in court decisions may also help outside readers get more information about the issue.⁴¹ On the other hand, it has been observed that, in many cases, judges have referred to academic treatises or articles in which a position taken by law courts has been criticized but, despite this, have maintained their earlier standpoint.⁴²

5. Broadening the study

The description above shows that the style of court decisions has traditionally been very different in Germany, France and England. There is also a difference in the nature and frequency of references to other texts. In Germany, judges refer to various legal sources: legislation, *travaux préparatoires* and case law, as well as legal literature. In France, the judgment itself includes only references to statutory provisions. In England, the nature and frequency of references depends on the personality of the judge in question; however, references to case law and statutes are normally included.

The differences are particularly evident in the case of references to legal science. In Germany, these references have been customary for centuries. In England, they have been very rare⁴³ but are becoming more frequent. In France, too, references to legal literature are lacking in the text of the court decisions themselves, but are common if one takes into consideration the accessory documents of the decisions written by the judge *rapporteur* and the advocate general.

Taking into account these differences in the texts of court decisions in Germany, France and England, it is interesting to examine the situation in other legal cultures. For this purpose, some countries in Europe and overseas, representing both leading and minor legal cultures, will be briefly examined in the following pages. Today, there are good possibilities to do this thanks to the development of electronic data banks. The decisions of the supreme jurisdiction of almost every country can be read and analyzed *in extenso* via the Internet. The properties

³⁹ Goodman 2006, p. 106.

⁴⁰ This has been expressed with the axiom “the only good academic is a dead one” (De Cruz 2007, p. 290).

⁴¹ Hope of Craighead 2005, p. 9.

⁴² De Cruz 2007, pp. 258-259 and 290-291.

⁴³ Earlier the difference with Germany was very clear. In 1985, every German court decision included on average 13 references to legal literature while the corresponding figure in the case of English court decisions was 0.77 (!). This information comes from a comparative study by Hein Kötz. See De Cruz 2007, p. 265.

of various data banks differ as far the ease of information retrieval is concerned, but in many cases it is possible to search for relevant court decisions by means of freely chosen key words. Hence, one can use words which, in the country in question, are most likely to give hits for court decisions including references to academic legal writing.

5.1. Poland

Poland is the biggest country in Eastern Central Europe, and therefore worthy of special attention. On the other hand, Poland is a civil-law jurisdiction which has, in addition to the Supreme Court, a separate Supreme Administrative Court (*Naczelny Sąd Administracyjny*). The data bank of the latter jurisdiction is highly developed, and it is easy to search for information by means of key words. As in Germany, Polish legal scholars write massive commentaries on laws. When the writer of this article searched for the word *komentarz* ('commentary'), the number of hits was almost four and a half thousand (4,355).⁴⁴ Spot checks showed that the Polish Supreme Administrative Court often enumerates, in its decisions, several academic authors whose standpoints support the opinion of the Court. A good example is the recent (2009) decision II SA/Wr 354/09, 2009-09-30 (see Example 4 of the Appendix).

5.2. Finland

In Finland, the data bank Finlex includes all the precedents of the Supreme Court (*Korkein oikeus / Högsta domstolen*) and the Administrative Supreme Court (*Korkein hallinto-oikeus / Högsta förvaltningsdomstolen*). A search for the word **kirjallisuus** ('literature' cut at the beginning and at the end of the word) in the texts of the precedents of the Supreme Court from 1926 to 2006 gave 320 hits.⁴⁵ In some of the hits, the reference to legal literature appears in the written pleading of a party (cited by the Supreme Court) or in the grounds given by a lower court (cited by the Supreme Court), but sometimes the reference appears in the grounds given by the Supreme Court itself. The reference is frequently a general one, but there are also precise references to the authors of books or articles.

To get a better idea how frequent precise references to legal authors and works are in Finnish court decisions, the writer of this article went through all the hits. The number of cases where there is a precise reference to a legal author in the grounds given by the Supreme Court itself is 27.⁴⁶ Correspondingly, the number of precise references to legal writing in the report of a referendary (reporting secretary of the court) or in a dissenting opinion is 24.⁴⁷ Normally,

⁴⁴ A considerable number of hits may also be obtained using other expressions referring to legal literature. When the writer of this article searched for the word *literaturze*, which appears in the expression *w literaturze* ('in literature'), the result was 881 hits.

⁴⁵ As for the Finnish Supreme Administrative Court, the corresponding number is approximately one hundred.

⁴⁶ KKO (= Supreme Court) 2008:46, 2008:30, 2008:19, 2007:23, 2005:95, 2005:14, 2001:12, 2000:23, 1998:96, 1998:54, 1998:31, 1997:206, 1997:198, 1997:184, 1997:169, 1997:156, 1997:70, 1997:69, 1997:61, 1997:10, 1996:129, 1996:112, 1996:37, 1996:26, 1995:196, 1994:94 and 1990:97.

⁴⁷ KKO 2007:40, 2006:94, 2006:74, 2006:56, 2005:76, 2005:75, 2004:109, 2004:47, 2003:129, 2002:43, 2001:115, 1998:34, 1997:209, 1997:107, 1997:86, 1997:47, 1997:6, 1996:54, 1996:53, 1995:206, 1994:112, 1993:169, 1993:68 and 1991:155.

references are made to only one author, but sometimes several legal scholars are mentioned.⁴⁸ On this basis, one can state that legal literature is quite seldom referred to in the grounds of Finnish court decisions.

5.3. Brazil

The most important genuine civil-law area outside of Europe is Latin America. Here we focus on Brazil, the biggest country in the area.⁴⁹ In Brazil, the comprehensive JusBras data bank includes a considerable number of court decisions from various jurisdictions (the Supreme Court, appellate courts, special courts, district courts, etc.). On the basis of searches in this data bank, references to legal scholars in Brazilian court decisions seem to be common. The word *doutrina* ('legal literature', 'legal science',⁵⁰) gave more than seven thousand hits in the precedents of the Supreme Court and the appellate courts. Legal literature is frequently referred to in a general way only, but there are precise references as well. An illustrative example is the decision REsp 150908 SP 1997/0071637-6) of the *Superior Tribunal de Justiça* (see Example 5 of the Appendix).

In Brazilian court decisions, it is worth noting that the references they contain often concern European legal literature. Indeed, after gaining independence, the states of South America largely took inspiration, in the 19th and beginning of the 20th centuries, from Continental Europe to develop their legal orders. For linguistic reasons, legal literature from the Latin countries of Europe, or translated into Romance languages, was read extensively in South America.⁵¹ The tradition of citing legal literature from Continental Europe is still visible in the Brazilian court decision cited above.

5.4. Republic of South Africa

In addition to the Americas, European colonial powers brought and implanted their legal systems, technically more developed than the native ones, to Africa and Asia. The most advanced African state south of the Sahara is the Republic of South Africa. The data bank of its supreme jurisdiction (*Supreme Court of Appeal*) reveals references to legal scholarship in

⁴⁸ The names of several legal scholars appear in, e.g., KKO 2001:12, 1996:129, 1996:37 and 1994:94.

⁴⁹ Court decisions in other Latin American countries, like Argentina and Chile, also include references to court decisions. However, it is not easy to get a clear idea of the frequency of these references on the basis of information from data banks alone. If one searches for references using the terms *literatura jurídica* ('legal literature') and *ciencia jurídica* ('legal science'), only a few hits occur in the data bank JurisChile and the data bank of the Supreme Court of Argentina. The term *doctrina* gives a large number of hits, but this term has two meanings in legal Spanish. It refers, on one hand, to legal literature (legal science) and, on the other hand, to an established interpretation of law courts on a certain point of law. This kind of ambiguity also appears in the case of some other words, like *autor* ('author'). In any case, law courts in both countries include, at least occasionally, precise references to legal literature, e.g., in the cases 03.08.04 - Rol N° 2098-03 (Chile) and C. 1757. XL. *Recurso de hecho Casal, Matías Eugenio y otro s/ robo simple en grado de tentativa, causa* No□ 1681 (Argentina).

⁵⁰ As in the case of legal Spanish (see the previous note), the Portuguese term *doutrina* may refer to both legal literature or legal science (sometimes called *legal dogmatics*) and an established interpretation of law courts on a certain point of law (*doutrina dos tribunais*). On the basis of spot checks, the term regularly appears in the sense of legal literature in Brazilian court decisions.

⁵¹ For more detail, see Mirow 2004, pp. 129-142.

South African court decisions.⁵² Here we will take a closer look at the case *Kruger v Joles Eiendom (Pty), Ltd.* (400/07) [2008] ZASCA 138 (27 November 2008) (see Example 3 of the Appendix).

One can see that this decision includes, *inter alia*, references to two legal scholars (Voet and Carpzovius), the works of whom are written in Latin, as their titles and the citations given in the Appendix show. Indeed, Johannes Voet was a Dutch scholar who lived from 1646 to 1714. His principal work was *Commentarius ad Pandectas* ('Commentary on the Pandects')⁵³, the first edition of which came out in 1698–1704. Benedict Carpzov (Benedictus Carpzovius) was a German legal scholar who lived from 1595 to 1666. He published, among other books, an important work entitled *Jurisprudentia Forensis Romano-Saxonica* (1668).⁵⁴

The reason why in a court decision given by the Supreme Court of Appeal of South Africa in 2008 there are references to Latin works written by European legal scholars in the 17th century goes back to the complicated legal history of the country. In the beginning of modern times, statutory law was incomplete and fragmented throughout Europe. For this reason, superior judges often founded their decisions on academic legal writing based on Roman law, in the form codified in Byzantium. This also applied to the Netherlands and her overseas colonies, where the power was exercised by the Dutch East India Company.

The Netherlands lost its Cape Colony to Britain before the modernization of Dutch law. As in other parts of the Empire, the British maintained the old private law system in South Africa and only those branches of law which had a clear political importance were rebuilt on a common-law basis. This is why the so-called Roman-Dutch private law has been conserved as a living system in the region. The confrontation between the British and the Boers in the 20th century led to a situation where the Roman-Dutch legal legacy was even more emphasized in the middle of the 20th century than in the 19th century.⁵⁵ This is still visible in the Republic of South Africa today, despite the fact that some of the judges of the supreme jurisdiction of the country are African (see the names of the judges in Example 3 of the Appendix).

5.5. India and Indonesia

In Southern Asia, there are two huge states: India and Indonesia. As in most countries, the data banks of the supreme jurisdiction of these States can be accessed via the Internet.

The precedents of the Supreme Court of Indonesia (*Mahkamah Agung*) include many references to statutory law. However, on the basis of key word searches, the number of references to legal scholars seems to be quite limited.⁵⁶ Despite this, some references can be

⁵² The terms *literature*, *learned (author)*, *scholar*, etc., give only a few hits, but the abbreviation "ed." gives almost 400. Besides, only references to books published in several editions are revealed this way; certainly, many books that have been published in only one edition are referred to by South African courts.

⁵³ Concerning Pandects, see footnote 11.

⁵⁴ Kleinheyer & Schröder 1996, pp. 87-92 and 440-442.

⁵⁵ For more detail see Merwe and du Plessis 2004, pp. 9-19 and 47-48, Zimmermann 1997, pp. 536-549, and Tamm 2009.

⁵⁶ The writer of this article searched for hits in the data bank of the Indonesian Supreme Court (including some 10,000 cases) using various words that could reveal references to legal literature:

found (see Example 7 of the Appendix). Unlike South Africa, the application of law in the legal science of the Netherlands – the earlier colonial power in both countries – is not cited in Indonesian court decisions.⁵⁷

This is not the case in India. In the decisions of the Supreme Court of India, one can easily find references to legal literature. In addition, some works referred to were originally written by English lawyers and have been updated by local scholars. One example is *Mayne's Hindu Law and Usage* (1st edition, 1906; 13th edition, 1991).⁵⁸ In important questions of interpretation, Indian Supreme Court judges often make extensive legal comparisons in which the legal literature of the other Commonwealth countries plays an important role. Example 8 of the Appendix exemplifies this tradition.

5.6. Common law countries

Nowadays, the decisions of the Supreme Court of the United States contain many more references to academic legal writing than previously. Already in the 1990s, decisions were given that contained dozens of references, sometimes fifty or more, to legal scholars.⁵⁹

Legal literature is quite often referred to in other Commonwealth countries besides India. In the following paragraphs, Canada and Australia are taken as examples.

As in common-law countries in general, Canadian court decisions are often extensive. The decisions of the Canadian Supreme Court may include a comprehensive list of sources used as the basis of the decision. For instance, the case *Gosselin c./vs. Québec* (2002 CSC 84)⁶⁰ contains as much text as a 200-page book. The list of sources used covers four pages. This list includes all the cases cited in the opinions of the judges, the relevant statutory provisions, and all books and articles to which reference is made. The list of the titles of these books and articles fills an entire page.⁶¹

penulis ('author'), *sastra* (*kesusastraan*) *hukum* ('legal literature'), *ilmu* (*pengetahuan*) *hukum* ('legal science'), *halaman* ('page'), etc. The only term that gave a hit – and it only produced one – was *ahli* (*akhli*) *hukum* ('legal scholar'). Furthermore, the author examined, in a cursory way, cases in some branches of law, like customary law (*hukum adat*). Concerning the translations of the terms mentioned, see Massier 1992.

⁵⁷ On the contrary, Dutch legal writing is frequently cited in some Indonesian legal treatises. See Mattila 2006, p. 116.

⁵⁸ John Dawson Mayne (1828 - 1917) was a famous judge and author of treatises on Indian law. When, in October 2009, the author of this article searched for hits on Mayne in the data bank of the Indian Supreme Court, the number was about 90, the most recent one from the same year (2009). In India, the members of each religious group (Hindus, Muslims, etc.) follow the law of the group in question, notably in matters of family law. This is why treatises on Hindu law, Islamic law, and others occupy an important position in the application of laws in India.

⁵⁹ Forster 1996, p. 130.

⁶⁰ The decisions of the Canadian Supreme Court are published in both English and French. The original document may be in either of these languages, depending on where the case originates. In the case referred to here, the original language is French.

⁶¹ The information retrieval system for the data bank of the Indian Supreme Court, which works in English, is well developed and easy to use. If one searches for the terms "learned author" and "learned authors", the bank gives 400 hits for the years 1960 - 2009, including some from each decade.

In Australia, legal scholars are also widely cited. This is clearly visible in the data bank of the *High Court of Australia*. Unlike judges in England or Canada, but like judges in the Republic of South Africa, Australian judges place all the references in footnotes.⁶² For instance, in the case *Wong v. Commonwealth of Australia*⁶³, the extensive text of the decision includes 320 footnotes. In addition to frequent references to precedents, statutory provisions, committee reports and parliamentary documents, they contain numerous references to legal scholars as well.

6. Conclusion

Only a few of the numerous legal cultures of the world have been examined in the present paper. Despite this, one can say that the overall picture is fragmented: there are countries where academic legal literature is widely cited in court decisions⁶⁴ and others where references to legal scholars are relatively rare.⁶⁵ The references are often general, but the names of authors and the titles of works may also be given.

Furthermore, the example of France demonstrates that academic legal literature may have a far greater importance in the decision-making of the law courts than one might suppose on the basis of the text of the decision itself. The real importance of legal literature clearly appears in accessory documents (the report of the judge *rapporteur* and the opinion of the advocate general). Hence, one has to be prudent when drawing conclusions on the importance of legal literature at law courts on the sole basis of the texts of the decisions. If legal scholars are often referred to, it is natural to conclude that academic legal writing has a great importance in the application of law in the court in question (even if English judges may maintain their position after having cited academic legal writers). However, it would be dangerous to draw the conclusion that academic legal writing is not important in the application of law in courts on the sole basis that the texts of decisions do not mention any works of legal scholars.

Our comparison also shows that there are many technical ways to construct and place references to other texts in court decisions. A classic custom is to add the references in the text of the decision in brackets (this is done in Argentina, Germany, Indonesia and Poland). The decision may also include a special list of sources cited, as in Brazil and Canada. Finally, one can avoid making the text cumbersome and unclear by placing all the references in footnotes (as is done in Australia, South Africa and the United States).

⁶² This practice was originally developed in the Supreme Court of the United States, which adopted it already at the end of the 1880s. Even if there has been some opposition, the usage of footnotes is today an established stylistic feature of the decisions of this Court. For more details, see Goodman 2006, pp. 40-41.

⁶³ 309 [2009] HCA 3 (2 February 2009).

⁶⁴ This was observed earlier in the 1990s by Marc Forster on the basis of a comparison of several legal cultures. He also states that in some countries there is a clear tendency towards more frequent references to academic legal writing. For instance, nowadays the supreme jurisdictions of the Netherlands and Switzerland clearly cite legal scholars more often than in the past (Forster 1996, pp. 129-130).

⁶⁵ Earlier, even binding prohibitions could be found. In Italy, legal provisions expressly forbade the citing of legal writers in court opinions (Forster 1996, p. 129).

As previously stated, the study above covers only a few countries. In addition, this study is mainly based on mechanical information retrieval from free data banks containing court decisions given in the countries examined. Finally, the study was carried out by a single person, the writer of this article, who possesses very limited background knowledge about the legal orders and the court systems behind the precedents examined. The risk of misunderstanding is therefore high.

Because of the limitations mentioned above, a more extensive and reliable study of the use of references, notably references to legal science, in court decisions is needed. This kind of research, on a comparative basis, would have both theoretical and practical value. From the linguistic point of view, it would give additional information on the problem of intertextuality in judicial texts. From the point of view of legal science, research on reference practices would elucidate the scope and forms of interaction between legal science and the application of law by jurisdictions in various countries, and the tendencies visible in this respect in different legal cultures. From a practical point of view, extensive comparisons of reference techniques used around the world would help the authors of guidebooks on legal style propose systems of reference that would make the court decisions as readable as possible. Hence, this kind of study would be a useful tool to achieve the goals of the plain legal language movement in one important sector: references.

The comprehensive project proposed here could be realized only through cooperation between linguists and lawyers in the framework of a joint project involving specialists from many countries. Indeed, it would be necessary to create an international network for this purpose.

Appendix

Example 1.

The following decision (Zivilsenat 11.11.2009 VIII ZR 221/08) of the German Supreme Court (*Bundesgerichtshof*) is a casual example of the extensive citing of legal literature in German judgments:

(...) Die wiederkehrenden Kosten einer solchen Öltankreinigung gehören daher zu den umlagefähigen Betriebskosten nach § 2 Nr. 4 Buchst. a BetrKostVO (ebenso AG Karlsruhe, DWW 2006, 119; AG Regensburg, WuM 1995, 319; Langenberg, aaO; Blank/Börstinghaus, *Miete*, 3. Aufl., § 556 BGB Rdnr. 27; Kinne in: Kinne/Schach/Bieber, *Miet- und Mietprozessrecht*, 5. Aufl., § 556 BGB Rdnr. 132; Schmidt-Futterer/Lammel, *Mietrecht*, 9. Aufl., § 7 HeizKV Rdnr. 30; Pfeifer, *Betriebskosten bei Wohn- und Geschäftsraummiete*, 2002, S. 61 f.; Sternel, *Mietrecht aktuell*, 4. Aufl., Rdnr. V 12 und 542; Wall in: Eisenschmid/Rips/Wall, *Betriebskostenkommentar*, 2. Aufl., Rdnr. 2968 f.; Staudinger/Weitemeyer, *BGB* (2006), § 556 Rdnr. 25; Schmid, *Handbuch der Mietnebenkosten*, 11. Aufl., Rdnr. 5101; aA AG Speyer, ZMR 2007, 871; AG Hamburg, WuM 2000, 332; AG Rendsburg, WuM 2002, 232; AG Gießen, WuM 2003, 358; LG Landau, WuM 2005, 720).

Translation (including titles of books and articles):

Therefore, the typical costs of cleaning such an oil tank are counted as operating costs to be taken into consideration in taxation in accordance with Section 2, Subparagraph 4a of the Decree on Operating Costs (likewise: Local Court of Karlsruhe, DWW (= Zeitschrift "Deutsche Wohnungswirtschaft") 2006, 119; Local Court of Regensburg WuM (= Wohnungswirtschaft und Mietrecht; Zeitschrift), 1995, 319; Langenberg, o.p.; Blank/Börstinghaus, Lease, 3rd ed., § 556 BGB = Bürgerliches Gesetzbuch), margin number 27; Kinne in: Kinne/Schach/Bieber, Law on Lease and Lease Procedure, 5th ed., § 556 BGB, margin number 132; Schmidt-Futterer/Lammel, Law on Lease, 9th ed., § 7 HeizKV (= Heizkostenverordnung), margin number 30; Pfeifer, Operating Costs in the Lease of Residential and Business Flats, 2002, S. 61 f.; Sternel, Topical Law on Lease, 4th ed., margin numbers V 12 and 542; Wall in: Eisenschmid/Rips/Wall, Commentary on Operating Costs, 2nd ed., margin number 2968 f.; Staudinger/Weitemeyer, BGB (2006), § 556 margin number 25; Schmid, Handbook on Additional Costs in Lease, 11th ed., margin number 5101; differently: Local Court of Speyer, ZMR 2007, 871; Local Court of Hamburg, WuM 2000, 332; Local Court of Rendsburg WuM 2002, 232; Local Court of Gießen, WuM 2003, 358; District Court of Landau, WuM 2005, 720).

Example 2

In France, the reports of the judges *rapporteur* may include, *inter alia*, profound analyses of judicial theory based on the discussion in legal literature. Case No. 04-16.174 (arrêt no.- 263 du 10 octobre 2008, rapport de Mme Radenne, *Conseiller rapporteur*) of the Supreme Court is a good illustration of this. It includes the following paragraph:

Attachée aux seuls actes juridictionnels mettant fin à la contestation, l'autorité de la chose jugée revêt deux aspects, une autorité négative, qui empêche qu'un même procès soit renouvelé, notion sur laquelle chacun s'entend, et une autorité positive, qui donne lieu à de nombreuses controverses doctrinales et divergences sémantiques. Pour la doctrine classique, l'autorité positive, qui impose de tenir pour vrai ce qui a été jugé, n'a d'effet qu'entre les parties. L'effet erga omnes, qui déroge au principe du contradictoire, n'a lieu qu'à titre exceptionnel lorsque l'ordre public l'exige. Un courant doctrinal plus récent estime que tout jugement définitif, qui certes n'a d'effet substantiel qu'entre les parties, est néanmoins opposable à tous en ce qu'il modifie l'ordonnancement juridique. Les effets du jugement ne doivent cependant pas être confondus avec l'autorité de la chose jugée(2). Les tiers, qui, pour reprendre la formule de Marie-Anne Frison-Roche, extérieurs à l'instance n'en sont pas moins spécialement intéressés par le sort du procès,(3) devant pouvoir contester une décision à laquelle ils n'ont pas été parties. Pour un autre courant doctrinal "*les tiers comme les parties doivent admettre que ce qui a été jugé entre les parties a autorité*"(4).

Footnotes of the report:

2. Gérard Cornu et Jean Foyer, in "Précis procédure civile", Thémis, droit privé Puf, p. 590.

3. Marie-Anne Frison-Roche, in "Généralités sur le principe du contradictoire", Thèse Paris II, 1988, p. 94.

4. Voir notamment Georges Wiederkher, in "Rep. pr. civ. Dalloz, Chose jugée" n° 366.

Translation:

Res judicata (l'autorité de la chose jugée),⁶⁶ which is attached only to court decisions that bring an end to a lawsuit, is a two-sided phenomenon: the negative *res judicata*, which prevents the possibility of resuming legal proceedings in the same lawsuit – a notion on which everyone agrees – and the positive *res judicata*, which gives rise to numerous doctrinal controversies and semantic divergences. In classical legal science, the positive *res judicata*, which presupposes that what has been confirmed by a judgment is considered to be true, has effects solely between the parties. An *erga omnes* effect, which forms an exception to the principle of contradictoriness, comes into existence only exceptionally, when it is required by public policy (*l'ordre public*). A more recent doctrinal trend esteems that every final judgment which has material effects only between the parties, none the less has effects on everyone (*est néanmoins opposable à tous*) because it modifies legal regulations. However, the effects of a judgment should not be confused with *res judicata*.⁽²⁾ *Tertii* (third parties), who – to cite Marie-Anne Frison-Roche – have an equal interest in the outcome of the lawsuit⁽³⁾, even though they are procedurally outsiders, must be able to contest a decision in which they have not been parties. Another doctrinal trend states that “both the *tertii* and the parties must approve that what has been stated in a judgment between the parties is valid”⁽⁴⁾.⁶⁷

Translation of the footnotes:

2. Gérard Cornu and Jean Foyer, in “Basics of Civil Procedure”, Thémis, civil law Puf, p. 590.

3. Marie-Anne Frison-Roche, in “General Ideas on the Principle of Contradictoriness”, Thèse Paris II, 1988, p. 94.

4. See especially Georges Wiederkher, in “Rep. pr. civ. Dalloz, Res Judicata” n° 366.

Example 3.

As stated in Footnote 27, judges have considerable authority not only in England but also in the other countries that follow the English legal tradition. They are free to choose the style of their judgments. For instance, in the United States, the texts of the opinions of some judges have an extremely personal flavor. This may be due to a state of intense agitation. A famous example is the dissenting opinion of Judge Musmanno in a case concerning Henry Miller's *Tropic of Cancer*:

⁶⁶ Due to important differences between civil-law thinking and common-law thinking in the field of procedural theory, and the conceptual differences in consequence, it is difficult to give an exact English translation of certain Continental terms of judicial procedure, such as *autorité de la chose jugée* or *opposabilité*. The translation *res judicata* is common in legal dictionaries, but it has also been criticized (see Mattila 2006: 266—267). In the same way, the expression *opposable à tous* is a typical term of French procedural law. According to the leading French legal dictionary, *opposabilité* is « aptitude d'un droit, d'un acte, d'une situation de droit ou de fait à faire sentir ses effets à l'égard des tiers. » (Cornu, 2000). Michel Doucet and Klaus Fleck translate the expression *opposable aux tiers* in legal German as *Dritten gegenüber wirksam* (Doucet & Fleck 1997). Accordingly, the writer of this article uses the word “effects” here.

⁶⁷ Unofficial translation by the writer of this article.

“Cancer” is not a book. It is a cesspool, an open sewer, a pit of putrifaction, a slimy gathering of all that is rotten in the debris of human depravity. And in the center of all this waste and stench, besmearing himself with its foulest defilement, splashes, leaps, cavorts and wallows a bifurcated specimen that responds to the name of Henry Miller.... From Pittsburgh to Philadelphia, from Dan to Beersheba, and from the Ramparts of the Bible to Samuel Eliot Morison’s Oxford History of the American People, I dissent.⁶⁸

Exceptionally, an American judge may be irritated by the opinions of his or her fellow judges in cases where ethical standards are involved (e.g., in a case concerning the immorality of a movie):

Some state judges, acting the part of sycophants, echo that doctrine. It would appear that such an argument ought only to be advanced by depraved, mentally deficient, mind-warped queers. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value of his own taste. If those judges have not the good sense and decency to resign from their positions as judges, they should be removed either by impeachment or by the vote of the decent people of their constituency.⁶⁹

Example 4.

The judgment II SA/Wr 354/09 (2009-09-30) of the Supreme Administrative Court of Poland is a good example of frequent references to legal scholars in court decisions. Its grounds include, *inter alia*, the following paragraph:

Żeby jednak uznać, że skarga dotyczy innych aktów lub czynności z zakresu administracji publicznej (lub bezczynność w tym przedmiocie) należy zbadać, czy wszystkie wyżej wymienione elementy występują (por. wyrok WSA w Warszawie z dnia 21 maja 2008 r. sygn. akt I SAB/Wa 24/08 - LEX nr 479036; B. Adamiak, Z problematyki właściwości sądów administracyjnych (art. 3 § 2 pkt 4 p.p.s.a.), ZNSA II nr 2/5/2006; T. Woś [w:] T. Woś, H. Knysiak-Molczyk, M. Romańska, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Wydawnictwo Prawnicze LexisNexis, Warszawa 2005, s. 59-63; J. P. Tarno, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Wydawnictwo Prawnicze LexisNexis, Warszawa 2006, s. 29-31; A. Kabat, Komentarz do art. 3 ustawy z dnia 30 sierpnia 2002 r. - Prawo o postępowaniu przed sądami administracyjnymi, [w:] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Zakamycze, 2006, wyd. II).

Translation:

However, in order to accept that other acts or measures in the field of public administration (or omitting to act in this respect) form the object of an appeal,⁷⁰ one has to study whether all the elements mentioned above are present

⁶⁸ Tiersma 1999, pp. 140-141.

⁶⁹ Salt Lake City v. Piepenburg (571 P.2d. 1299 (1977)). See George 2007, p. 449.

⁷⁰ The case concerns whether an administrative appeal may also be made concerning acts other than regular administrative decisions fulfilling the formal requirements established by law.

(compare the decision of the Administrative Court of Warsaw of May 2, 2008, deposit copy Nr I SAB/Wa 24/08 – LEX nr 479036; B. Adamiak, On the Problems of the Competence of Administrative Courts (Sec. 3, subs. 2, para. 4 of the Law on Administrative Procedure), ZNSA (= Scientific Journal of the Administrative Courts) II nr 2/5/2006; T. Woś [in:] T. Woś, H. Knysiak-Molczyk, M. Romańska, Law on Procedure before Administrative Courts. A Commentary, LexisNexis, Warsaw 2006, pp. 29–31; A. Kabat, A Commentary on Sec. 3 of the Law on Procedure before Administrative Courts (August 30, 2002) [in:] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, Law on Procedure before Administrative Courts. A Commentary, Zakamycze 2006, Part II).⁷¹

Example 5.

The following decision (REsp 150908 SP 1997/0071637-6) comes from the Brazilian *Superior Tribunal de Justiça* (which is competent in certain constitutional matters and matters of fundamental rights). A summary (*ementa*) of the decision may be found on the Internet. This summary includes a list of the books cited in the decision. The part of the summary containing references to legal literature reads as follows:

O Direito tem seu método. Se não observado, a conclusão, com certeza, será equivocada. O homicídio é crime porque elimina a vida do homem. A calúnia afeta a honra. O furto diminui o patrimônio. A literatura alemã, por influência jurisprudencial, construiu a doutrina da insignificância, cuja divergência é restrita ao seu efeito, ou seja, se elimina a culpabilidade, ou repercute na própria tipicidade. Aliás, a sensibilidade dos romanos consagrou - de "minimis non curat praetor".⁷² O prejuízo não é qualquer dano material, de que são exemplos o ligeiro corte na cutícula provocado pela manicure, ou o queimar, sem maior importância, as pontas dos cabelos da cliente. Nessa linha, "BETTIOL, ANIBAL BRUNO, MANTOVANI, MAURACH". O talonário de cheques, dada a insignificância de valor econômico, não se presta a ser objeto material do crime de furto, ou de receptação. Esta conclusão não se confunde com a conduta que se vale do talonário para praticar crime, de que o estelionato e o falso são ilustração.

Doutrina

OBRA: TRATTATO DEL FURTO E DELLE SUE VARIE SPECIE, TORINO, 1926, V. 3, AUTOR: VINCENZO MANZINI
OBRA: DIRITTO PENALE, 9ª ED, CEDAM, PADUA, 1976, P. 520. AUTOR: GIUSEPPE BETTIOL
OBRA: DIREITO PENAL, RIO DE JANEIRO, FORENSE, 1959, V. I, TOMO 2, P. 254. AUTOR: ANIBAL BRUNO
OBRA: DIRITTO PENALE, 2ª ED. CEDAM, PADUA, 1988, P. 197-198 AUTOR: FERNANDO MANTOVANI
OBRA: TRATADO, ARIEL, BARCELONA, 1962, P. 180. AUTOR: REINHART MAURACH

⁷¹ Unofficial translation by the writer of this article.

⁷² In the original court decision, the quotation mark is wrongly placed. It should appear before the word *de*.

Translation:

Law has its method. If this method is not observed, the conclusion is certainly incorrect. A murder or manslaughter⁷³ is a crime because it deprives a human being of his or her life. Defamation insults the honor. A theft diminishes property. German literature, influenced by case law, has constructed the doctrine of insignificance, according to which the distinction is based on the gravity of the act, so that the culpability may be eliminated or the typicalness may be lacking. In effect, the Romans were sensible enough to develop the maxim “de minimis non curat praetor”. A prejudice is not material damage. Examples of this are a slight cut in manicure or a minor singeing of hair ends. Along this line: BETTIOL, ANIBAL BRUNO, MANTOVANI, and MAURACH. A checkbook is not suitable as the material object of a larceny or concealment of illegally obtained goods when the insignificance of its financial value is taken into consideration. This conclusion must not be confused with a situation where the checkbook is used to commit a crime like fraud or falsification.⁷⁴

Legal literature

Work: Treatise on Larceny and its Types. Torino 1926, V. 3. Author: Vincenzo Manzini

Work: Criminal Law, 9th ed., Padova 1976, p. 520. Author: Giuseppe Bettiol

Work: Criminal Law, Rio de Janeiro, Forense 1959, V. I, Part 2, p. 254.

Author: Anibal Bruno

Work: Criminal Law, Barcelona 1962, p. 180 [a Spanish translation, *Tratado de derecho penal*, of the German original]. Author: Reinhart Maurach

Example 6.

The decision *Kruger v Joles Eiendom (Pty) Ltd* (400/07) [2008] ZASCA 138 (27 November 2008) of the Supreme Court of Appeal of the Republic of South Africa is worth citing. References to classical European scholars from the period of the *jus commune* are made in Point 8 of the opinion of Judge Heher (which expresses the opinion of the majority):

THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case No: 400/07

JOHAN BLOEM KRUGER Appellant
and

JOLES EIENDOM (PTY) LTD 1st Respondent

REGISTRAR OF DEEDS (CAPE TOWN) 2nd Respondent

Neutral citation: *Kruger v Joles Eiendom (Pty) Ltd* (400/07) [2008] ZASCA 138 (27 November 2008).

Coram: MPATI P, MTHIYANE, CLOETE, HEHER JJA *et* KGOMO AJ

Heard: 10 NOVEMBER 2008

Delivered: 27 NOVEMBER 2008

Summary: Servitude-interpretation where ambiguous:

⁷³ In legal Portuguese, *homicídio simples* corresponds roughly to manslaughter and *homicídio qualificado* to murder.

⁷⁴ Unofficial translation by the writer of this article.

[8] In the circumstances I believe that such ambiguity as there is should be resolved by applying the well established rule of construction that because a servitude is a limitation on ownership, it must be accorded an interpretation which least encumbers the servient tenement. Voet,(12) in discussing the urban servitude of *tigni immittendi* (i.e., the right to let a beam into a neighbour's party wall), contrasts the position under a limited agreement as opposed to a general agreement and says that where the number of beams and mode of letting in has been defined, the owner of the dominant tenement is not allowed either to let in more or to alter the shape of the letting in. The reason he gives is:

'That is especially so because the granting of a servitude receives a strict interpretation as being an odious thing (because it is opposed to natural freedom); and in case of doubt there must be a declaration in favour of freedom.'(13)

As authority for this proposition Voet refers to, amongst others, Carpzovius(14) and the author of the opinion in the *Hollandsche Consultation*(15), where the passage from Carpzovius which follows is quoted:

'... *servitus ceu res odiosa restringi, ac in dubio pro libertate pronunciari debet. Et semper servitus indefinita ita est interpretanda, quo fundus serviens minori afficiatur detrimento.*'

The passage may be translated as follows:

'... a servitude, being something odious, should be interpreted restrictively and so, in case of doubt, should be declared free of restraint. And an imprecise servitude must always be interpreted so that the servient tenement is the less adversely burdened.'

Footnotes from the passage:

12 *Commentarius ad Pandectas* 8.2.2.

13 Gane's translation, Vol. 2, p. 440. To the same effect, as regards the general principle, is Schorer in his supplementary notes to Grotius 2.32, Austen's translation, p. 303.

14 *Jurisprudentia Forensis Romano-Saxonica* 2.41.4.

15 Opinion 146.

Example 7.

Decision No. 581 K/Pdt.Sus/2008 of the Indonesian Supreme Court (*Mahkamah Agung*) is not typical of Indonesian court decisions since it includes precise references to legal scholars. This decision was given in a case of patent law involving questions of a procedural nature. The decision refers to legal literature in three passages (giving grounds for the decision), numbered and beginning with the word "that" (*bahwa*). The use of "bahwa" may be compared with the way the word "que" is used in French court decisions (See Section 3).

15. Bahwa putusan Hakim yang dianggap tidak memberikan pertimbangan yang cukup pada putusan yang dijatuhkannya, haruslah memenuhi salah satu kriteria-kriteria di bawah ini: a. Apabila diabaikan suatu dalil (yang dapat memberi arah untuk suatu kesimpulan lain yang berbeda [...]) (dikutip dari

buku “ANEKA MASALAH HUKUM DAN HUKUM ACARA PERDATA”, Setiawan, SH. terbitan ALUMNI, Bandung, cetakan I/1992, halaman 388) [...]

19. Bahwa kewajiban seorang Hakim untuk memberikan *motivering*⁷⁵ yang cukup bagi putusannya sesuai dengan pendapat Setiawan, SH. dalam bukunya “ANEKA MASALAH HUKUM DAN HUKUM ACARA PERDATA” , terbitan ALUMNI, Bandung Cetakan I/1992, halaman 372, menjelaskan bahwa: Adanya kewajiban bagi seorang Hakim untuk memberikan suatu *motivering* terhadap putusan-putusannya memberikan jaminan akan adanya suatu “fair hearing” [...]

21. Bahwa menurut pendapat ahli hukum Prof. R. Subekti, SH. dalam bukunya Hukum Pembuktian, Pradnya Paramita, Jakarta, Cetakan ke 11, 1995, halaman 15 menyatakan: “Suatu masalah yang sangat penting dalam Hukum Pembuktian adalah masalah pembagian beban pembuktian.” [...]

Translation:

15. That a judicial decision for the part of which it is esteemed that sufficient grounds have not been given must fulfill one of the following conditions: a. When a consideration has been omitted (which can support another outcome) [...] (cited from the book “SOME LEGAL PROBLEMS AND LAW OF CIVIL PROCEDURE”, [by] Setiawan, Law Graduate (Bachelor of Laws), Publishing House ALUMNI, Bandung, publ. I/1992, p. 388) [...]

19. That the obligation of the judge to give sufficient grounds for his or her decision is in harmony with the opinion of Setiawan, Law Graduate (Bachelor of Laws), in his book “SOME LEGAL PROBLEMS AND LAW OF CIVIL PROCEDURE”, Publishing House ALUMNI, Bandung, publ. I/1992, p. 372 [where the author] states: The [existence of an] obligation of the judge to give the grounds for his or her decisions guarantees that there has been a “fair hearing” [...]

21. That Prof. R. Subekti, Law Graduate (Bachelor of Laws), states as his opinion in his book “Law of Evidence”, Publishing House Paramita, Jakarta, 11th ed., 1995, p. 15: “One problem which is very important in the law of evidence is that of the allocation of the burden of proof.” [...] ⁷⁶

Example 8.

The following example is a decision of the Supreme Court of India given in a case involving Constitutional Law. The decisions of the Indian Supreme Court are given in English, which is an

⁷⁵ The judges here use a Dutch legal term (*motivering*) instead of the Indonesian term *pertimbangan* (‘grounds’). This is an example of the partial conservation of the legal traditions of colonial times in Indonesia. Indonesian court decisions include other Dutch expressions as well, as in the following sentence (which also appears in the decision cited above): “Bahkan Mahkamah Agung, di tingkat kasasi dapat membatalkan putusan pengadilan (baik Pengadilan Negeri ataupun Pengadilan Tinggi) atas dasar pertimbangan bahwa putusan itu tidak diberikan pertimbangan yang cukup (*niet voldoende gemotiveerd*).” An unofficial translation by the writer of this article reads: ‘Furthermore, the Supreme Court may quash, in the cassation procedure, a decision of a court (either district court or appellate court) on the grounds that sufficient reasons have not been given for the decision (*niet voldoende gemotiveerd*).’ In effect, it can be generally stated that there is still a great deal of Dutch influence in legal Indonesian. For more details, see Massier 2008, pp. 241-244.

⁷⁶ Unofficial translation by the writer of this article.

“associate national language” according to the Constitution. Judge C. K. Thakker’s opinion contains broad comparisons of law between various countries of the Commonwealth. Legal scholars of these countries are cited:⁷⁷

CASE NO.:
Writ Petition (civil) 1 of 2006
PETITIONER:
Raja Ram Pal
RESPONDENT:
The Hon'ble Speaker, Lok Sabha & Ors
DATE OF JUDGMENT: 10/01/2007
BENCH:
SABHARWAL, Y.K. (CJI) & BALAKRISHNAN, K.G. (J) & THAKKER,
C.K.(J) & R.V. RAVEENDRAN (J) & JAIN, D.K. (J)
JUDGMENT:
J U D G M E N T
With
TC (C) Nos. 82/2006, 83/2006, 84/2006, 85/2006, 86/2006, 87/2006,
88/2006, 89/2006, 90/2006 and WP (C) No. 129/2006.
Y.K. Sabharwal, CJI.

Factual Backgrounds

The interpretation of Article 105 of Constitution of India is in issue in these matters. The question is whether in exercise of the powers, privileges and immunities as contained in Article 105, are the Houses of Parliament competent to expel their respective Members from membership of the House. If such a power exists, is it subject to judicial review and if so, the scope of such judicial review. [...]

Sir Edward Coke was in favour of ‘High Court of Parliament’ having its law and was of the view that the matters decided in Parliament were not part of Common Law. He observed that it was not for a Judge to judge any law, custom or privilege of Parliament. The laws, customs, liberties and privileges of Parliament are better understood by precedents and experience than can be expressed by a pen.

As Lord Tennyson stated;

“A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down,
From precedent to precedent.”

Let us consider the view points of learned authors, jurists and academicians on this aspect. In Halsbury’s Laws of England, (Fourth Edn.; Reissue : Vol. 34; p. 569; para 1026); it has been stated; [...] Although the House of Commons has delegated its right to be the judge in controverted elections, it retains its right to decide upon the qualifications of any of its members to sit and vote in Parliament. [...]

⁷⁷ All grammatical forms and punctuation are faithful to the original text. A few paragraph breaks have been excised in the interests of conciseness.

O. Hood Phillips also states ('Constitutional and Administrative Law', Fourth Edition; p. 180) that the House may also expel a member, who although not subject to any legal disability, is in its opinions unfit to serve as a member. [...]

Wade and Phillips also expressed the same opinion. In 'Constitutional Law', (7th Edition; p.793); it was stated; "The House of Commons cannot of course create disqualifications unrecognized by law but it may expel any member who conducts himself in a manner unfit for membership." [...]

Sir William Anson in "The Law and Custom of the Constitution", (Fifth Edn; Vol. I; pp. 187-88) states; "In the case of its own members, the House has a stronger mode of expressing its displeasure." [...]

Griffith and Ryle in "Parliament, functions, practice and procedures", (1989), at p. 85 stated; "The reconciliation of these two claims (the need to maintain parliamentary privileges and the desirability of not abusing them) has been the hall-mark of the House of Commons treatment of privilege issues in recent years." [...]

In Twentieth Edition by Sir Charles Gordon (1983), in Chapter 9 (Penal Jurisdiction of the Houses of Parliament), it had been stated; [...] In the case of contempts committed against the House of Commons by Members, two other penalties are available, viz. suspension from the service of the House and expulsion. [...]

In Twenty-third Edition by Sir William McKay (2004), Chapter 9 titles (Penal jurisdiction of Both Houses). The relevant discussion reads thus; [...] In the case of contempts committed against the House of Commons by Members, or where the House considers that a Member's conduct ought to attract some sanction (see pp. 132-33), two other penalties are available in addition to those already mentioned : suspension from the service of the House, and expulsion, sometimes in addition to committal. [...]

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<http://www10.gencat.net/eapc_rld/revistes/revista.2008-12-02.1415701122>.

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Fishing with New Nets in Familiar Waters: A Legal Linguistic Foray into Comparative Law, Legal Culture and Legal Ideology

CHRISTOPHER GODDARD¹

This paper aims to expose a gap in legal linguistic research methodology and to suggest possible means of filling that gap. The paper asserts that the terms “legal culture”, “comparative law” and “legal ideology” may be unsuitable as elements in research question variables due to absence of concrete, uniform definition. However, it is not suggested that research under the banner of these terms should be disregarded. The paper goes on to identify some examples of social institutions and social issues that might be addressed by law, language, or other means, as more concrete substitute elements for legal linguistic research questions. It concludes with findings, implications and recommendations.

After 35 years, I have finished a comprehensive study of European comparative law. In Germany, under the law, everything is prohibited, except that which is permitted. In France, under the law, everything is permitted, except that which is prohibited. In the Soviet Union, under the law, everything is prohibited, including that which is permitted. And in Italy, under the law, everything is permitted, especially that which is prohibited.
Newton N. Minow.²

1. Introduction

Law does not exist in a vacuum. As Tuori puts it: “The legal order does not constitute a hermetically closed system of norms; through legal principles it opens up towards general morality and ethics.”³ Moreover, law is not an autonomous system: its existence depends on external influences, since “the primal impetus for legal change always comes from outside the law”.⁴

It regularly occurs that issues in different legal systems are resolved in different ways through different legal institutions.⁵ Further, taking a broader, functional approach, different societies may employ different means to address social (and other) institutions as well as social (and other) issues.⁶ The means may involve not only legal rules and institutions but also other

¹ Riga Graduate School of Law, Riga, Latvia. This paper forms part of the requirements for the author’s doctoral studies in legal linguistics at the University of Lapland.

² Former chairman of the US Federal Communications Commission, cited in Ball, Donald A. and McCulloch, Wendell H. Jr. (1993) *Introduction to International Business*. Irwin Illinois (p. 368).

³ Tuori, Kaarlo (2007) “Legal Culture and General Societal Culture” in Wilhelmsson, Thomas, Paunio, Elina and Pohjolainen, Annika (eds.) (2007) *Private Law and the Many Cultures of Europe*, Alphen aan den Rijn: Kluwer 23-35 (p. 24); see also notes 45, 49 and 50 *infra* (Bogdan).

⁴ Tuori *op. cit.* (p. 33).

⁵ See note 51 *infra* (Bogdan).

⁶ Örüçü, Esin (2004) *Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*. Martinus Nijhoff: Leiden (p. 25).

rules and institutions which the lawyer or translator from another (target) legal system will need to access,⁷ very often through the language in which the first (source) system operates, in order to find effective solutions for expressing those means in the language of the target legal system,⁸ in particular in quest of the golden fleece of “equivalence”. Typically, access may be through research in comparative law (as the literature strongly suggests),⁹ comparative legal cultures, or comparative legal ideologies. But is this research enough? Put differently, can we be sure that research in these areas will produce the solutions we are looking for?

Indeed, as this paper attempts to show, comparative law, legal culture, and legal ideology may be flawed as research tools because they are either too narrow or lack uniform definition. For this reason, they could be unsuitable as elements of concrete research question variables. At the same time, dismissing research in these fields as also somehow flawed would be like throwing out the baby with the bathwater. Therefore, this paper examines a possible alternative systematic research framework to aid translators and lawyers in their approach to equivalence and other problems associated with target language representation of source language legal concepts and terminology. This involves adjusting our research question and asking to what extent legal translators and lawyers operating in two or more legal languages can benefit from knowledge of how different societies address social (and other) institutions and social (and other) issues through law, language, or other means.

In this paper I will briefly review translation challenges, then highlight problems with legal culture, legal ideology, and comparative law as research tools in the sense of concrete research question elements, before going on to explore social institutions and social issues as possible substitute or alternative research tools, especially as concrete elements in research question variables. Examining social issues as targets of public policy leads to external influences on legal systems – that is, the idea that law does not exist in a vacuum – to see whether these may explain differences in the way individual legal systems address social institutions and social issues and, indeed, whether these differences are reflected in conceptual and terminological terms. This preliminary study, like a military reconnaissance patrol, probes the field to establish whether further exploration might be useful and, if so, in what direction. The main limitations are that topics in the shape of social institutions and issues are taken at random and are somewhat few, while the study cannot, for reasons of space, go beyond the social context to address other areas such as economics, politics, and security. Nor, for reasons of space, can it examine the internal influences on legal systems such as different attitudes and perceptions in approaches to concepts and terminology.

⁷ Husa, Jaako (2011) “Comparative Law, Legal Linguistics and Methodology of Legal Doctrine” forthcoming in Van Hoecke, Mark (ed.): *Methodology of Legal Research. Which Kind of Method(s) for What Kind of Discipline(s)?* Oxford: Hart. (pp. 209-228).

⁸ See, e.g., Örüçü, Esin (2007) “A Project: Comparative Law in Action” in: Örüçü, Esin and Nelken, David (eds.) (2007) *Comparative Law: A Handbook*. Oxford/Portland: Hart (pp. 435-449, 441): “[D]irect translations or synonyms did not suffice...Functional equivalents were sought.”

⁹ See, e.g., Goddard, Christopher (2009) “Where legal cultures meet: translating confrontation into coexistence (footnotes 188-190) in *Investigationes Linguisticae*, Vol. XVII, Adam Mickiewicz University (pp. 168-205), available at <http://www.staff.amu.edu.pl/~inveling/index.php?page=issues&vol=17&cat=0&article=208>.

2. Translation challenges

As de Groot has pointed out, challenges in legal translation largely arise from the inherent “system-specificity” of legal language, in that “any given language can have as many legal languages as there are systems using that language as a legal language”, as opposed to “a single chemical, economic or medical language within a certain language”. Moreover, where the source language and the target language relate to different legal systems, finding virtual full equivalence is a challenge. Further, in expressing serious doubts about the “functional equivalence” approach – that is, using a term or expression in the target language which embodies the nearest situationally equivalent concept – de Groot notes that “for a target language term to be identified as an equivalent to a source language term, not only must there be functional equivalence, but also a similar systematic and structural embedding”.¹⁰ Put differently: “The required equivalence must not only be a *functional* one, but also must be well founded in terms of the technical structure of the legal system”.¹¹ This applies even if two languages are closely related linguistically.¹²

Not only is legal language system-bound,¹³ but for the last two centuries it has – at least in Europe – existed as a national phenomenon, which, in turn, has affected legal scholarship.¹⁴ The truth of this proposition is evident from the need for harmonization in the European Union (EU).¹⁵ But is this comparative law approach enough for the lawyer and legal translator operating in two or more legal languages, perhaps through the medium of English, between related or unrelated legal systems? We shall briefly look into this question under the section on comparative law.

3. Problems with legal culture, legal ideology, and comparative law as research tools

3.1. Legal culture

According to Nelken: “Legal culture as a topic for research raises both conceptual and methodological problems”.¹⁶ Cotterrell¹⁷ supports this idea and argues for the very limited

¹⁰ De Groot, Gerard-René and van Laer, Conrad J.P. (2008) “The Quality of Legal Dictionaries: an assessment” Maastricht Working Papers 2008-6 Faculty of Law (p. 3), at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287603>.

¹¹ De Groot, Gerard-René Law (1991) “Legal Language and the Legal System: Reflections of the Problems of Translating Legal Texts” ‘Recht, Rechtsprache und Rechtssystem: Betrachtungen über die Problematik der Übersetzung juristischer Texte’, *Terminologie et Traduction*, 3, (pp. 279-312) in Volkmar Gessner *et al.* (eds.) *op.cit.* (p.158). Translation by John Blazek, Brussels.

¹² *Op. cit.* (p. 159).

¹³ *Op. cit.* (p. 155).

¹⁴ Zweigert, Konrad and Kötz, Hein (Translation by Tony Weir) (1998). *An Introduction to Comparative Law*. 3rd rev. ed. Oxford: OUP (pp. 15 and 29).

¹⁵ “For if no substantial differences exist between the national private laws, then a process of harmonization is unnecessary. Everything could stay as it is because everyone could rely on their case being decided in the same way in any European country. One could draw up contracts according to one’s own law and trust that they will be recognized by all other European countries. Differences in concepts, structure and content of the law would not matter.” Kähler, Lorenz (2007) “Conflict and Compromise in the Harmonization of European Law” in Thomas Wilhelmsson *et al.* (eds.), (pp. 125-139) (at p. 126).

¹⁶ Nelken, David (1997) in Nelken, David (ed.) (1997) *Comparing Legal Cultures* Dartmouth: Aldershot (p. 2).

application of legal culture as a precise research tool, for example, in examining the overall contextual matrix in which state law operates. This section examines the limits of legal culture as a research tool.

Blankenberg affirms¹⁸ that “The ‘legal cultures’ which we discuss in comparative law [...] will inevitably be those of the professional and not those of the general public [...] [T]here is no ‘legal culture’ outside existing legal institutions.” This could be said to be the narrow definition of legal culture. However, in the same volume, Nelken notes¹⁹ that elsewhere Blankenberg uses the term “legal culture” more broadly and thus confusingly. Blankenberg adds: “Our key concept of ‘legal culture’ is defined by means of socio-legal indicators. They tell us that, even though on paper the various legal systems are very much alike, the law in action may differ considerably.”²⁰ The introduction to the same volume notes the range of definitions of legal culture, including some of the influences on how law develops and is applied.²¹ Nelken and Cotterrell also note that Friedman’s definition of legal culture has varied considerably over the years.²²

Again, legal culture is often more broadly described as concerning attitudes towards the law, or the role of law in society, such as:

- “what people think about law, lawyers and the legal order [...] it means ideas, attitudes, opinions and expectations with regard to the legal system”;²³
- the “historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system”;²⁴
- “the framework of intangibles within which an interpretive community operates, which has normative force for this community [...] and which, over the *longue durée*, determines the identity of a community *as community*”;²⁵
- “the typical embodiment of values and behavioural patterns in societies’ (legal) institutions. Legal culture thus is situated at the crossroads of comparative law, law in action, and legal values.”²⁶

¹⁷ Cotterrell, Roger (1997) “The Concept of Legal Culture” in Nelken, 13-30 (pp. 21-25).

¹⁸ In Nelken (1997). “Civil Litigation Rates as Indicators for Legal Cultures” 41-65 (p. 65).

¹⁹ In Nelken (1997) “A Comment on Blankenberg” 69-88 (pp. 72-73).

²⁰ Blankenberg, Erhard and Bruinsma, Freek (1994) “The Role of Courts in the Netherlands and Germany: Dutch Legal Culture Compared”, in *Dutch Legal Culture*, 2nd ed., Deventer: Kluwer Law and Taxation Publishers, Deventer (Netherlands) (pp 3-13), reprinted in Gessner *et al.* (eds.) (p. 345). Translation by John Blazek, Brussels.

²¹ Gessner *et al.* (eds.) (1996). Foreword xvii: “The unavoidably open-ended concept of ‘legal culture’ can be given two interpretations. First, ‘legal culture’ can be used as it is in legal philosophy and legal theory to characterise the professional administration of the law. This approach would embrace the historical foundations of the law’s development in Europe, the academic training of jurists, the requirements imposed by the rule of law on legislation and legal practice, and the styles of legal argumentation. Second, the legal-sociological understanding of legal culture as the sum total of conditions that impinge on the law’s development and application, whether this be the procedural methods employed by institutions, the interests and qualities of the legal actors, or the general legal consciousness of the public”.

²² In Nelken, (p. 2) and Cotterrell, (pp. 15-16).

²³ Friedman, Lawrence (2006) ‘The Place of Legal Culture in the Sociology of Law’, in *Law and Sociology: Current Legal Issues*, Michael Freeman (ed.) Oxford: Oxford University Press.

²⁴ Merryman, John Henry and Clark, David S. (1978) *Comparative Law: Cases and Materials* Charlottesville: The Michie Company (p. 29).

²⁵ Legrand, Pierre (1999) *Fragments on Law-as-Culture* Deventer: Kluwer (p. 27).

²⁶ Van Rossum, Wibo “Comparative Legal Cultures” course overview available at

While these definitions correctly stress the element in legal culture of attitudes and values underlying the law, two main objections arise:

- Legal culture is seen as a given, inherent and inescapable: Merryman and Clark's "deeply rooted attitudes" suggest something mysteriously fateful like von Savigny's *Volksgeist*.²⁷ By contrast, other research sees culture itself as something that is acquired,²⁸ "the collective programming of the mind which distinguishes the members of one group or category of people from another".²⁹ This definition of culture as "mental software" suggests that culture is shared by a group of people but need not be defined on the basis of nationality.
- Legal culture is traditionally seen first and foremost as national,³⁰ whereas many legal cultures may exist *within* one country and may even cross national borders: "[G]lobalising processes have created one world-wide network of legal communications which downgrades the laws of nation-states to mere regional parts of this network which are in close communication with each other."³¹ While von Savigny's society was national and based on national *Volksgeist*, today society and legal orders are developing beyond the state.³²

This paper therefore asserts, firstly, that the narrow definition of legal culture is simply too narrow to help the lawyer and legal translator operating in two or more legal languages, in particular when using English as the medium and even more between unrelated legal systems than related ones, and, secondly, that the second definition still may not go far enough. Even culture itself has been variously described, for example (in addition to the definition above): "culture is not an argument, but rather a collection of attitudes, traditions, ideals and memories. It influences how people think without ensuring the legitimacy of their attitudes."³³ However, for the purposes of this paper it is clear that legal culture does not possess a universal, concrete conceptual definition.³⁴ As Nelken puts it, "it is beyond doubt

<<http://www.wibovanrossum.nl/page5/page2/page2.html>>.

²⁷ Savigny, Friedrich Carl von (1814) *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* Heidelberg: Mohr und Zimmer. It should be noted that Von Savigny himself never used the term *Volksgeist*.

²⁸ Hofstede, Geert (1997) *Cultures and Organizations: Software of the Mind* 2nd ed., New York, McGraw-Hill and (2001) *Culture's Consequences* 2nd ed., Thousand Oaks, Sage. See also, as to the work of Hofstede, Smits, Jan (2000) *The Good Samaritan in European Private Law* Deventer: Kluwer (p. 40).

²⁹ See *supra* note 28, p. 5.

³⁰ Although this may not be clear from the definitions themselves, it is clear from the context in which they are being used by these authors.

³¹ Teubner, Günther (1998) "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", 61 *Modern Law Review*, (pp. 11-32) at (p. 16). See also Teubner, Günther (ed.) (1997) *Global Law Without a State*. Aldershot: Dartmouth.

³² Smits, Jan "Legal Culture as Mental Software, or: How to Overcome National Legal Culture?" in Thomas Wilhelmsson *et al.* (eds.) (2007) (pp. 141-151).

³³ Kähler, Lorenz, "Conflict and Compromise in the Harmonization of European Law" in Thomas Wilhelmsson *et al.* (eds.) (2007) pp. 126-139 at 126, adding (p. 129): "No tradition can justify its own continuation. Therefore, each reference to tradition or culture needs some additional argumentative support."

³⁴ Wilhelmsson, Thomas "Introduction: Harmonization and National Cultures" in Wilhelmsson *et al.* (eds.) (2007) (pp. 3-20): "Legal culture – if defined as the practices and tacit knowledge of the legal profession – is predominantly an elite culture"; "... the English feeling uncomfortable with formal rules, whilst the Germans are programmed to need structured environments" (p. 5 footnote omitted);

that a more precise definition is needed to make (legal culture) a workable concept.”³⁵ That alone makes legal culture unsuitable as an element of an independent variable for a research question.³⁶ But it does not necessarily invalidate research carried out in the name of legal culture, *a fortiori* if we can remove the label of legal culture and replace it with a viable alternative.

3.2. Legal ideology

According to Cotterrell³⁷ “much of what legal culture can embrace might be considered in terms of *ideology*”, which can be regarded “not as a unity but rather as an overlay of currents of ideas, beliefs, values and attitudes embedded in, expressed through and shaped by practice”. An example of legal ideology appears in trusts, where trustees have the appearance of power, which in fact is vested in beneficiaries.³⁸ Although not legal doctrine as such, legal ideology is heavily influenced by doctrine³⁹ and may help to see how doctrine frames or shapes social understandings: for example, how legal doctrine both constructs and perpetuates gender role stereotypes.⁴⁰ It also examines the link between social power and currents of thought. However, while law can be said to be “a system of enforceable rules governing social relations and legislated by a political system [...], the connection between law and ideology is both complex and contentious [...] because of the diversity of definitions of ideology, and the various ways in which ideology might be related to law.”⁴¹ Again, this suggests that legal ideology is not suitable as an element in a research question variable. Nevertheless, the concept of law as ideology is useful in enabling the researcher to view the law and the role of law more critically and to examine related sociological and political factors, including the way that law and non-law aspects of society mutually shape and influence one another.⁴² We shall examine some of these below under factors bearing on legal systems.

Tuori, Kaarlo “Legal Culture and General Societal Culture) in Wilhelmsson *et al.* (eds.) (2007). (pp. 23-35 at 23): “Culture and legal culture are difficult notions, contested categories. Because of the variety of meanings suggested, proposed or implied, some researchers have proposed outright abandoning of the very concept of legal culture; Roger Cotterrell is one of these”; *op.cit.* (p. 24) “...legal culture – i.e., the professional legal culture of learned lawyers...”

³⁵ See Nelken, David (2006) “Legal Culture”, in Smits, Jan (ed.) *Elgar Encyclopedia of Comparative Law*, Cheltenham: Elgar (p. 372).

³⁶ Unless, of course, a uniform definition of legal culture can be agreed upon.

³⁷ Cotterrell, Roger “The Concept of Legal Culture” in Nelken (1997) (pp.13-30). See generally, Cotterrell, Roger (1984) *The Sociology of Law*. London: Butterworths.

³⁸ Moffatt, Graham, Bean, Gerry, Dewar, John (2005) *Trusts Law: Text and Materials*. CUP: New York (p. 59).

³⁹ The concept of doctrine itself is not entirely clear. See Tiller, Emerson H. and Cross, Frank B. (2005) “What is legal doctrine?” *Northwestern University Law Review* Vol. 100, No. 1 at (pp. 517-534), available at <<http://www.law.northwestern.edu/lawreview/v100/n1/517/LR100n1Tiller-Cross.pdf>>.

⁴⁰ Levit, Nancy (1996) “Feminism for Men: Legal Ideology and the Construction of Maleness”, 43 *UCLA Law Review* 1037 at 1054, available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1016&context=nancy_levit>.

⁴¹ Synpnowich, Christine, “Law and Ideology” in *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition) Zalta, Edward N. (ed.), available at <<http://plato.stanford.edu/archives/fall2008/entries/law-ideology/>>.

⁴² *Ibid.*

3.3. Comparative law

Comparative law is the “comparison of the different legal systems of the world”,⁴³ of the differences and similarities between the laws of different countries. Several disciplines have developed as separate branches of comparative law. These include comparative constitutional law, comparative administrative law, comparative civil law (in the sense of the law of torts, delicts, contracts and obligations), comparative commercial law (in the sense of business organisations and trade), and comparative criminal law.

According to Cotterrell, “The main conceptual mechanisms of comparative law seem inadequate for the purposes of sociology of law, since the latter requires comparison not of legal doctrine as such but of legal ideas and practices regarded as inseparable from a broader social context”.⁴⁴ Michael Bogdan notes⁴⁵ that the term “comparative law” is something of a misnomer and that ideas about the meaning of the concept vary greatly. He affirms that comparison should be purposive, such as when forum shopping for contracts or investments,⁴⁶ and stresses its contribution to legal education⁴⁷ and translation.⁴⁸

Moreover, Bogdan points out that comparative law studies should cover a foreign legal system in its entirety, justifying this with two examples: a social law question in one legal system may be reflected in the fiscal law of the counterpart system, and a matter of inheritance law in one legal system may be reflected in the matrimonial law of the counterpart system.⁴⁹ But what if an issue in one legal system is dealt with outside the counterpart legal system, or indeed is not an issue at all? Bogdan deals with this⁵⁰ by affirming that “the legal system is a social phenomenon and expresses only one aspect of the society. It therefore cannot be seen isolated from the same society’s other aspects”. He lists these other factors as the economic system, political system and ideology, religion, history and geography, demographic factors, co-influence of other means of control, and accidental and unknown factors.⁵¹ Put differently, law does not exist in a vacuum, as noted in the introduction to this paper.

However, if a social issue is also a legal issue in one legal system but is not a legal issue (or even a social issue) in another legal system, then comparative law studies (and perhaps also sociology of law) will be of no help to the lawyer or translator operating between those two legal systems; the problem is compounded if the language of neither system is English but they wish to express themselves in English, for example, as a relay or target language. Moreover, Bogdan’s view suggests that the term “comparative law” should perhaps be avoided as an element in a research question. At the same time, this is not to suggest that comparative law studies are of no use at all to the lawyer and translator, merely that what is being sought may not fall within the ambit of comparative law, so that comparative law

⁴³ Zweigert, Konrad and Kötz, Hein (1987:2). *An Introduction to Comparative Law*. 2nd rev. ed., Oxford: Clarendon Press. Translation by Tony Weir.

⁴⁴ Cotterrell, Roger ‘The Concept of Legal Culture’ in Nelken (1997). 13-30, (p. 13).

⁴⁵ Bogdan, Michael (1994) *Comparative Law*. Deventer: Kluwer.(pp. 17-18).

⁴⁶ *Op. cit.* (pp. 21-22).

⁴⁷ *Op. cit.* (pp. 25, 37-38).

⁴⁸ *Op. cit.* (pp. 50-51).

⁴⁹ *Op. cit.* (p. 49).

⁵⁰ *Op. cit.* (p. 54).

⁵¹ *Op. cit.* (pp. 70-77).

cannot deliver answers in circumstances where it cannot even recognise the questions. This concurs with Cotterrell's view of comparative law as inadequate to meet the requirements of legal sociology.

4. The law and its treatment of social institutions and social issues

Having suggested the unsuitability of legal culture, legal ideology, and comparative law as research tools in the limited sense of concrete elements of research questions, we now go on to explore the merits of using social institutions and social issues in relation to the law as possible alternatives. This is followed by a random trawl through the literature to examine factors influencing legal systems and, in turn, their concepts and terminology.

4.1. Social institutions

The term "institution" is used in sociology to describe normative systems operative in five basic areas of life and which could be termed *primary institutions*. In short, these are: the family, government, economy, education and religion.⁵² Interestingly, legal systems feature among the complex self-reproducing social forms that contemporary sociologists describe as *social institutions*.⁵³ Others include, in addition to governments and the family, human languages, universities, hospitals, and business corporations. One definition of social institution is:

[...] a complex of positions, roles, norms and values lodged in particular types of social structures and organising relatively stable patterns of human activity with respect to fundamental problems in producing life-sustaining resources, in reproducing individuals, and in sustaining viable societal structures within a given environment.⁵⁴

Another, much simpler definition is: "Institutions [...] are the more enduring features of social life."⁵⁵ The same author goes on to list modes of discourse, political institutions, economic institutions and legal institutions as institutional orders.⁵⁶ Another definition of institution is: "an interlocking double-structure of persons-as-role-holders or office-bearers and the like, and of social practices involving both expressive and practical aims and outcomes" such as shops, post offices, police forces, asylums and the British monarchy.⁵⁷

We should distinguish social institutions from:

⁵² "Sociology Guide – A Students Guide to Sociology, at <http://www.sociologyguide.com/basic-concepts/Social-Institutions.php>.

⁵³ Miller, Seumas, "Social Institutions", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Zalta, Edward N. (ed.), available at <http://plato.stanford.edu/archives/fall2008/entries/social-institutions/>.

⁵⁴ Turner, Jonathan (1997) *The Institutional Order*, New York: Longman (p. 6).

⁵⁵ Giddens, Anthony (1984) *The Constitution of Society: Outline of the Theory of Structuration*, Cambridge: Polity Press (p. 24).

⁵⁶ *op. cit.* (p. 31).

⁵⁷ Harré, Rom (1979) *Social Being*, Oxford: Blackwell (pp. 97-98).

- less complex social forms such as conventions, social norms, roles and rituals, which feature among the constitutive elements of institutions;
- more complex and more complete social entities, such as societies or cultures, of which institutions feature as constitutive elements.

Moreover, some institutions function as *meta-institutions* – that is, institutions or organisations such as governments – that organise other institutions (including systems of organisations). However, some institutions – such as the English language – are not organisations or systems of organisations. General properties of social institutions include structure, function, culture, and sanctions. The notion of institutional culture comprises the informal attitudes, values, norms, and the ethos or spirit that pervades an institution.⁵⁸ Good examples are provided by the regimental system in the British army and the “house” system in British boarding schools.

The importance of how different societies address social institutions through law, language, or other means will readily be seen in the framework of this paper. Social institutions may be suitable as elements of research questions, at least to the extent that they are uniform and concrete in definition.

4.2. Social issues and public policy

Social issues are problematic or controversial matters directly or indirectly affecting a society. Often, they are connected with moral values. Examples of major social issues include: poverty, pollution, access to justice, discrimination, abortion, same-sex marriage, gun control, religion (also in itself a social institution), crime, consumer protection, education, censorship, healthcare, unemployment, war, and peace. Social issues appear as features for research⁵⁹ and publication.⁶⁰

Social issues concern the fabric, even the integrity, of a community, often involving conflicting interests. Solutions lie beyond the control of individuals but may have to be imposed by the community or society, even in the form of laws. These may be shaped by “public policy”, in turn influenced by lobbies and pressure groups in society. In the law, public policy features as a largely unseen but ever present force, occasionally surfacing in court decisions to justify an unusual or landmark decision.

“Public policy” appears to have multiple definitions,⁶¹ for example:

⁵⁸ Miller, Seumas, (2008)

⁵⁹ A sample of subjects covered by the Social Issues Research Centre in the United Kingdom: Pubs: culture, etiquette, violence; Drinking: social aspects / violence / binge drinking; Racing: as a culture; corporate bonding; Eating habits: obesity / eating at home; Football: fans / violence in Europe. See: Social Issues Research Centre, at <<http://www.sirc.org/publik/publik.html>>.

⁶⁰ Some sample titles from the Journal of Social Sciences: Reducing Prejudice and Promoting Social Inclusion: Integrating Research, Theory, and Practice on Intergroup Relations; Restorative Justice and Civil Society: Emerging Practice, Theory, and Evidence; What is Peace Psychology the Psychology of?; Religion as a Meaning System: Implications for the New Millennium; Inequities in Higher Education: Issues and Promising Practices in a World Ambivalent about Affirmative Action; Ageism: Prejudice Against Our Feared Future Self. See: Journal of Social Sciences, at <<http://www.wiley.com/bw/journal.asp?ref=0022-4537>>.

⁶¹ Academics continue to contemplate the definition of public policy, since there is currently no

- “the basic policy or set of policies forming the foundation of public laws. The field of public policy involves the study of specific policy problems and governmental responses to them”;⁶²
- “a broad statement regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society”;⁶³
- “a decision or action of government that addresses problems and issues”;⁶⁴
- “policy at any level of government”;⁶⁵
- “whatever governments choose to do or not to do”.⁶⁶

Public policy might be expressed as a corpus or *acquis* of foundational operational principles for legal systems. These principles address the social, moral and economic values that bind a society together. In turn, these values vary from one culture to another. Additionally, they change over time; an example of such a change is briefly discussed below.

Public policy is commonly embedded or embodied “in constitutions, legislative acts, and judicial decisions”;⁶⁷ often in the shape of declared (state) objectives concerning the health, morals, and well being of citizens – or, to put it differently, as part of social law and state interventionism, both of which are treated in more detail below. In the interest or in the name of public policy, legislatures and courts may aim to render ineffective any action, contract, or trust that goes counter to these objectives, even where no statute expressly declares it ineffective.⁶⁸

A condition is against public policy if it is in the interest of the state that it should not be performed. What is contrary to public policy has varied from time to time, and many conditions now upheld which in former days would have been declared to be contrary to the (public) policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion.⁶⁹

Thus, behaviour that is – or is not – a social issue in one generation may be or become a social issue – or non-issue – in the next, in line with “the principles which [...] guide public

consensus. The study of public policy began in 1922, when political scientist Charles Merriam sought to build a link between political theory and its application to reality. Numerous issues are addressed by public policy, including crime, education, foreign policy, health, and social welfare.
<<http://www.wisegeek.com/what-is-public-policy.htm>>.

⁶² Disaster Dictionary at <www.semp.us/publications/disaster_dictionary.php>.

⁶³ Government of Alberta, at
<justice.alberta.ca/programs_services/public_education/Pages/vocabulary.aspx>.

⁶⁴ Congress link at <www.congresslink.org/print_lp_whyneedcongress_vocab.htm>.

⁶⁵ Journal of Epidemiology and Community Health at <jech.bmj.com/content/55/9/622.full>.

⁶⁶ Dye, Thomas (1992) *Understanding Public Policy*, 7th ed., Prentice Hall (p. 2). Such a definition covers government action, inaction, decisions and non-decisions as it implies a very deliberate choice between alternatives; see also Hall, Colin Michael and Jenkins, John M. (1995) *Tourism and Public Policy*. Routledge: “For a policy to be regarded as public policy it must at the very least have been processed, even if only authorised or ratified, by public agencies” (p. 529), at
<www.stile.coventry.ac.uk/cbs/staff/beece/BOTM/Glossary.htm>.

⁶⁷ Schuster, W. Michael II (2009) “For the Greater Good: The Use of Public Policy Considerations in Confirming Chapter 11 Plans of Reorganization” *Houston Law Review*, Vol. 46, (p. 467).

⁶⁸ Business Dictionary at <<http://www.businessdictionary.com/definition/public-policy.html>>.

⁶⁹ From the 2002 (8th) edition of *Williams on Wills*, at
<<http://www.duhaime.org/legaldictionary/P/PublicPolicy.aspx>>.

opinion” and which, presumably, in turn shape public policy. Good examples are smoking and male homosexuality: in 1950, smoking was not a social issue and was considered acceptable, even more or less fashionable, while male homosexuality was a social issue and was considered deviant if not more or less criminal. By 2010, the situation had become more or less the reverse.

The importance of how different societies address social issues through law, language, or other means will readily be seen in the framework of this paper. In particular, a social issue in one society may not be an issue in another society. For example, in an earlier paper, the author demonstrated that the political impact of the term “taxpayers’ money” differs in the United Kingdom, on the one hand, from France and Germany, on the other, and that an article on protecting the vulnerable, a subject that is outside the mainstream in the United Kingdom and therefore of interest there, would be of little interest in France or Germany, where it would be seen as discussing the obvious.⁷⁰

Thus, although the term “public policy” may – for the same reasons as “comparative law”, “legal culture” and “legal ideology” – be unsuitable as an element in a concrete research question, the same objection would not apply to the term “social issue”.

The next stage is to examine some of the external influences on legal systems that may explain differences in how the systems address social (and other) institutions and social (and other) issues – or do not address them at all if they are not seen as issues. The logical next step – for which regrettably this paper has insufficient space – would be to examine the internal influences on legal systems to see to what extent these differences are reflected in concepts or terminology; this, in turn, may give a clue as to differences in approach.

5. External factors bearing on legal systems

5.1. *Power relations in society – “legal reality”*

As we have seen, law does not exist in a vacuum. We now move on to examine some external influences bearing on legal systems. For reasons of space, this examination will be somewhat cursory, taking a brief look at the ideas of Hugo Sinzheimer and Niklas Luhmann.

Sinzheimer,⁷¹ writing in Weimar Germany, asserted that the factual power relations in a society are truly constitutive or determinative of the legal relations and practices in a country, and ultimately specified how they really worked.⁷² To put it differently, a proper understanding of the operation of law and legal institutions involves penetrating the legal reality (*Rechtswirklichkeit*) which stands behind the formally valid normative order: the fate of legal constructs depends on the factual relationship between forces in society, especially economic relationships.⁷³

⁷⁰ Goddard (2009). (pp. 168-205 at pp. 183-184).

⁷¹ Drawing on Ferdinand Lassalle. Lassalle, Ferdinand (1993) *Über Verfassungswesen*. Rede am 16. April 1862 in Berlin. EVA Reden; Bd. 8. Hamburg: Europäische Verlagsanstalt.

⁷² See Sinzheimer, Hugo and Fraenkel, Ernst (1968) *Die Justiz in der Weimarer Republik. Eine Chronik*. Berlin: Neuwied und Luchterhand (p. 229).

⁷³ Sinzheimer and Fraenkel (1968). (p. 383).

Sinzheimer understood that basic rights in the constitution – as in the Weimar constitution – can open the way to state interventionism;⁷⁴ this will be examined in more detail in the following section. He further asserted that legal science should go beyond the “commodity order” towards the “human order” and in so doing recognize and disclose that abstractions such as commodity, property, contract, and legal person also cover real contradictions, tensions, domination, and dependencies between human groups and classes.⁷⁵

Luhmann, too, examines the “equilibrium of real forces which bring about the law”⁷⁶ and “constitution” as a relational concept. He asserts that a constitution, for example, establishes a *structural coupling* between legal and political social sub-systems.⁷⁷ In Luhmann’s autopoietic systems theory, a structural coupling exists when the same social element operates simultaneously in two social sub-systems, thereby establishing a bridge over their reciprocal operative closure.

From a legal linguistic standpoint, the relevance of power relations is illustrated by Shore:⁷⁸ “any analysis of cross-cultural translation needs to take into consideration the institutional context and relations of power between the [...] parties [...] including the *inequality* of languages and what translation means as *institutional practice*”. Having dismissed the 2004 EU Constitutional Treaty as “a constitution disguised as a treaty”, Shore notes that the text “impose[d] a new and opaque legal terminology, the political effects of which were to disguise the transfer of national competences to the EU”.⁷⁹

Again in the legal linguistic context, different societies and different legal systems may employ different approaches to general clauses and discretionary powers in legal documents – i.e., signalling their intent to allow more or less discretion to judges and administrators.⁸⁰ However, this implies an interpretative ability on the part of judges and others which has been lacking, for example, in Central Europe.⁸¹ Moreover, language forms also play a role in signalling intent.⁸²

This brief overview suggests that the study of power relations in society may be of assistance to lawyers and translators, for example, in understanding how legal systems generate concepts and terminology.

⁷⁴ See Caldwell, Peter C. (2000) “Is a ‘*Social Rechtsstaat*’ Possible? The Weimar Roots of a Bonn Controversy”, in *From Liberalism to Fascism*, P. C. Caldwell and W. E. Scheuermann (eds.), Boston: Humanities Press (p. 137).

⁷⁵ See Sinzheimer and Fraenkel (1968) (p. 84) and Kahn-Freund, Otto (1981) *Labour Law and Politics in the Weimar Republic*. Oxford: Basil Blackwell (p. 102).

⁷⁶ Luhmann, Niklas (2004) *Law as a Social System*. Oxford: OUP. E.g., relationships between law and other aspects of contemporary society, including politics, the economy, the media, education, and religion.

⁷⁷ See Luhmann (2004) (p. 404 *et seq.*).

⁷⁸ Shore, Cris (2005) “All in the Translation: Interpreting the EU Constitution”. *SITES: New Series*. Vol. 2 No. 2, 2005 (p. 26) (original emphasis).

⁷⁹ *Ibid.*

⁸⁰ Levits, Egils “General Clauses and Discretionary Power of Administrative Institutions and Courts. Functions in Laws, Application in Individual Cases, Control in Higher Administrative Authorities and in Courts” in *Likums un Tiesības* 2004.

⁸¹ Levits, (2004) para. 37: “This has been a serious problem in Eastern European countries where these interpretation methods were neither recognized, nor used in the inherited socialist traditions of law.”

⁸² Levits (2004) e.g., para. 48 *et seq.*

5.2. State intervention/public powers

In European societies, the state has always intervened to a far greater degree through laws and adjudication in regulating the life of society than it does in the USA and – to a large extent – other common law countries,⁸³ where voluntary associations both perform social self-regulatory functions and specialise in implementing rights and interests. In Europe, by contrast, the major federations and churches collaborate with the state in resolving conflicts and regulating society.⁸⁴ This section touches briefly on the role of associations and non governmental organisations (NGOs), followed by examples of state interventionism in the shape of the welfare state and juvenile justice, before finally considering ideas of social justice and means of achieving social justice that are firmly linked to state interventionism and influences on the law and legal systems in which they operate.

5.2.1. Associations and NGOs

The following quotation sums up in a few words the kind of invisible differences between societies that may not be apparent from a study of comparative law:

In Germany, accidents and diseases seem to be more easily accepted as the price for progress and wealth than in Britain. Moreover, institutions like the Royal Society for the Prevention of Accidents and the British Safety Council, which have no equivalent in Germany, guarantee a certain level of continuing public discussion on health and safety topics. Local health and safety groups and workshops help to motivate and mobilize employees at workplace level. There are no comparable initiatives in German workplaces.⁸⁵

Workplace safety thus appears to be a social issue in one society (Britain), which addresses that issue in its own way that is not reflected in another society (Germany) because workplace safety does not feature as a social issue in that society, at least not in the same way.⁸⁶ This perhaps echoes the comment on “taxpayers’ money” in Section 4.2 above.

According to the thesis of this paper, since safety in the workplace is not a social issue in Germany, then it may not appear in the German legal system, in which case comparative law research may not find it – or may not find it where we expect it.⁸⁷ However, if we ask, for example, “What function does the British Safety Council fulfil in England?” and receive the answer “Its function is A”, then we can ask the legal linguistic question, “How does German society address A through law, language, or other means?” In any event, this is a matter of

⁸³ Münch, Richard (1993), *Das Projekt Europa*, Frankfurt-am-Main: Suhrkamp, (pp. 157-158), reprinted in Gessner *et al.* (eds.) (1996) (p. 517). Translation by John Blazek, Brussels.

⁸⁴ *Ibid.*

⁸⁵ Gräbe, Sylvia (1991) “Regulatory Agencies and Interest groups in Occupational Health and Safety in Great Britain and Western Germany: A Perspective from Western Germany” in *Law and Policy*, 13 (1), January 1991, pp. 55-72. Oxford: Basil Blackwell Ltd., reprinted in Gessner *et al.* (eds.) (1996), p. 370.

⁸⁶ A statutory insurance system is in place. Moreover, a sign of change appears in a web news item of 3 December 2009, “New names for the research institutes of the German Social Accident Insurance: The new names reflect the developments in the accident insurance system”, at [<http://www.dguv.de/content/news/2009/Q4/institute/index.jsp#>](http://www.dguv.de/content/news/2009/Q4/institute/index.jsp#).

⁸⁷ But see *supra* notes 48-50.

interest to lawyers and translators operating in two or more languages, whose task is to find the language to express relevant concepts and terminology.

5.2.2. *Styles of state intervention*

More invisible differences, again between Germany and Britain, appear in the following:

In the field of welfare-state intervention in the international perspective, in Great Britain, longstanding national tradition favours consensual interaction with the parties subject to regulation: under the common law tradition, the parties involved are regarded as equals. The common law tradition is also reflected in a preference for generalists as civil servants, and for informal action in enforcement. The assumption is that generalists are less concerned with technical details, and thus are less likely to establish close ties with special interest groups. In marked contrast to the British common-law tradition, Germany – whose legal tradition is rooted in Roman law – developed detailed administrative law rules specifying how civil servants were to deal with their clients. In this legal tradition, the state and its representatives (the civil servants) stand *above* society – they are not ‘equals’.⁸⁸

This illustrates differences in the attitude of the state towards society in administrative matters, which in turn may be reflected in language, a matter of interest to lawyers and translators as before.

5.2.3. *Styles of intervention in juvenile justice*

Another area of interest, again taken at random, is juvenile justice in the shape of a comparison between England and Canada (legal-centred model) and France (judge-centred model) as the first of five distinctive criteria, the others being:

- all-embracing versus strict demarcation for judicial intervention;
- judge as referee versus judge as instigator;
- formal versus substantive guarantees;
- individualist versus social concepts of family law.

For example, as a result of their continuous relationship, the French children’s judge and social services generally manage to reach agreement. Social workers familiar with the judge can anticipate the judge’s decision:

Moreover, they may be able to devise a code in their report-writing that enables the judge to read between the lines. Such a “personalized” report is not possible in England, where it would be considered highly suspect, almost illegal.⁸⁹

These distinct approaches to judicial intervention in family cases may be linked to different conceptions of the family in Anglo-Saxon and Latin countries. Latin societies are traditionally more respectful of parental authority and anxious to preserve family unity.

⁸⁸ Héritier, Adrienne (1993), ‘Europa: Herausforderung für sozialpolitische Theorien und Konzepte’, *Leviathan*, (pp. 103-126), reprinted in Gessner *et al.* (eds.) (1996), (p. 295). Translation by John Blazek, Brussels.

⁸⁹ Garapon, Antoine (1990) “Paternalism and Legalism in Juvenile Justice: Two Distinct Models” *The Liverpool Law Review*, XII, 1990, pp. 115-27. Deborah Charles Publications, Liverpool, reprinted in Gessner *et al.* (eds.) (1996) (pp. 340-344).

Anglo-Saxon societies, on the other hand, are more willing to accept the idea of children being brought up outside the family. The judicial model and the philosophy that inspires it would appear to cohere with the society which the legal system addresses.⁹⁰

Perhaps significantly, family law and inheritance seem resistant to harmonisation. For example, although Nordic legislative cooperation has achieved much in the field of private law, important differences remain,⁹¹ while EU law has largely left family law untouched. Beyond the EU, in Tunisia, which is heavily influenced by French law, “Islamic law is in evidence only in fragmentary form in several branches of the law, such as private law [where] it regulates only certain institutions of family law and inheritance law”,⁹² while in the Indian subcontinent during the colonial era “the traditional systems of law - Hindu law and Muslim law – remained in force [...] and the rules from these systems are still applied there [...] limited to traditional branches of the law, notably those relating to the family and inheritance”.⁹³ These matters would be of interest to lawyers and translators, especially to the extent that they are reflected in (legal) concepts and terminology.

5.3. Ideas of social justice⁹⁴

Ideas of social justice are closely linked with legal ideologies, power relations in society, the welfare state and state interventionism, including a wide spectrum of areas from promotion of multiculturalism and respect for different identities to (the more usual) fair distributive outcomes in society, allocation of wealth and power, and “social regulation” or “social law”, public policy – “the forces that bring about the law”. Hugo Sinzheimer states explicitly that social law is unequal law: social law privileges the weak against the strong; it challenges the abstract and purely formal idea of equality (before the law), which reproduces inequalities in the real world and, therefore, can function as a backbone for the strong and wealthy.⁹⁵ Ideas of social justice have also become supranational, for example in the EU, where one example would be the Unfair Commercial Practices Directive.⁹⁶ However, the “institutional architecture” for achieving social justice may vary between one state and another, and may consequently be differently reflected in their legal and social systems and perhaps also in the language of concepts and terminology employed.

5.3.1. Means of achieving social justice⁹⁷

Again, different societies may use different means – through law or otherwise – to achieve social justice, such as protection of “weaker parties” to contracts. This might, for example, be either through principles embedded in the private law system (common law systems) or through targeted social regulation (civil law systems), with much the same result. As we have

⁹⁰ *Ibid.*

⁹¹ E.g., as to inheritance of farms, where the Nordic countries have very different legislative solutions (Finland and Norway) or very little legislation (Denmark and Sweden).

⁹² Mattila, Heikki E.S. (2006) *Comparative Legal Linguistics*. Aldershot: Ashgate (p. 213).

⁹³ *Op.cit.* (p. 245).

⁹⁴ Collins, Hugh (2007) “Does Social Justice Require the Preservation of Diversity in the Private Laws of Member States of Europe?” in Wilhelmsson *et al.* (eds.), (pp.155-176).

⁹⁵ See Sinzheimer and Fraenkel (1968) (pp.195–196).

⁹⁶ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (‘Unfair Commercial Practices Directive’).

⁹⁷ See *supra* note 94.

seen, concepts of social justice may go beyond the welfare state and wealth to well-being,⁹⁸ including ideas of identity, self-worth, and social inclusion.⁹⁹

In the EU, arrangements for achieving social justice may vary between states in the “institutional architecture” deployed. Collins illustrates as follows:

Consider [...] three hypothetical legal systems, each of which seeks to secure to every family a ‘living wage’. Each national system, however, employs a different method: in one the private law rules invalidate unfair contracts and impose a restitutionary obligation on employers to pay a fair price for goods and services; in another legal system, private law upholds the contract, but mandatory regulation imposes a minimum wage on the parties as a term of the contract or an independent statutory right; and in a third system, the contract of employment remains valid and unaltered by private law and regulation, but the government provides ‘in-work benefits’ or ‘negative income tax’ in order to increase the take-home pay of the worker. The end result in each legal system is approximately the same – the worker receives a living wage – even though the method of delivery differs considerably.

Collins rightly draws two inferences from this. The first is that, in spite of private law differences, each of the three states follows its own approach in delivering social justice. The second point is that even apparently substantial differences between private law systems “may not reveal any significant difference in national attitudes towards social justice viewed in terms of welfare.” In comparative law terms, this example recalls Bogdan’s earlier comment¹⁰⁰ that legal systems need to be studied in their entirety. But does it have any significance in terms of concepts and terminology for the lawyer or translator operating in two or more languages between legal systems? This question invites further study.

6. Summing up

Imagine a legal system with a well-developed system of concepts and related terminology in some area of social practice reflected in law, which has to be translated into another language where that same system of concepts is absent both in related social practice and law. One example has already appeared in section 4.2 on taxpayers’ money; others were given in section 5.2.1, for example, on the role of associations and NGOs in the field of safety at work.

Another good example is cited by Lindroos-Hovinheimo: the advanced system of ombudsmen in the Nordic countries and translating the concept of the Finnish Consumer Ombudsman into Japanese, where the concept is lacking.¹⁰¹ She notes:

[...] the difficulty of translating the concept of Consumer Ombudsman into Japanese does not lie in the fact that the institution does not exist in Japan. The

⁹⁸ For the notion of “well-being”, see: Gray, John (2000) “Inclusion: A Radical Critique” in Askonas, Peter and Stewart, Angus (eds.) (2000) *Social Inclusion: Possibilities and Tensions*, Basingstoke: Macmillan (pp. 19, 28); Raz, Joseph (1986) *The Morality of Freedom*, Oxford: Clarendon Press (Chapter 12).

⁹⁹ Young, Iris Marion (2000) *Inclusion and Democracy*, Oxford: Oxford University Press.

¹⁰⁰ *Supra* note 48.

¹⁰¹ Lindroos-Hovinheimo, Susanna (2007) “On the Indeterminacy of Legal Translation” in Thomas Wilhelmsson *et al.* (eds.) (pp. 374-375).

problem is that *because* the institution does not exist in Japan, it is likely that there is no established way of talking about it or referring to it in Japanese. So the ultimate problem is not that the Japanese legal system lacks something, but that Japanese *use of language* lacks something.

Lindroos-Hovinheimo concludes: “The meaning of a legal text is determined by its local legal context”. That is true, but perhaps that is only part of the story, because law does not exist in a vacuum: law is the product of social and other forces within a particular society. So we have to go beyond the legal system itself – and therefore beyond comparative law – to find answers. One might think that the natural place to search beyond the field of comparative law as such would be in the fields of legal culture and legal ideology. As we have seen, this may be true – but only to some extent.

If we take the above example, then according to the thesis of this paper, since the institution of Consumer Ombudsman is nowhere to be found in the Japanese legal system, comparative law research may well not find the answer, so we need to frame our question differently, because our research takes us beyond comparative law in search of an answer. In framing our question, we first have to ask, for example, “What function does the Consumer Ombudsman fulfil in Finland?” If the answer is X, then we ask “How does Japanese society address X through law, language, or other means?” Will the concept of legal culture, or legal ideology, help? This paper has explained why these concepts may be no more useful than comparative law, though they may provide useful pointers in the right direction. Again, research would likely be easier between two related or similar legal systems than between unrelated or dissimilar legal systems.

Galdia proposes the following solution:

[...] the essential problem in legal translation is the legal and technical qualification of legal institutions. This involves reinterpreting terms that are largely incompatible and that can only be solved by comparative law methods. Nevertheless, the scope of debate surrounding legal translation is characterised by an increasing amount of questions which relate to the technical language and pragmatic aspects of legal language. These are in turn elements of legal linguistics – which is indeed an evolving field of study for which the conditions and methods must still be clarified. The conceptual convergence of these two disciplines may result in procedures that will facilitate the methodically sound translation of legal texts.¹⁰²

Hopefully, this paper will have provided some value in that context.

7. Conclusion

This research shows that the terms “legal culture”, “comparative law” and “legal ideology” may be unsuitable as elements in research question variables due to the absence of concrete, uniform definition, although it is not suggested that research under the banner of these terms should be disregarded. Again, while the need of lawyers and translators for knowledge of comparative law is not disputed, it does appear that both the angle and focus of legal linguistic research might benefit from study of the external influences on legal systems as

¹⁰² Galdia, Marcus “Comparative law and legal translation” *The European Legal Forum (E)* 1-2003, 1 – 4 2003 IPR Verlag GmbH München.

reconnoitred in this paper. These might be of help in establishing how different societies address social (and other) institutions and social (and other) issues through law, language, or other means, at the same time crucially (for the lawyer and translator) establishing what social (and other) issues in one society are mirrored by non-issues in another. This requires considerable further research in the fields of legal sociology and the history of law and – dare it be said? – in the field or under the umbrella of legal linguistics, as well. Other external influences on legal systems such as economic, political, and security influences should also be studied, as well as other influences such as the mutual influence of EU and Member State national law, human rights law and international law. Finally, the internal influences on legal systems and how different attitudes and perceptions are reflected in approaches to concepts and terminology should also be examined, in the interest of achieving a better understanding of the legal linguistic consequences that lawyers and legal translators require.

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The pitfalls of legal translations between legal systems from two different legal families:

a focus on translations of French legal material into English

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The aim of this paper is to provide an overview of the main difficulties encountered by legal translators working from French to English and provide practical solutions. Though France and England are separated by only a narrow stretch of water and share a Judeo-Christian historical background, the task of providing an accurate translation from French to English is complicated by the fact that the two countries belong to different legal families. Different translation methodologies need to be used appropriately, bearing in mind that a certain harmonisation process has started to develop between the two legal systems, based essentially on a set of common European principles and values, under the influence of European law and the European Convention of Human Rights. It is hoped that this convergence process will efface some of the more pronounced differences in legal understanding between France and the UK, and thus facilitate, in the long term, legal translations.

1. Introduction

Providing an accurate legal translation is not an easy task. It has been described as the “ultimate linguistic challenge”.² Indeed, the path towards a perfect legal translation contains numerous pitfalls. A legal translator is expected to demonstrate a proficiency in both linguistics and law. While one has to make linguistic choices, such as the extent of the closeness in the syntax and style between the source language (hereafter ‘SL’) and target language (hereafter ‘TL’), an expertise in both the SL and TL legal systems is required in order to understand legal terms and concepts included in the source text and convey them in the most comprehensible way to readers of the target text.² For Harvey, such an endeavour combines “the inventiveness of literary translation with the terminological precision of technical translation.”³

The task of comprehending a legal system and its terminology is complicated in no small manner when two countries do not share the same language. This difficulty is explainable by the fact that law has always been influenced by national socio-cultural aspects and has

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² Harvey, M. (2002) What’s so Special about Legal Translation? *Meta: Translators’ Journal* 47, (2002), p.177.

² See G  mar, J.C. (1979) La traduction juridique et son enseignement: aspects th  oriques et pratiques. *Meta : Translators’ Journal* 24, (1979), at 51; Lauzi  re, L. (1979) Un vocabulaire juridique bilingue canadien. *Meta: Translators’ Journal* 24, (1979) at 111; B  langer, C. (2004) « Faut-il   tre juriste ou traducteur pour traduire le droit? » : contribution au d  bat. *Meta: Translators’ Journal* 49, (2004), p. 457.

³ Harvey, *supra* note 1, at 177. See also Weston, M. (1991) *An English Reader’s Guide to the French Legal System*, London: Berg.

traditionally been country-specific, that is to say, confined to a national boundary.⁴ Each legal system is based on ‘cultural principles, a method of organizing and attributing meanings, and a practice of cognitive mapping’.⁵ Thus, a legal system is developed according to a clearly defined, distinctive frame of mind and contains ‘irreducibly distinctive modes of legal perception’.⁶ Importantly for a translator, this leads to legal terminology varying from country to country and remaining specific to each society, which was founded on different socio-cultural elements. Just like the legal system in which it exists, a legal term or concept cannot be blindly transposed from one country to another. What has a specific meaning in one legal system can have a different meaning or be absent from another legal system. As Gutteridge puts it, “differences in the language of the law constitute not the least of the barriers which separate the various legal systems of the world.”⁷ As law distinctively lacks a common knowledge base, it has failed to become standardised.⁸ Clearly, the absence of a common denominator makes law stand out as a field as opposed to, for example, finance or science.⁹

Though the two countries are geographically separated by just a narrow stretch of water, a gulf separates France and England in terms of legal culture and history. The separation has had a definite influence on the shaping and style of their respective legal systems, which are based on very different legal traditions ideologically as well as in relation to legal technique.¹⁰ The stark differences between the legal systems is clearly evidenced by French and English law being part of two different legal families: René David and most legal comparatists consider the French legal system to be part of the Romano-Germanic family, which is essentially based on the principle of codification, and the English legal system to be part of the common law family, described as mainly casuistic law, with the law developing from decision to decision.¹¹ Both systems have developed distinct legal concepts as well as institutions that are alien to the other system. The distinction between law and equity, for instance, is essential in English law but has no counterpart in continental law.¹² Another example is the dichotomy between private and public law. In France, it is essential and is based on the idea that the same rule cannot apply both to the state and to ordinary citizens. Any interference of the state in people’s private lives is regulated by administrative law, a branch of public law, with a special set of courts, administrative courts, having jurisdiction in

⁴ Gémard, *supra* note 2, at 48. See also Gémard’s statement, on the same page : « [Pour la règle juridique] les frontières constituent souvent un obstacle infranchissable puisqu’elle ne s’applique que dans le cadre limité de l’Etat qui l’a conçue ».

⁵ Arditi, J. (1994) Geertz, Kuhn and the Idea of a Cultural Paradigm. *Brit. J Sociology*, (1994), at 614, in Legrand, P. (1996) European Legal Systems Are Not Converging. *ICLQ* 45, (1996), at 80.

⁶ *Ibid*, p. 81.

⁷ Gutteridge, H.C. (1938) The Comparative Aspects of Legal Terminology. *Tulane Law Review* 12, (1938), at 401.

⁸ Groffier in Harvey, *supra* note 1, p. 180.

⁹ Gémard, *supra* note 2, p. 48.

¹⁰ As Zweigert and Kötz highlight, the style of a legal system can be identified from its historical background, “its predominant and characteristic mode of thought in legal matters, its particularly distinctive concepts or institutions, which legal sources it uses and how it handles them, and its ideology”. Zweigert, K. & Kötz, H. (1998) *An Introduction to Comparative Law*. 3rd ed., Oxford: OUP, p. 36.

¹¹ David, René (1972) *French Law*. Baton Rouge: Louisiana State University Press, Preface, v-xv. Zweigert & Kötz have come up with a similar, though more detailed, classification of legal families by referring for France and the UK to the Romanistic and Anglo-American legal families, *Ibid*.

¹² *Ibid*, pp. x-xi.

these disputes.¹³ In English law the concept is fairly recent and has only limited practical consequences as there is not a separate court system for public law issues and the same general rules of common law apply to all disputes.¹⁴ One should, however, bear in mind the remarkable development of judicial review in English law as a public law remedy.¹⁵

The diversity between separate legal families, based on different understandings of the law, is one of the main reasons for the difficulty of legal terminology¹⁶. When translating a legal document from French into English, one is thus faced with the challenge of providing a translation that makes legal as well as linguistic sense. Consequently, a translator can provide an accurate translation only if he/she has an understanding of the SL and the TL legal systems.¹⁷

This paper aims to look at some of the issues that need to be taken into account for a successful legal translation from French (as the source language) into English (as the target language). After focusing on the spirit of both legal systems (Part I), this paper will discuss the different translation methodologies (Parts II & III) before analysing to what extent a possible harmonisation might be taking place between the legal systems, and the consequences for French-English legal translation (Part IV).

2. The spirit of the French and English legal systems

«C'est un très grand hasard si [les lois] d'une nation peuvent convenir à une autre.»¹⁸

French and English lawyers do not reason or apply law in the same way. They display “irreducibly distinctive modes of legal perception”.¹⁹ The French favour a more principled, theoretical approach than the English by creating a rational order through a comprehensive set of rules that are applicable to every future situation.²⁰ On the other hand, the common law displays an aversion to explicit theory, often preferring common sense to logic.²¹

Thus, primary importance is given in French law to legislation. French law is, however, not just a system of written law, and a common law lawyer will be struck at how well the rules of French are organised through systematic, complete and principled codified law.²² Described by Lord McMillan as a “practical code”, the main characteristic of the common law is not to

¹³ Weston, *supra* note 3, at 47.

¹⁴ Brown, N. & Bell, J. (1998) *French Administrative Law*. 5th ed., Oxford: OUP, at 6. See also Kahn-Freund, O., Lévy, C. & Rudden, B. (1973) *A Source-book on French Law*. Oxford: Clarendon Press, pp. 2-3.

¹⁵ Weston, *supra* note 3, at 47; Brown & Bell, *ibid*, p. 6.

¹⁶ Gémard, *supra* note 2, p. 44.

¹⁷ Weston, *supra* note 3, p. 4.

¹⁸ “It is extremely rare that the legislation of one country is appropriate for another country”. Montesquieu, *De l'Esprit des Lois*, (1748), 1, 3 in Gémard, J.C. (1981) *Réflexions sur le langage du droit: problème de langue et de style. Meta: Translators' Journal* 26, (1981), p. 343.

¹⁹ Legrand, *supra* note 5, p. 81.

²⁰ Nicholas, in Bell, J. (2001) *French Legal Cultures*. London: Butterworths, at vii; David, *supra* note 11, p. xi.

²¹ Legrand, *supra* note 5, p. 66.

²² David, *supra* note 11, xi-xii; Bell, *supra* note 20, in vii; Zweigert & Kötz, *supra* note 10, p. 86.

be a body of well-organised rights.²³ “As a system of general rules, the Common Law is a thing merely imaginary” and, instead, consists of “almost infinite particulars”²⁴; Legrand refers to it as “the disorder of fragmented and dispersed facts”.²⁵

Lord Wilberforce famously explained in *Davy* that “English Law fastens not on principles but remedies.”²⁶ French law identifies rights and tries to work out appropriate protection, whereas English law, by contrast, focuses on whether a remedy is available to a new situation.²⁷ Accordingly, a common law lawyer will not ask whether a legal rule exists, but whether remedies are available to a claim. As a consequence, legal terminological difficulties are likely to arise between French and English law as they are “systems which do not go back to a common origin”.²⁸ Applying the appropriate translation methodology becomes essential in the comprehension of a legal document in the TL.

3. The use of different translation methodologies

Underlying any legal translation is the rule that the content of the source text should be imparted in the most comprehensible way into the SL document. In order to achieve this goal, a variety of translation methodologies are available.

3.1. *To trust or not to trust the word-for-word translation methodology... that is the question*

In legal translation, primary consideration should be given to the word-for-word translation methodology. It maintains the syntax of the original document and thus provides the least interference with the SL style and legal thinking, thereby conveying form as well as content.²⁹ In a way, it requires only minimal subjective input by the translator, who merely acts as a neutral channel between the SL and TL texts. Also known as formal equivalence, this methodology only works up to the point when information mentioned in the SL document stops being imparted clearly and starts being misleading or controversial.³⁰ Judgement whether or not to apply formal equivalence is made on a case-by-case basis. The translator’s experience and expertise are essential in determining the appropriateness of such a methodology.

Some legal concepts can be directly translated using the word-for-word methodology as they exist in the legal systems of both the SL and TL and have the same meaning. For instance, ‘*cour d’appel*’ can be translated as ‘Court of Appeal’, as can ‘*juge*’ by ‘judge’. This type of legal concept is the least controversial to translate, even between fundamentally different legal systems. Ultimately, what matters is that it makes sense in the TL.

²³ Lord McMillan, *Reads v Lyons & Co*, [1947] AC 156, 175 (HL), in Legrand, *supra* note 5, at 67.

²⁴ See Bentham, J. (1928) *A Comment on the Commentaries*, at 125, and Edward Coke, Preface to the first collection of reports published between 1600 and 1616, 1 Co. Rep. I at xxvii in Legrand, *supra* note 5, p. 68.

²⁵ *Ibid.*, p. 69.

²⁶ *Davy v. Spelthorne BC* [1983] 3 All ER 278 at 285, in Brown & Bell, *supra* note 14, p. 22.

²⁷ See David and Samuel, in Bell, J. (2001) *French Legal Cultures*. London: Butterworths, vi & ix.

²⁸ Gutteridge, *supra* note 7, p. 408.

²⁹ Weston, *supra* note 3, p. 24.

³⁰ *Ibid.*

In some cases, formal equivalence can be used to translate an SL term that is unfamiliar to the TL legal system. To translate '*Assemblée Nationale*' as 'National Assembly', for instance, is perfectly clear, even though such a concept does not exist in English law, as it is commonly used to describe the lower house of parliament in a large number of countries in the world. This is not, however, always the case: a common law lawyer will not necessarily understand what is meant by 'civil law' when translating '*droit civil*', as it is an unfamiliar concept in common law. On other occasions, word-for-word translation will become completely nonsensical: a '*Garde des Sceaux*', a term specific to the French legal system, should not be translated as 'Guardian (or Keeper) of the Seals'³¹, which would only leave an English reader clueless, but could instead be translated by 'Justice Secretary' or 'French Minister of Justice'. By the same token, the '*Conseil d'Etat*', the highest French administrative court and a government advisory body, has no direct equivalent in the common law system and should not be translated as 'Council of State', but rather the original SL term should be retained.

Another possible pitfall is the use of the formal equivalence methodology in relation to *faux amis*: words that look or sound the same in both SL and TL, and are commonly used in both languages, but do not have the same meaning. A literal translation may be misleading or only provide a partially correct picture.³² Take, for instance, '*un magistrat*': in France, it is usually used to describe a professional judge, whereas a 'magistrate' in England is a lay judge, thus exactly the opposite.³³ One should also be mindful of the fact that being a professional judge is a career profession in France, but not in England.³⁴ '*Une juridiction*' in France usually describes a court. In England, 'jurisdiction' refers to the issue of whether a court has the authority to hear a case. Nor is '*la rescision*' the equivalent to 'rescission' in English law: in French law, it describes a remedy at the disposal of a party who suffers a financial prejudice as the result of a disequilibrium between the obligation provided and the one received in a contract³⁵; in English contract law, it is the main remedy available in case of misrepresentation.³⁶ Inversely, Common law will not be translated by '*droit commun*' in French, as it refers to the applicable law unless stated differently by legislation, but the SL expression: '*la common law*' should be retained.

Some expressions may be *faux amis* only in certain circumstances: '*un crime*' is a particularly serious offence in French criminal law, whereas 'a crime' is much more of a generic term in English criminal law.³⁷ One should also tread carefully when using the term 'commercial law' for '*droit commercial*'. Commercial law in France is a body of law distinct from Civil law. In English law, it is not a separate branch of law. It merely refers to those topics that are relevant to business and commercial practice.³⁸

³¹ *Ibid*, p. 25.

³² Markesinis, B. (1993) Bridging Legal Cultures. *Israel L.R.*, (1993), p. 369.

³³ Cairns, W. & McKeon, R. (1995) *Introduction to French Law*. London: Cavendish, p. 194.

³⁴ See Elliott, C. (2010) *English Legal System*. 11th ed., Harlow: Pearson Education, at 154; Elliott, C., Jeanpierre, E & Vernon, C. (2006) *French Legal System*. 2nd ed. Harlow: Pearson Education, pp. 260-264.

³⁵ Youngs, R. (2007) *English, French & German Comparative Law*. 2nd ed., Abingdon: Routledge-Cavendish, at 590. For an English version of art. 1118 of the French Civil Code, see the Légifrance website: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=439> [accessed 15 June 2010].

³⁶ Stone, R. (2008) *The Modern Law of Contract*. 7th ed., London: Routledge-Cavendish, p. 340.

³⁷ Elliott, Jeanpierre & Vernon, *supra* note 34, p. 108.

³⁸ Weston, *supra* note 3, p. 51.

In addition to socio-cultural peculiarities moulding each legal system differently, a legal translator faces the challenge of overcoming ambiguity in a legal document because of the existence of numerous polysemous words in the field of law.³⁹ It is therefore important to ensure understanding of the context of the source text in order to determine the relevant meaning to give to the SL polysemous term. The word ‘demandeur’, for instance, may be used to describe either ‘a plaintive’ or ‘an appellant on a point of law’, depending on the context. The French word ‘société’ also has two distinct meanings: it can be either a society or a company in a business sense. When the French President’s website provided in 2001 the English version of article 16 of the 1789 French Declaration of the Rights of Man and Citizen, it used this second way of translating ‘société’, and stated that: “Any company in which no provision is made for guaranteeing rights or for the separation of powers has no Constitution.”⁴⁰ The English version should have translated ‘société’ in this context as ‘society’. ‘Dol’ is another example of a polysemous word that necessitates a translator’s full attention. The first meaning of ‘dol’ refers to the formation of a contract and is the French equivalent of ‘misrepresentation’.⁴¹ The second meaning, on the other hand, refers to the extent of a debtor’s liability for failing to perform a contract.⁴² Finally, a translator should ensure that ambiguity is not created by being aware of the different TL polysemous words. A ‘convention’, for instance, has two distinct meanings in English law: it can be an international treaty or a non-legally enforceable source of the British constitution.⁴³

3.2. The appropriate use of the equivalent term in the TL

If the word-for-word methodology leads to confusion in the translated document because the term is unknown in the TL, a translator may prefer to use a TL equivalent term. Known as “functional equivalence”, this methodology is appropriate in cases where the SL and TL terms have a similar meaning.⁴⁴ A ‘*Conseil des ministres*’, for instance, if translated literally is ‘a council of ministers’, which has no meaning in English domestic law, but is the title given to a decision-making body of the EU. A better solution would surely be to translate it as ‘cabinet’.⁴⁵ This applies as well to ‘board of directors’, which is the English equivalent of the French ‘*conseil d’administration*’.⁴⁶

³⁹ See Gémard, who claims that: «De toutes les langues spécialisées, la langue juridique est peut-être celle où règne la plus grande polysémie.» In Gémard, *supra* note 18, at 342. See also Bélanger, *supra* note 2, p. 458.

⁴⁰ Official website of the President of the Republic: http://www.elysee.fr/ang/instit/text1_.htm [accessed in July 2001]. The original French version states: «Toute société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution.» <http://legifrance.com/html/constitution/const01.htm> [accessed 15 February 2010].

⁴¹ See article 1116 of the Civil Code. Bear in mind that while both are considered vitiating factors, the French term is not confined to representations as the English term is. See Youngs, *supra* note 36, p. 595.

⁴² Nicholas, B. (1992) *The French Law of Contract*. 2nd ed., Oxford: OUP, at 229. See also the French Civil Code, arts. 1150 & 1151, *Code civil* (2010) 109th ed., Paris: Dalloz.

⁴³ See the concept of constitutional conventions in Bradley, A.W. & Ewing, K.D. (2007) *Constitutional and Administrative Law*. 14th ed., Harlow: Pearson Education, p. 20.

⁴⁴ Weston, *supra* note 3, p. 21.

⁴⁵ *Ibid.* See also Elliott, Jeanpierre & Vernon, *supra* note 34, p. 36.

⁴⁶ Cairns & McKeon, *supra* note 33, p. 199.

Special attention should be paid if the concepts are slightly different in different legal systems, what Weston calls the “nearest equivalent term”.⁴⁷ But one should be mindful of the danger of misleading the reader, as the nearest equivalent term often leads to an imperfect translation: ‘*Avocat*’, for instance, may be translated as ‘barrister’ when related to court proceedings and court pleadings but will be more adequately translated as ‘solicitor’ when referring to legal advice or the drawing up of legal documents.⁴⁸ Alternatively, the safest solution might be to use the generic term ‘lawyer’ in case of uncertainty. The term ‘*commerçant*’ is only imperfectly translatable in English as ‘registered tradesman’ or ‘businessman’, as the legal consequences of the SL term vary from those of the TL term. The same is true for ‘*acte de commerce*’ if translated as ‘commercial transaction’.⁴⁹ It will be up to the translator to decide whether such a choice is suitable for the situation or not.

Sometimes the method of using the nearest equivalent term should clearly be set aside. The French ‘*Sénat*’, for instance, cannot be translated by the British ‘House of Lords’, though both are upper Houses of Parliament. Overall, the most important element to take into account when reverting to the functional equivalence methodology is the readership of the TL document: the more specialised it is, the less acceptable this methodology is.

3.3. Admitting defeat

It is sometimes impossible to provide a sufficiently accurate translation of an SL institutional term or concept that is unfamiliar in the TL legal system. As explained by Weston, it then becomes necessary for the translator to “admit defeat”, and the use of the original SL non-translatable term – including, if necessary, a TL explanation when the term is used for the first time – becomes the only alternative.⁵⁰ As a rule, the greater the degree of technicality and specificity of the SL term, the harder it is to translate.⁵¹ To make a culinary comparison, a ‘*pain au chocolat*’ is always associated with French and has no British equivalent, thus becoming non-translatable, just as a ‘Christmas pudding’ is always associated with Britain and is known in France as ‘*le christmas pudding*’.

In French law, an example of such a non-translatable concept is ‘*cause*’ in the French law of obligations. It is mentioned in articles 1131 to 1133 of the French Civil Code and is the reason why a person enters into a contract. ‘Consideration’ is the nearest equivalent in English law and serves a similar purpose to *cause*. The scope and legal construct of ‘consideration’ is, however, very different to its French counterpart, as it mainly helps to determine which agreement is enforceable in English contract law.⁵² It should thus not be translated. The ‘*Conseil d’Etat*’ and the ‘*Cour de cassation*’, the highest ordinary court, are examples of non-translatable SL culture-specific institutions. Weston, however, has been

⁴⁷ Weston, *supra* note 3, p. 22.

⁴⁸ Elliott, Jeanpierre & Vernon, *supra* note 34, p. 243.

⁴⁹ The reader should bear in mind that *le commerçant* and *les actes de commerce* are the two essential cornerstones of French commercial law. The same is not the case in English commercial law.

⁵⁰ Weston, *supra*, note 3, p. 26. See also Pollard as an example of the frequent use of non-translatable terms, Pollard, D. (1998) *Sourcebook on French Law*. 2nd ed., London: Cavendish.

⁵¹ *Ibid*, p. 36.

⁵² For an extensive comparison of *cause* and ‘consideration’, see Nicholas, *supra* note 42, 144-149; and Markesinis, B.S. (1978) ‘*Cause and Consideration: A Study in Parallel*’. *CLJ* (1978), 53-75. For ‘consideration’, see also Peel, E. (2007) *Treitel – The Law of Contract*. 12th ed., London: Sweet & Maxwell, Chap. 3.

willing to accept the expression ‘Court of Cassation’ as, sometimes, the frequency of the use of an SL expression leads to its integration, or naturalisation, into the TL through the creation of a neologism.⁵³ Aside from Bridge, in his legal dictionary, I have not come across any other legal academic ready to accept this neologism, and would advise the continued use of the French version of the institution’s title.⁵⁴

There are few French institutions that have been proved to be so unfamiliar to common law lawyers as the ‘*Conseil constitutionnel*’. Linguists and lawyers alike have struggled to find the most appropriate translation of this institution created by the French Constitution of 1958. Pollard defines it as an “independent but non-judicial arbitrator”.⁵⁵ It mixes judicial with non-judicial features and has thus at times, usually unsatisfyingly, been called a ‘Constitutional Court’. Whereas Youngs calls it a constitutional court, the official website of the *Conseil constitutionnel* uses the term ‘Constitutional Council’, as do Bridge and Troper.⁵⁶ I agree, however, with the wider consensus among academics that the institution’s name should remain non-translated due to its distinctive Frenchness.⁵⁷ Its composition, as well as its multiple functions, genuinely make it *sui generis*. Interestingly, Bell prefers to keep the French term in most of his books except for the one he co-authored with Brown.⁵⁸ There might, however, be a case for using the term ‘Constitutional Court’ in future, as I will argue below.

Finally, when using the original French term in English, it is essential to have an understanding of the French rules regarding capitalised letters as non-translated terms should be re-transcribed correctly in the TL document. Terms taking a capital letter are strictly regulated in French, but much more informally in English. The rule is that a term is generally written in lower case, unless specified differently by a French grammatical rule. For example, the nouns, but not their accompanying adjectives, of the terms describing the main institutions are written in upper case: for example, ‘*Cour de cassation*’. In contrast, more widespread institutions take lower case: for example, ‘*tribunal de grande instance*’. Important written documents also take upper case: for example, ‘*la Constitution de 1958*’ and ‘*le Code civil*’.⁵⁹

⁵³ Weston, *supra* note 3, p. 30.

⁵⁴ Bridge, F.H.S. (1994) *The Council of Europe French-English Legal Dictionary*. Strasbourg: Council of Europe Press, at 57.

⁵⁵ Pollard, *supra* note 50, p. 31.

⁵⁶ *Conseil constitutionnel* official website, see pages in English: <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html>> (accessed 14 February 2010); Bridge, *supra* note 54, at 47; Troper in Bermann, G. & Picard, E. (eds.) (2008) *Introduction to French Law*. Alphen aan den Rijn: Kluwer Law International, p. 30.

⁵⁷ See e.g. Elliott, Jeanpierre & Vernon, *supra* note 34, at 130; and Boyron, S. in Bell, J., Boyron, S. & Whittaker, S. (2008) *Principles of French Law*. Oxford: OUP, p. 156. See also, *inter alia*, Pollard, *supra* note 50, and Dadoomo, C. & Farran, S. (1996) *The French Legal System*. 2nd ed., London: Sweet & Maxwell.

⁵⁸ Contrast Bell, J. (1992) *French Constitutional Law*. Oxford: OUP, p. 29 and Bell, J. (2001) *French Legal Cultures*. London: Butterworths, at 33, with Brown, N. & Bell, J. (1998) *French Administrative Law*. 5th ed., Oxford: OUP, p. 14.

⁵⁹ For the best explanation, see: http://larevue.hammonds.fr/Post-it-Du-bon-emploi-de-la-majuscule-par-les-juristes_a246.html, a newsletter by the law firm Hammonds Hausmann [accessed 3 June 2010].

4. Issues relating to the type of translation to provide

The aim of any translator is to get the right mix between the different translation methodologies examined above in order to render the TL document as clear and idiomatic as possible. Thus, an awareness of the culture-bound aspects of the TL is essential. For example, '*droit international privé*' can be translated as 'private international law', but the expression traditionally used in the UK is 'conflict of laws'. This feel for the appropriate TL expression is what an experienced translator can provide. Determining the kind of translation to provide necessitates addressing a number of important issues, such as whether or not to stick to the style of the source document (Section III.A) or address the expected readers of the target document (Sections III.B and III.C).

4.1. How closely linked to the source text structure and style does the reader expect the information provided in the target text to be?

An important academic debate has revolved around the exact role of the translator and whether he/she should make his or her presence felt or stick scrupulously to the original text. In other words, should a translation remain true to the 'letter' or to the 'spirit' of an SL text?⁶⁰ Since the second half of the 20th century, the pendulum has clearly swung towards the latter: a successful translation should not, according to Sarcevic, be measured "in terms of formal correspondence between source and target text but of equivalent effects".⁶¹ The main aim of a translator should be fidelity to the uniform intent and meaning of the translated document, rather than formal fidelity to the source text. According to Vinay and the theorists of the Paris School, a translation is done in order to convey a message in a manner that is clear and understandable to the receiver.⁶² This view is also espoused by Markesinis, who encourages legal translators to use a creative interpretation. In effect, it requires more than linguistic skills but a feeling for the TL legal system and a mastering of "intellectual juggling to allow the matching of different concepts and notions".⁶³ In contrast, Newmark asserts that a "good translator abandons a literal version only when it is plainly inexact or badly written. A bad translator will always do his best to avoid translating word for word."⁶⁴ Furthermore, in practice, linguistic fidelity to the source text, by using the word-for-word methodology and maintaining the same length of sentences, is often the first consideration required of legal translators.⁶⁵ In that way, translators do not impose their own interpretation of the SL text.⁶⁶ Often, a distinction is made between translations that have an aesthetic pretence and pragmatic ones whose purpose is purely to be informative.⁶⁷

Beyond the ideological debate, a practical question arises: what should be the extent of interpretation of a source text? There is in my mind no doubt that the answer to that question

⁶⁰ Harvey, *supra* note 1, p. 180.

⁶¹ Šarčević, S. (1997) *New Approach to Legal Translation*, The Hague/London/Boston: Kluwer Law International, *ibid*.

⁶² 'Vinay: 'le sens seul compte [...] on traduit pour faire comprendre' in Gémard, *supra*, note 2, at 37. See also Weston, *supra* note 3, p. 24-25.

⁶³ Markesinis, *supra* note 32, p. 370.

⁶⁴ In Weston, *supra* note 3, p. 25.

⁶⁵ See Šarčević, 16, e.g., UN Instructions for translators: 'fidelity to the original text must be the first consideration', *supra* note 71, p. 181.

⁶⁶ *Ibid*.

⁶⁷ Brislin, R.W. (1976) *Translation. Applications and Research*, in Weston, *supra* note 3, p. 10.

is linked to the type of translator providing the translation. From my experience of teaching legal translation to both linguists and lawyers, I have noticed a clear tendency to find two types of legal translators:

The first type is the linguist-translator who has a linguistic background and was originally a general translator. When confronted with a legal document, the translator will tend to favour the word-for-word translation methodology and refrain from legal interpretation unless absolutely necessary in order to avoid any misunderstanding and retain the style of the source text. He/she remains overall as neutral as possible, and his/her personal imprint in the target text remains limited.

The second type is the lawyer-translator who has a legal background and has requalified as a translator. The aim of this kind of translator is to provide the exact meaning of the source text, and not necessarily stick to literal translation, and to convey legal terms and thoughts as precisely as possible. His/her excellent understanding of the law means that this kind of translator will provide more personal input into the translation, not hesitating to apply his/her personal legal interpretation of the source text.

As well as the translator's background, the style of a legal translation will also depend on the expected reader of the target text. After all, the ultimate aim of any translation should be that it makes sense to its reader(s) and that it serves a useful purpose. It is a juggling process between the information available in the source text and that expected by the reader of the target text.

4.2. *From which country is the potential reader?*

Since each legal system is based on a specific set of socio-cultural elements, it is important, in a French-English legal translation, to determine at which English-speaking legal system the target text is aimed. This will have important practical consequences, as the phraseology will depend on such an assessment. If it is aimed at a wider global audience, such as on a website, more generic terms might be used, whereas a target text aimed at a specific country might use that country's specific equivalent terms, so as to render the style more idiomatic and free-flowing. '*Un avocat*' may be translated using the more generic term 'lawyer' for a global audience, or the country-specific terms 'attorney' for North America or 'barrister/solicitor' for the UK. It is essential to bear in mind that important differences exist between the different common law legal systems in terms of legal concepts, institutions and legal terminology. The USA, for instance, has a federal system and a written constitution, unlike the UK. Whereas 'judicial review' refers to judicial control over acts of public administration in English law, it means the power of the courts to declare legislation unconstitutional in American law.⁶⁸ '*Droit du travail*' is known as 'labor law' in the USA and 'employment law' in the UK. It is probably because it is aimed at a wider audience that the French Government's official website *Légifrance* has translated '*Code pénal*' as 'Penal Code' instead of 'Criminal Code', the expression normally used in the UK.⁶⁹ In addition, in order to render the translated terms and concepts clear and idiomatic to their readers, British

⁶⁸ For a comparison, see Brown & Bell, *supra* note 14, p. 6. For a detailed explanation of English judicial review, see Bradley & Ewing, *supra* note 43, p. 725.

⁶⁹ *Légifrance*: <<http://195.83.177.9/code/liste.phtml?lang=uk&c=33>> [accessed 24 May 2010].

academics, will, for instance, refer to French cases by the names of the parties, which is usually not done in French law for decisions by ordinary courts.⁷⁰

4.3. How much legal expertise does the reader have?

The extent to which a technical term or concept needs to be explained depends on the reader's prior legal knowledge: does he/she have a good understanding of both the French and English legal systems? The degree of technicality and specificity of a TL text depends on the degree of legal expertise a reader is expected to have. In some cases, a translation might require fairly extensive explanation of a legal concept that is unfamiliar to the reader; in others, basic information is sufficient. If, for instance, reference is made to the French '*pourvoi en cassation*', a knowledgeable reader might merely need to be told that it is a 'system of *cassation*', whereas a reader who has no prior knowledge of the French legal system might need to be told that it is a review by the highest ordinary court of the legitimacy of a decision by a lower court.⁷¹

5. Increasing harmonisation between the English and French Legal Systems

An added complication in legal translations is the fact that legal concepts have a certain degree of instability.⁷² Just like living organisms, legal systems are constantly evolving and changing.

5.1. Legal systems do not remain immobile

At certain times in their history legal systems go through fundamental changes. In the process, new institutions are created, while old ones disappear. The French Constitution of 1958, for instance, introduced the *Conseil constitutionnel*. Even during ordinary times, it is normal that legal systems do not stand still. For instance, the UK Supreme Court was created in October 2009 to replace the defunct Law Lords.⁷³ In France, a new set of courts, the *juridictions de proximité*, or neighbourhood courts, were created in 2002 to relieve existing courts of some of their workload and be closer to the people.⁷⁴

In addition, as pointed out by Gutteridge, legal terms can take on different meanings with the passing of time.⁷⁵ In English law, the role of the Lord Chancellor is not what it used to be, after it was radically amended by the Constitutional Reform Act 2005. Some of the Lord Chancellor's traditional functions have been allocated to the Secretary of State for Justice,

⁷⁰ The reference method used in French law is to mention the court that provided the decision, accompanied by the exact date of the case. See Bell, J. (2001) *French Legal Cultures*, London: Butterworths, at IX; Marsh, P.D.V. (1994) *Comparative Contract Law*, Aldershot: Gower.

⁷¹ See, e.g., Bell, Boyron, & Whittaker, *supra* note 57, p. 3.

⁷² G  mar, *supra* note 18, p. 343.

⁷³ "Institutions have to adapt and change to survive and maintain their legitimacy." Speech by Justice Secretary Jack Straw at the official opening of the Supreme Court, 16 Oct. 2009 - Ministry of Justice official website: < <http://www.justice.gov.uk/news/speech161009a.htm> > [accessed 4 June 2010].

⁷⁴ These courts have only been partially successful, and criticism of their existence is frequent. Elliott, Jeanpierre & Vernon, *supra* note 34, pp. 89-90.

⁷⁵ Gutteridge, *supra* note, 8, at 401.

who sits in the Cabinet and in Parliament, and some to the Lord Chief Justice, who has become the head of the judiciary. The Lord Chancellor has kept some of the traditional ceremonial functions. Furthermore, whereas the Lord Chancellor used to be the speaker of the House of Lords, the Secretary of State for Justice now sits in the House of Commons.⁷⁶ Another example is provided by the French Constitution of 1958, which limited the scope of parliamentary legislation (*loi*), which previously had unlimited jurisdiction, to subjects listed under its article 34.⁷⁷

Legal systems also go through various phases of legal terminological modernisation. In French law, a new version of the French Commercial Code came into force in 2000. One of the aims of this change was to modernise the style of the Commercial Code. Some of the vocabulary used in the original Code, dating back to the early 19th century, was amended and replaced by contemporary terms.⁷⁸ For instance, the term ‘*voiturier*’ (i.e., a carrier) was replaced by ‘*transporteur*’.⁷⁹ In English law, it is important to have an understanding of the Woolf Reforms as they not only fundamentally changed the civil justice system but also simplified the legal terminology after April 1999.⁸⁰ It is of course essential for a translator to have an awareness of this evolutionary process, as it will influence the accuracy of the translation.

5.2. *An existing closeness and a trend towards rapprochement as a natural development in domestic legal systems*

“[C]ontinental law tends to become [...] a law of remedies rather than a law of rights at a time when the common law [...] tends to become a law of rights instead of a law of remedies.” (René David)⁸¹

Undoubtedly, some of the characterisations of French law are extremely stereotypical and portray legal reality imperfectly. Even though they all have a family resemblance, the different branches of French law also have distinctive features. Bell argues that it is thus not helpful to talk about a single, uniform French legal culture.⁸² Whereas, for instance, *droit*

⁷⁶ UK Constitutional Reform Act 2005,

<http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1> [accessed 12 June 2010]. For more information, see Bradley & Ewing, *supra*, note 43, 405-407.

⁷⁷ Elliott, Jeanpierre & Vernon, *supra* note 34, at 70. For an up to date English version of the French Constitution, see: <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html>> [accessed 14 June 2010].

⁷⁸ *Ibid*, at 11.

⁷⁹ See, for instance, Article L132-9 of the French Commercial Code, *Code de commerce* (2009) 104th ed., Paris: Dalloz:

‘I. - La lettre de voiture doit être datée.

II. - Elle doit exprimer :

1° La nature et le poids ou la contenance des objets à transporter ;

2° Le délai dans lequel le transport doit être effectué.

III. - Elle indique :

1° Le nom et le domicile du commissionnaire par l'entremise duquel le transport s'opère, s'il y en a un;

2° Le nom de celui à qui la marchandise est adressée ;

3° Le nom et le domicile du **transporteur**. ...’ (emphasis added)

⁸⁰ Elliott, *supra* note 35, 531-537.

⁸¹ David, R. (1972) *French Law*, Baton Rouge: Louisiana State University Press, at 13.

⁸² Bell, *supra* note 80 p. 255.

civil and most of private law can rightly be described as codified law, the same cannot be said of all branches of French law.⁸³ French administrative law is mainly case-based and operates in a manner closer to the common law.⁸⁴ Though it now possesses a code that regulates some procedural and institutional aspects of administrative law⁸⁵, it has been rightly described as an uncoded branch of law in nature.⁸⁶ A further characteristic of French administrative law that is familiar to a common law lawyer, as pointed out by Bell, is its *modus operandi*: as in English law, it is a branch based on remedies as opposed to other branches of French law, which are based on rights.⁸⁷ Though ideologically different at its inception, French law is closer to common law than one might at first imagine.⁸⁸

A distinct trend towards rapprochement between the French and English legal systems is also clearly noticeable and has been analysed in detail by comparative lawyers. Markesinis has, for instance, described it as “gradual convergence” and refers to the idea of continental law as statutory and English common law as casuistic as more and more of a “myth”.⁸⁹ In effect, English law is being ‘continentalised’ and French law is becoming anglo-saxonised.⁹⁰ As a consequence, both legal systems appear to be moving towards a more standardised, global approach to law. One of the reasons for the convergence of the two legal systems is the fact that their distinctive characteristics are fading away: the traditional pre-eminent role of the *loi* is being eroded in France, with Parliament currently providing only minimal legislation. This has enabled judges to increase their role in helping to determine the cultural and ethical mood of the country. In a number of sensitive societal issues judges have not merely stuck to the letter of the law, but have instead often preceded the enactment of relevant legislation, and thus have become “more consciously activists”.⁹¹ French judges had, for instance, developed protection against breaches of privacy long before article 9 of the Civil Code introduced a right to privacy in 1970, and banned surrogacy agreements before the 1994 legislation on bioethics introduced an express ban in article 16-7 of the Civil Code.⁹² Furthermore, the idea that French law is based on broad principles organised in an orderly, methodical manner has

⁸³ Analysis put forward by Bell, *ibid*, p. 247.

⁸⁴ Bell, Boyron & Whittaker, *supra* note 57, p. 7.

⁸⁵ *Code de justice administrative*.

⁸⁶ Brown & Bell, *supra* note 14, p. 2.

⁸⁷ Bell, *supra* note 20, pp. 248-249.

⁸⁸ *Ibid*, pp. 243-252.

⁸⁹ Markesinis, *supra* note 32, at 380. See also Markesinis, B.S. (1994) *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*. Oxford: OUP.

⁹⁰ Glenn, P. (1993) ‘La civilisation de la *common law*’ (1993) *Rev. Int. Dr. Comp.* pp. 559-575.

⁹¹ Bingham, T.H., (1992) “There is a World Elsewhere”: the Changing Pattern of English Law. *ICLQ* 41, (1992), at 528. See also Rousseau in Bell, *supra* note 20, p. 257.

⁹² Articles 9 & 16-7, *Code civil* (2010), 109th ed., Paris: Dalloz. Another recent example demonstrates judges’ readiness to depart from the letter of the law when required: In a famous decision by the *Cour de cassation* on 17 November 2000 called the *Perruche* case, a doctor was sentenced to pay compensation for the birth of a disabled child after having failed to detect his disability during the pregnancy. This failure prevented the making of an informed decision whether to have an abortion or continue with the pregnancy. Surprisingly, the court decided that the disabled child, as well as his parents, was entitled to financial compensation. As the doctor had not contributed to his disability, this decision was based on flawed legal reasoning, as a child could clearly not be said to have suffered any damage from the mere fact of being born. Judges at the time, however, felt that it was the best solution to ensure that the financial means would be available for the child to receive the necessary medical treatment during his entire lifetime. The government intervened in 2002 by enacting legislation precluding any right to compensation for the birth of a child. See Elliott, Jeanpierre & Vernon, *supra*, note 35, p. 125.

lost some of its pertinence.⁹³ Some of the more modern codes, such as the Consumer Code, have been criticised as being mere compilations of texts lacking a proper order.⁹⁴ The codes also lack completeness, and it is frequently necessary to consult additional legislation (e.g., in commercial law) or resort to several codes at the same time (e.g., medical negligence) to gain an understanding of a specific branch of law.⁹⁵ Importantly for a translator, the drafting style of modern codes has changed. Once feted for their stylistic elegance⁹⁶, many modern codes lack the clarity of their predecessors and are often characterised by their redundancy and excessive emphasis on details. As a consequence, there is no doubt that French codification drafted by bureaucrats through the process of delegated legislation has replaced style by functionality.⁹⁷

In relation to English law, Glenn has noticed the opposite trend: the notion that case law is the essential source of English law is in decline.⁹⁸ While the role of case law is in stark decline, in importance if not in quantity, law is increasingly articulated in a rational manner, and statutory law is flourishing and plays an ever increasing role, with rights replacing remedies.⁹⁹ Indeed, important pieces of legislation define entire branches of law: with the noticeable exception of judicial review, many parts of English administrative law are nowadays precisely regulated by an Act of Parliament, such as, for instance, freedom of assembly by the Public Order Act 1986 and police powers by the Police and Criminal Evidence Act 1984.¹⁰⁰

5.3. *The role of common European values: a change in attitudes*

Both the French and English legal systems are becoming increasingly influenced by the way law is applied in other legal systems. The world is a small place. Through globalisation, lawyers have been able to encounter new foreign socio-legal ideas, values and solutions. As explained by Sir Thomas Bingham, French and English lawyers are finally looking beyond their borders.¹⁰¹ This is no mean feat, considering the insular mentality of British lawyers and the French aversion to communicate in any language other than their own. In a number of branches of law having an international focus, such as commercial law, France has experienced a noticeable common law influence and has directly transplanted a number of legal concepts: *leasing*, for instance, has become '*crédit-bail*' in French law just as 'lease-back' has become '*cession-bail*'.¹⁰² The judiciary, as well, has started to look across the English Channel, either implicitly, as in the Muammar Gaddafi case on 13 March 2001, when the *Cour de cassation* had to decide on the question of the Libyan leader's immunity from

⁹³ See Bell, Boyron & Whittaker, *supra*, note 57, p. 8.

⁹⁴ See *inter alia* Bell, *supra* note 20, p. 244.

⁹⁵ Elliott, Jeanpierre & Vernon, *supra* note 34, p. 11.

⁹⁶ *Ibid.*, p. 9.

⁹⁷ Catherine, R. (1968) *Le Style Administratif*. Paris: Albin Michel, in Gémard, *supra* note 18, at 348. For delegated legislation, see article 38 of the Constitution previously mentioned.

⁹⁸ «Le juge de la common law n'est plus ce qu'il était.» in Glenn, *supra* note 90, at 570. See also an interesting discussion on the role of English judges on pp. 571-573.

⁹⁹ David, R. (1972) *French Law*, Baton Rouge: Louisiana State University Press, at 103; Glenn, *ibid.*, p. 574.

¹⁰⁰ See Parpworth, N. (2008) *Constitutional and Administrative Law*. 5th ed., Oxford: OUP, Chaps. 18 and 19.

¹⁰¹ Bingham, *supra* note 91, p. 513.

¹⁰² Dekeuwer-Défossez, F. (2004) *Droit Commercial*, 8th ed., Paris: Montchrestien, 308.

prosecution in international law, mirroring the findings of the House of Lords decision concerning Pinochet, or even expressly, as when the *Conseil d'Etat* cited the English High Court in the *Techna* decision of 29 October 2003 on a question related to European law.¹⁰³ Such examples of direct influence between France and the UK, however, remain exceptional.

On the other hand, European law and the European Convention of Human Rights (ECHR) have become a privileged meeting place between common law and civil law,¹⁰⁴ with lawyers trained in a judge-made system frequenting those trained in codified systems. This has enabled a new awareness of the differences in legal cultures.¹⁰⁵ More than just a closer contact with others, however, it has also given rise to a receptiveness to other legal concepts.¹⁰⁶ I believe that a visible *rapprochement* between French and English law is taking place based on adherence to a broad commonality of principles through adherence to the fundamental principles of European Law and the ECHR.¹⁰⁷ Indeed, the rulings of the European Court of Human Rights have standardised a number of aspects of European domestic legal systems, as has the growing influence exercised by European law over domestic legislation, through preliminary questions and the supremacy of European Law.¹⁰⁸ Legal institutions and concepts are being standardised in both France and the UK to comply with common values based on democratic principles and fundamental rights. I will illustrate my point with several examples in France and the UK:

In France, concerned that the absence of an ordinary appeal following a decision of guilt by the *Cour d'assises*, the court which tries the most serious criminal offences, might breach the European Convention of Human Rights, the government introduced a right to appeal following an Act of 15 June 2000. Prior to 2000, the reason for preventing such a procedure was based on the argument that the *Cour d'assises*' verdicts were reached by a jury composed of ordinary citizens who were deemed to be sovereign.¹⁰⁹ Legal tradition was replaced in this case by European human rights values. Furthermore, following a constitutional amendment of 23 July 2008, the role of the *Conseil constitutionnel* was expanded so as to include the right of private individuals involved in legal proceedings to challenge the constitutionality of a statute which infringes fundamental rights protected by the Constitution.¹¹⁰ It was previously impossible to challenge the constitutionality of a statute after it had come into force. These reforms, added to previous constitutional amendments and creative case law mean that the *Conseil constitutionnel* increasingly resembles a proper Constitutional Court in terms of its role if not its composition, which remains heavily political.¹¹¹ From a legal terminological point of view, it signifies that it might become

¹⁰³ See Elliott, Jeanpierre & Vernon, *supra*, note 34, at 80.

¹⁰⁴ Markesinis, *supra* note 32 at 365.

¹⁰⁵ Legrand, *supra* note 5, at 79.

¹⁰⁶ Bingham, *supra* note 91, at 526.

¹⁰⁷ Bell, Boyron & Whittaker, *supra* note 57, at 2.

¹⁰⁸ See Bell, *supra* note 20, at 252.

¹⁰⁹ Elliott, Jeanpierre & Vernon, *supra* note 34, at 112.

¹¹⁰ Article 61-1 of the Constitution: "If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'Etat* or by the *Cour de Cassation* to the Constitutional Council, within a determined period." Official website of the French *Conseil constitutionnel*, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais_oct2009.pdf> [accessed 12 May 2010].

¹¹¹ Public Lecture by Sophie Boyron at UCL on 8 February 2010 for the Constitutional Law Group on 'the revised Constitution of the French Republic'.

increasingly acceptable to translate ‘*Conseil constitutionnel*’ as ‘constitutional court’. Here again, the concern to increase individuals’ fundamental rights signifies that France is slowly creating a Constitutional Court with similar features to those of its European counterparts.

In English law, the ECHR and its incorporation into English law through the 1998 Human Rights Act have had a major influence in the development of the law.¹¹² Not only has it led to the development of a proper right to privacy, but it has also transplanted into English law a novel safeguard against government action: proportionality. Proportionality is a principle that is present in a number of different legal systems and has been developed by the European Court of Human Rights and the European Court of Justice.¹¹³ It implies that “administrative action ought not go beyond what is necessary to achieve its desired result”.¹¹⁴ It was discussed in great detail by the House of Lords in the *Daly* case.¹¹⁵ Lord Steyn considered proportionality to be “more precise and sophisticated” than the traditional principle of unreasonableness, which is used in English administrative law for judicial review and which it might with time supplant.¹¹⁶ Another example of the influence of European values concerns the Supreme Court, which replaced the Appellate Committee of the House of Lords as the final court of appeal in October 2009.¹¹⁷ The Supreme Court was set up by the Constitutional Reform Act of 2005 as a clear indication of the separation of powers between the judiciary and the legislature, and to underline the independence of the judicial system.¹¹⁸ The same reason was given for amending the role of the Lord Chancellor and creating the position of Secretary of State for Justice.¹¹⁹ The examples mentioned above indicate a clear move in the UK towards a rigid constitutional structure based on parliamentary legislation, and thus similar to its European counterparts, and not merely on the quintessentially British concepts of constitutional conventions.

If this trend continues, it will greatly facilitate the task of the legal translator and the readers’ understanding of different legal systems, as there will be a noticeable reduction of non-translatable English and French *sui generis* terms and institutions. Consequently, translators will be able to focus more extensively on the linguistic aspects of a legal translation.

¹¹² This has led to what Lord Bingham called a “more sharply focused and long overdue attention to human rights.” Bingham, *supra* note 91, at 514.

¹¹³ Markesinis, *supra* note 32, at 382. The doctrine of proportionality was conceived in Germany and adopted by France and the EC, and first recognised by Lord Diplock as a possible future ground for reviewing administrative decisions in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, in Bingham, *supra* note 91, at 519.

¹¹⁴ Leyland & Anthony (2005) *Textbook on Administrative Law*. 5th ed., Oxford: OUP, at 331.

¹¹⁵ *R. (on the application of Daly) v. Secretary of State for the Home Department* [2001] UKHL 26.

¹¹⁶ *Ibid*, at 547. For the principle of unreasonableness, see *Associated Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

¹¹⁷ UK Supreme Court official website: <<http://www.supremecourt.gov.uk>> [accessed 7 June 2010] and UK Constitutional Reform Act 2005:

<http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1> [accessed 7 June 2010].

¹¹⁸ Speech by then Justice Secretary of State and Lord Chancellor Jack Straw at the official opening of the Supreme Court on 16 October 2009: <<http://www.justice.gov.uk/news/speech161009a.htm>> [accessed 4 June 2010].

¹¹⁹ See UK Ministry of Justice official website: <http://www.justice.gov.uk> and UK Constitutional Reform Act 2005 <http://www.opsi.gov.uk/acts/acts2005/ukpga_20050004_en_1> [accessed 7 June 2010].

6. Conclusion - harmonisation can only go so far

I would like to finish where I started by stating that providing an accurate legal translation is not an easy task. It requires a good understanding of the SL's traditions and history and the TL. It is certainly easier if the two legal systems involved in a legal translation are part of the same legal family and thus display similar characteristics. On that basis, the translation of a legal document between French and Italian will certainly contain fewer pitfalls than translation between French and English.

As shown above, a certain degree of *rapprochement* is taking place between the French and English legal systems. This can only be a good thing as it will facilitate understanding between lawyers of both legal families and reduce legal and terminological ambiguities. The ECHR, through the development of a set of common values, and the European Court of Human Rights as the guardian of them, have an important role to play, but probably not as important as that of the European Union. The EU's role in people's lives is constantly increasing and will continue to do so, as it aims to further its legal reach into new branches of law. Some of the most recent ventures have been in Criminal Law, the European arrest warrant, and Human Rights Law, e.g., the European Charter of Fundamental Rights. The aim of an *ius commun Europeum* through the creation of a European Code is probably the most ambitious EU project. Its realisation would lead to a European legal *lingua franca*, which would revolutionise legal translation. I do not share, however, de Groot's optimism, at least not for the foreseeable future, that "legal systems of the European States will form one great legal family with uniform or strongly similar rules in many areas".¹²⁰ So far, just like the idea of a common European army, this project, more commonly known as the Von Bar project, which began more than twenty years ago, has remained a far-off dream.¹²¹

Although the process of convergence between French and English law, encouraged by common European values, will undoubtedly continue, it will only ever go so far. As pointed out by Legrand, full harmonisation between the two systems will probably never take place, as long as law remains country-specific and retains its historical foundations and does not become completely supra-national.¹²² It will always lack a common assumption, a shared legal tradition, and thus will only be superficially or imperfectly understood by a lawyer from a different legal family.¹²³ For that reason, in any legal translation, an understanding of the aim and socio-cultural context in which a document was drafted in the SL and will be received in the TL is of paramount importance. Each legal document to be translated has a life of its own, its own specificities. With each legal system having a specific vocabulary of 10,000 to 20,000 words, and the frequent use of ambiguous or polysemous terms, a translation is an extremely challenging task.¹²⁴ Ultimately, it is the translator's experience that will enable him/her to determine which translation methodology will most accurately

¹²⁰ G-R de Groot, 'European Education in the 21st Century', in De Witte and Forder (eds.) (1992) *The Common Law of Europe and the Future of Legal Education*, at 11, Kluwer Law International, cited in Legrand, *supra* note 5, at 54.

¹²¹ For the most recent development of a European restatement of contract law, see the official EU website:

<<http://europa.eu/rapid/pressReleasesAction.do?reference=IP%2F10%2F595&format=HTML&aged=0&language=EN&guiLanguage=en>> [accessed 10 June 2010].

¹²² Legrand, *supra* note 5, at 75.

¹²³ Legrand therefore claims that 'one can never step into the shoes of a lawyer from a different legal tradition, just imagine that one is [...] step[ping] into it'. Legrand, *ibid*, at 76.

¹²⁴ Figures provided by Auriel David, in G  mar, *supra* note 2, at 42.

impart the information and the soul of the law from the SL to the TL. This state of affairs certainly means that the legal translator will retain a special place among linguists for a long time to come.

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Legal German Courses Towards a Culture-Oriented Teaching Concept

ALMUT MEYER¹

This study is a presentation of the results of work in progress on LSP teaching and course planning for legal German. So far these matters have mainly been distinguished by subject-orientated research, in this case essentially legal linguistics. To adjust teaching planning for the first time to the concrete professional needs, empirical data have been collected in interviews with Finnish jurists. Since the interviews show a clear qualitative need for legal German language and knowledge in Finnish-German relations, the current inquiry focuses on conflicts in the trading context, Germany being the most important Finnish trading partner. Therefore, the investigation reflects conflict situations in relation to the ascertained professional needs from a teaching perspective. The results gained so far will be presented and discussed in the following article.

1. Introduction

For five decades language studies in Finnish, Swedish, English and German have formed an integral part of the law programme in the Faculty of Law of the University of Turku. Since I am a teacher of German as a foreign language for specific purposes, my research focuses on aspects of teaching legal German, especially in regard to questions of course design. Thus issues of conflict and partnership in the Finnish-German context, which are relevant to this conference, are approached from a pedagogical-didactic point of view.

Legal practitioners deal with conflicts, especially when working across legal cultures through language. From the teaching perspective the question arises as to whether legal conflicts should play an essential role in syllabus design. For that reason, conflicts are examined more closely in regard to a possible typology: What kind of problems appear? What are the reasons for the problems? In terms of methodology, information was collected in semi-structured interviews with professional practitioners so as to enable the teaching practice to fulfill more concretely the essential didactical task: What has to be taught, so that legal German courses in the Faculty of Law meet actual professional needs?

To localize this study in LSP research in a more general sense, its context will be briefly outlined:

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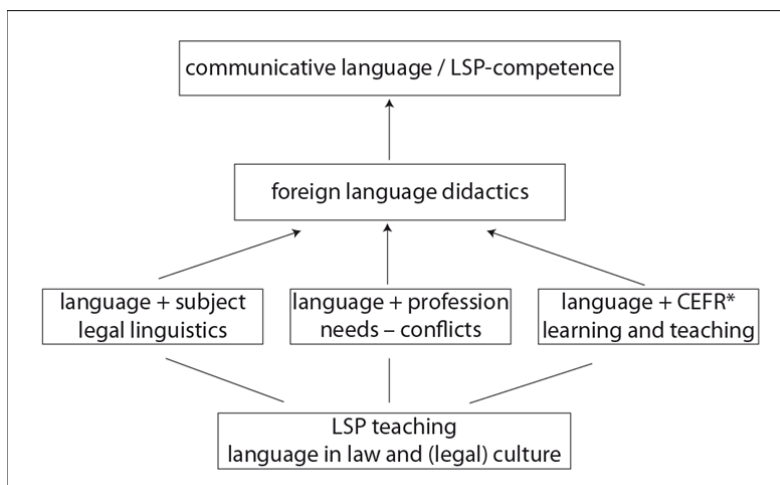


Figure 1. Common European Framework of Reference for Languages: Learning, Teaching, Assessment (Council of Europe 2001)²

The starting and ending point of this inquiry is the LSP teaching of legal German at the Faculty of Law of the University of Turku. Language in LSP teaching has been conceptualized in relation to three fields of reference. These are subject, profession and the *Common European Framework of Reference* (CEFR), to which research-orientated LSP teaching refers.

According to a modern LSP linguistics approach underlined here by Fluck, the understanding of language in the subject (*Sprache im Fach*) is a modified version of language in the law and in (legal) culture.³ This concept has to be further differentiated, so that in the case of legal language it is not limited to a means of communication within the subject, but the subject functions rather as the institutional framework of language.⁴ In addition, legal language – as well as law – is always culturally bound, because understanding law necessarily requires conceptualization in its particular historical, political and social contexts.

Following the above-mentioned concept, legal language teaching is linked to the subject through legal linguistics, which has itself arisen from common research interests in linguistics, legal theory and legal interpretation, through investigation of the communicative aspects (*Sprachlichkeit*) of law. Jurists work with, at and through legal texts.⁵

Language, in the teaching and learning context, is another reference field of the framework in which the CEFR plays a decisive role by providing a common basis for teaching development. The CEFR's main relevance is its explicit description of objectives, content and methods, which provides guidelines and tools for the elaboration of language syllabuses and for the assessment of learners' language proficiency. The third field of reference is the professional context, relating teaching to working life or, in other words, in accordance with the CEFR, to the occupational domain as the specific context of the language use.

² The Council of Europe (2001).

³ Fluck, Hans-R. (1998) *Bedarf, Ziele und Gegenstände fachsprachlicher Ausbildung*. Tübingen: Narr p. 949.

⁴ Wiesmann, Eva (2002) *Rechtsübersetzung und Hilfsmittel zur Translation*. Tübingen: Narr p. 14.

⁵ Müller, F. (1999) *Warum Rechtslinguistik? Gemeinsame Probleme von Sprachwissenschaft und Rechtstheorie*. Berlin: Duncker p. 31.

These three fields are set out here as the guidelines for foreign language didactics, which implements the requirements of the subject, the profession itself and language learning into teaching practice. The understanding of LSP teaching rests on the ultimate assumption that the aim of legal German courses is communicative language competence in the field of law. The language learner should be empowered to act in a professional environment using specifically the thinking, linguistic and acting patterns of the subject.⁶ Communicative language competence is also defined by Baumann as the ability to produce and receive specialists' texts:

... Fachtexte als interkulturell, sozial, situativ und funktional bestimmte, sachlogisch gegliederte, semantisch strukturierte, linear-sequentiell sowie hierarchisch organisierte sprachliche Einheiten zu produzieren bzw. rezipieren.⁷

This definition integrates the use of texts and thereby relates teaching to legal linguistics as well as to legal studies, since texts are the basis, substance and outcome of juridical work.⁸

Against this theoretical background this article deals with the professional needs ascertained and studied earlier in relation to conflicts and their importance for LSP teaching. Thereby attention is primarily paid to the data collected from lawyers engaged in commercial law. In the following, methodological matters will first be dealt with, and then the presentation of selected findings will be made.

2. Methods and Realisation

To my knowledge, for Finland no detailed inquiry into the explicit needs concerning German in the legal profession has ever been carried out. The needs analysis of foreign languages in working life (2005) done by the University of Helsinki includes jurists, but it is too general and is not related to teaching practice so as adequately to serve the present study.⁹ Moreover, legal professionals were the least active group of respondees in the University of Helsinki survey.

Because the already-existing empirical data from an earlier stage of this ongoing research project will be integrated here, a brief reference to this data will be given as well. Empirical information was collected for the first time in 2008 in semi-structured interviews with ten Finnish jurists in Turku and Helsinki, who, according to their own information, use German in their professional communications. In 2009-2010 the data base of this needs-analysis was supplemented by three additional interviews in which legal conflicts were explicitly made the subject of the inquiry. Altogether nine lawyers, one judge and one consulting official were involved; the gender relation was nine males to two females. The interviews with the eleven jurists were recorded as audio documents and later transcribed, whereas two follow-up interviews with jurists who had been involved in the previous research were carried out by telephone without being saved as audio data. But the jurists' answers were recorded

⁶ See *supra* note 2. Denk-, Sprach- und Handlungsweisen.

⁷ Baumann, Klaus-Dieter (2000) *Die Entwicklung eines integrativen Fachsprachenunterrichts – eine aktuelle Herausforderung der Angewandten Linguistik*. Tübingen: Narr, p. 159.

⁸ See. Busse 1992, Müller 1999.

⁹ Karjalainen, Sinikka; Lehtonen, Tuula (2005) *Että osaa ja uskaltaa kommunikoida*.

Akateemisissa ammateissa tarvittava kielitaitoöntekijöiden ja työnantajien kuvaamana. Helsinki: Helsingin yliopisto, kielikeskus.

afterwards in written form. The ten earlier interviews are included in this study because they contain valuable information that has been confirmed by the new data.

Semi-structured interviews were chosen to avoid misunderstandings by queries or further questions and to get all the questions answered. In particular, the results are comparable due to the fact that the interviewees answered the same questions.¹⁰

The subjects of the questionnaire-survey are typical legal problems between Finnish and German contracting parties. This, in particular, means differences of interpretation between clients, the reasons why problems arise and how they might be prevented. Thus, it appears that conflict is accentuated in this context even before recourse to arbitration, although arbitration processes have gained popularity in Finnish-German relations. Nonetheless, experience has shown that arbitration is not always an adequate means for solving problems in a satisfactory manner for all sides.

The interviews are a practical tool of investigation because jurists willingly give detailed answers about confidential issues while still guaranteeing their clients' anonymity. To obtain authentic material from arbitration processes would clearly demand a larger scale of research which would be enormously time-consuming. The investigation here does not claim to be exhaustive, yet it provides concrete data about legal conflicts for teaching purposes so courses can be developed that are closer to professional needs and that give a stronger impetus for the learner. Furthermore, the university is under pressure to elaborate new courses, update study programmes and, in general, work with research-based material, although human and monetary resources are limited. It is thus legitimate to work with quantitatively limited empirical material.

The following approach constitutes the basis for the present study, which has been influenced by a teaching experience of ten years and the results of the previous study:

- Conflicts appear mainly in labour and commercial law, because legal German is needed most in these fields of law.
- Disputes that arise are preferably subjected to arbitration and ordinary court proceedings are excluded, because it is predominantly small and middle-sized companies that are involved in Finnish-German commercial relations.
- Communicating in foreign language includes a risk of problems arising. Problems are to be expected in connection with reading comprehension and oral communication, so these are the most important language proficiencies.
- Defective legal and culture knowledge may also, due to a lack of these skills, create conflicts.

3. Findings

The data collected in this study generally confirmed the results of the previous study, but allow further differentiation and modification of the conclusions. With respect to didactics especially, the elucidative examples given by the lawyers are valuable because theoretical

¹⁰ Long, Michael H. (2005) *Methodological issues in learner needs analysis*. Cambridge: University Press, p. 37.

assumptions can now be more decisively related to professional practice, or, in other terms, didactic work is empirically underpinned.

The answers are individual, ranging across a whole spectrum, and therefore do not allow systematic categorisation. For example, on the one hand typical conflicts cannot be distinguished, and on the other hand typical matters in dispute are listed. These individual answers do not contradict each other but rather supply concrete examples to be implemented in teaching and so form a meaningful whole. With respect to the description of cultural differences and the role of legal as well as cultural knowledge, information is congruent throughout.

3.1. Matters in dispute

For legal professionals matters in dispute are at first difficult to distinguish, because their everyday routine consists of conflict situations in one sense or another: legal experts either have to act beforehand to prevent conflicts or, more often, are involved in solving already-existing problems that normal citizens have got into involuntarily. This response corresponds to the sociological view that law always deals with (social) conflicts and controls behaviour in situations of conflict.¹¹

On closer inspection, problematic situations can be determined in the field of commercial law, which is one of the domains in which German is needed most. Typical cases arise in conjunction with the delivery of goods if, for example, a refining installation for the paper industry is malfunctioning. As possible consequences, legal actions like a complaint, a demand for the correction of faults, or withdrawal from the contract might follow. Issues concerning exported log houses the quality of which does not coincide with the expectations of the German customer are also common. Such cases usually end in a settlement. Furthermore, it is not only product quality that is a matter of dispute but copyright questions as well.

In connection with the European integration process, conflicts may also occur in the field of public law. So it may happen that a German client feels improperly treated when the City of Helsinki, in accordance with EU legislation, invites tenders from all over Europe for a road construction project and turns to a lawyer to take his or her case.

In the field of private law divorces (which are quite frequent), marriage settlements and inheritance quarrels between Finnish and German parties involve legal experts. Inheritance quarrels may extend into the field of company law, if, for example, a company is to be involved in an inheritance suit. Typical cases in the private sphere are Finnish summer cottages bought by Germans and imported second-hand cars from Germany that sometimes fall apart in a literal sense.

Problems in the field of criminal law play only a marginal role for the jurists interviewed for this research, who mainly work as experts in corporate law. If a conflict is dealt with in the court, usually damages are claimed.¹²

¹¹ Luhmann, Niklas (1981) *Ausdifferenzierung des Rechts*. Frankfurt: Suhrkamp, p. 92.

¹² According to German law, damages cannot be claimed in a trial but have to be claimed in a separate civil action, whereas in Finland the criminal and civil cases are joined in one lawsuit.

To refer to a more abstract level of description of the legal disputes, it is the actual management of legal issues that raises a central problem. The legal side is not seen as causing problems, which lie in the way the issues are handled. The parties may draw different conclusions from negotiations: the Finnish partner assumes that all issues are settled during the negotiations, but the German partner may afterwards send a letter that begins: "The parties agree as follows..." in an attempt to put down in writing how he/she has understood the oral agreements. This behaviour creates irritation at least on the Finnish side and definitely brings a moment of uncertainty into the business relationship. In Finnish law oral agreements are as legally binding as written ones.

Again, differences in written business correspondence can be mentioned as being problematical. The Germans may produce written documents, unlike their Finnish partners, if they see a benefit for themselves in respect of gathering, for instance, supporting evidence that can be used later. The German style of written communication is characterised by writing in due time, concentrating on essential information and sticking to polite conventions of communication. On the Finnish side the absence of formality, not acting in due time, and incorrect expressions in the foreign language which, to German understanding, might seem impolite, could give rise to problems.

There is something substantial behind these different ways of behaving, because they put into concrete form some basic principles that have been stated by the interviewees. In general, Finnish behaviour – and also decision-making – are orientated toward the pragmatic, whereas Germans generally act in a more theoretically-orientated way by clearly bringing forward their principles and adhering to them. Germans are willing to accept compromises as long as they are supported by basic arguments. If reasons are not given, Germans remain unconvinced and are motivated to take their case before the court, mostly because they feel insulted. Often they suffer financial loss when they come up to the North to try their best in a lost cause. This can be explained by the fact that Germans strongly believe in their own legal system and assume that other legal systems work in the same way. Thus, conflicts in legal contexts may certainly arise because of different ways of thinking that sometimes cause the parties to fail to communicate with each other.

3.2. Reasons for conflicts

3.2.1. Legal knowledge

Laypeople usually get involved in legal matters against their own will. The reasons for this may be a lack of knowledge of the other legal system or ignorance of recognized customs of trade or even of contracts. Such a misunderstanding of substantial elements definitely courts a risk of disappointment. But legal experts may also face conflicts through lack of a certain technical knowledge in a case; merchants, seen at least as legal semi-professionals, also need professional advice. Even if they enter into a contract concerning important legal issues, the terms of these contracts are not always expressed accurately and thus can lead to conflicts. A concrete example is given below:

A Finnish and a German entrepreneur enter into contract concerning the delivery of goods and agree that German law is to be applied. The Finnish customer brings an action against the German vendor because the particular machine is malfunctioning. The Finnish party demands the cancellation of the contract and receives a negative answer from Germany. The German

partner argues that, as laid down in the contract, Germany is the venue for all disputes and therefore German civil law is to be applied. But surprisingly for the German court and the lawyer involved, the UN Convention on Contracts for the International Sale of Goods (CISG) is the only relevant norm, because German law has not been explicitly excluded. The German side was not at all aware of this fact, and so did not realize that the CISG is as much a part of German as of Finnish law. Finally, the rescinding of the contract becomes possible.

Even if legal questions have been thoroughly investigated beforehand, face-to-face negotiations have to be managed. In situations in which the parties meet for the first time and do not know each other, conflicts easily arise. In such cases problems appear at the cultural level, but are rooted in differences between the legal systems: to shake hands on a contract at the end of negotiations is sufficient, to the Finnish understanding, whereas German law still requires a written document. Often, however, the German document contains something different to what the Finnish side believes has been agreed on.

3.2.2. Language

Language problems are difficult to systematize, for each language user has his/her own individual skills. In general, typical features of legal German can be localized at the morphological, semantic and grammatical level. Such features are, for instance, complex participle constructions or genitive objective structures. On the other hand, legally differing concepts in both languages that appear superficially to be identical have to be detected to avoid misunderstanding. Interpretations of legal terms in relation to the legal system in question are not so much seen as linguistic problems but actually arise in the field of specialized knowledge.

Obviously lawyers do not regard these demanding linguistic features as something disturbing. This is hardly surprising and might be explained by the fact that the Finnish jurists' proficiency in German is at the B2 – C1 CEFR levels of proficiency in respect of reading comprehension skills¹³. Further studies could investigate whether or to what extent an absence of language skills is especially compensated by specific knowledge, because teaching experience supports such a supposition. However, a highly developed language awareness and language competence can generally be explained by the fact that jurists work with and through language.

To avoid problems in legal German, English is also used in the Finnish-German context. English functions as a lingua franca and is often the only common language of the parties. As a result of the Anglo-American influence, parties may negotiate and enter into contracts in English. Finnish partners like to follow US standards in contracts and are thus including an increasing number of clauses. From the German point of view, this extends the document in an unnecessary way, which annoys the German partners. Besides this, the danger very often arises that both parties may sign a contract in English without actually understanding its content.

¹³ The jurists were asked to provide a self-evaluation in respect of the CEFR levels of proficiency in the interviews.

3.2.3. *Cultural differences*

From the above, it can be concluded that cultural problems are significant in the Finnish-German context when the parties are communicating with each other. Cultural differences as such do not cause conflicts, but the ignorance of the other party's culture may.

Differences exist in ways of thinking and behaving. German clients are characterized as aggressive, offensively raising legal issues and actively discussing them. Within the German discourse culture, it is polite to listen "actively": the listener expresses interest by nodding, making short affirmative utterances, talking simultaneously, and even interrupting the other party. For something important, Germans often repeat themselves within the conversation or negotiations, which may irritate the Finns, who tend to utter the essentials only once. Finns let the other party talk until they are finished, which may upset the Germans.

Finnish clients are in general more reserved and open to compromise, and they do not insist on their rights as Germans like to do. If the matter of dispute concerns labour law, however, the Finnish partner exceptionally insists on his or her rights.

As with clients, aggressive behaviour is also allowed for lawyers: Germans may provoke and insult the opposite party. Nothing like that is evident in Finnish legal discourse.

Cultural conflicts are also seen in the work context, when German companies perform in Finland as employers. German employers insist on hierarchies and going through the proper channels, whereas Finland is known for its low level of hierarchy. A German discount-entrepreneur who performs in several European markets may serve as a fitting example of a clash in working cultures where the result is that both sides feel misunderstood. It is true that only a few cases are known in which a clash of working cultures has been the source of legal conflicts. From the data, however, it can still be concluded that the work context contains the potential for conflict.

3.2.4. *Conflict solving*

Conflict solving in general is of marginal interest in this study because the purpose of teaching is localised in its task of preventing conflicts from arising. The issue of arbitration has, however, been brought up in this text, and consequently the presumptions concerning the significance of arbitration must now be reviewed.

At a general level, arbitration procedures are nowadays popular as an alternative for sorting out legal problems and might be essential when contract partners otherwise face unsolvable difficulties. At a concrete level, arbitration procedures play a tangential role in Finnish-German legal conflicts, because they have not always proved to be an adequate tool for handling legal problems. The initializing costs are often so great that they are hardly affordable to smaller and middle-sized companies, who function as typical trade partners. So arbitration agreements have to be carefully considered to minimize possibly severe financial risks for the parties.

3.2.5. Prevention

As preventive measures have been mentioned, it is worth pointing out that the legal competence of both systems allows the sorting out of legal issues beforehand. The legal work has to be done carefully with a thorough understanding of the texts in question.

Of even greater importance than the subject-specific side is cultural knowledge as the crucial element in this intercultural constellation. To gain the necessary cultural competence, multicultural experiences and foreign language learning are seen as key means:

Have a look at the cars they drive, how they talk to their dogs or read German literature – then you will be able to understand legal matters. (Respondee 11)

Not to be restricted to one's own thought-patterns helps to develop intercultural sensitivity and understanding in border-crossing activities: "If you know how they are wired it is a pleasure to deal with a German." (Respondee 10)

4. Discussion

Do legal conflicts play a constitutive role in legal German courses, German taught as a foreign language? That was the initial question for this study. To answer this question in general there is no special need to emphasize conflicts in teaching. As reading comprehension is one of the most important linguistic proficiencies, legal texts and text work form an integral part of any course.¹⁴ Company and labour law, which are the fields of law that are chiefly connected with Finnish-German relations, are now examined from the point of view of conflict. These fields of law, together with the type of contracts connected with them, should be key topics in teaching.

Apart from contracts and the decisions of the highest courts, academic texts do have great significance as a relevant type of text for learning about the way of thinking in respect of legal issues and behaviour on the other side. Such texts can be taken from German textbooks that are appreciated by Finnish students because of their didactic qualities. Through the use of authentic text-material language teaching also mediates legal knowledge. In this context, knowledge of the Finnish legal system, or a framework of world knowledge in general, helps the students comprehend the German legal system, due to the fact that Finnish law has been strongly influenced by German legal culture.¹⁵ On the other hand, the study of academic texts can at the same time extend the knowledge of the Finnish legal system by revealing the historical layers of the German influence in the past. The awareness of these connections allows a deeper understanding of one's own legal system as well.

A didactic approach to texts that involves legal linguistics ensures the detection of potential conflicts and enables the learner to acquire equally well both linguistic and legal knowledge. To support legal learning, cooperation with law teachers is occasionally practised and needs

¹⁴ See Meyer, Almut (2010) Wozu brauchen Juristen Deutsch im Beruf? Eine Bedarfsanalyse. In Hyvärinen, I. & Korhonen, J. (eds.) Frankfurt: Lang (forthcoming).

¹⁵ See Busse, D. (1992) *Recht als Text*. Tübingen: Niemeyer, p. 36 ff. Busse talks about *Wissenrahmen*, translated here as "a framework of world knowledge".

be further elaborated, for learning motivation benefits from such interdisciplinary arrangements. Such language and content-integrated courses can be individually and flexibly organized, because the integration of language and legal learning depends on several factors such as the level of language proficiency, legal knowledge, human, financial and time resources.

The significance of cultural differences in regard to legal problems is underlined in specialized foreign-language teaching. Issues such as ways of behaving do not always interest law students, because they often regard everyday cultural items as not being relevant to their legal studies. This finding complements the outcomes of the earlier study, in which the importance of general oral language skills and mediating competence have been emphasized. Cultural competence can now be conceptualised as a task which is conflict-based and action-oriented. Contact situations with the other party such as negotiations can easily be set up and trained for in simulations.

Culture, in my opinion, has so far played an inferior role in specialized language teaching, and where its significance is acknowledged, a profound conceptualisation of culture for teaching purposes is often lacking. Therefore, it is necessary to sketch out a method that integrates culture into the teaching of legal German.

5. Conclusions and outlook

The relationship between language and culture or law and culture is well known: the term 'culture' is defined in manifold ways in various disciplines. Another fundamental concept that is closely connected with law and culture is text as the basis, means and result of legal work. Legal work is characterised by a dynamic interpretation of texts, which means that interpretations of rulings, for example, are directed to the future and can change depending on, for instance, time, the interpreting institution, or the interests concerned. Changes in interpretations can, in an exemplary way, be followed in court decisions when the judgment of the lower court is overruled.

My concern here is not to add another definition of culture in the legal context, but rather to apply a holistic concept of legal German teaching that includes culture as an integral part of the teaching and not merely adding it to existing parameters like language and culture or law in culture: in other words, the idea of interpreting legal texts as culture.

In this context a development is in process from a hermeneutic concept of culture that corresponds at the meta-level of culture to the concrete level of text work. Interpretation functions here as the relevant connecting link between legal sciences and linguistics, subject and language teaching. Legal texts are interpreted in terms of certain aspects that derive originally from an anthropological point of view and have been elaborated earlier for language teaching purposes.¹⁶

¹⁶ See Meyer, Almut (2000) *Mediating cultural knowledge through music cultures in teaching German as a foreign language*. Jyväskylä: unpublished licentiate thesis.

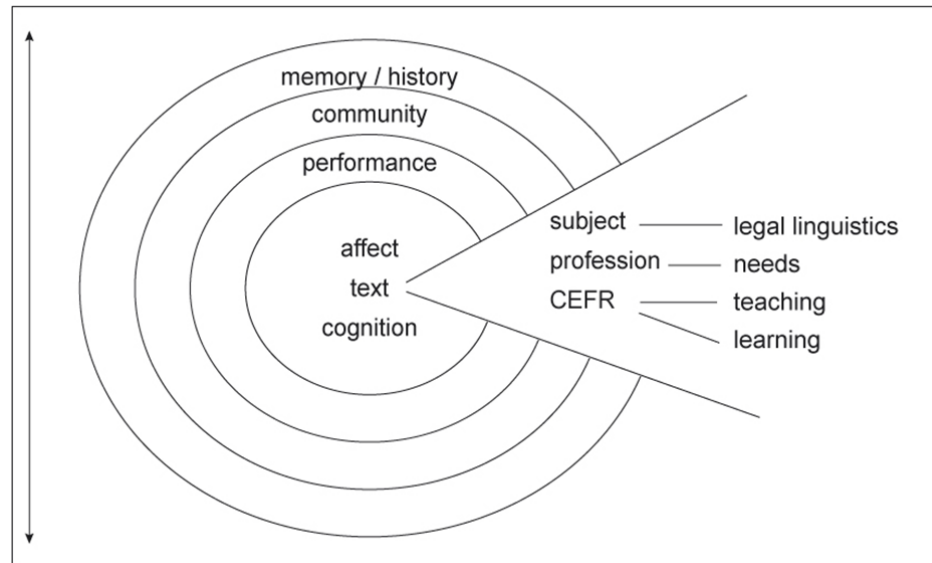


Figure 2. Model of interpretation of legal texts as culture

Culture comes into being through the permanent reading of phenomena that surround us in life. In general, we receive information and interpret it with regard to cognitive aspects, its appearance, the community we belong to, our memory and history. In a continuous process of interpretation relations between individuals and their surroundings are constructed. These relations can be understood as a network of interpretations, understanding culture as the ongoing process of constructing meaning. This idea is summed up in the following quotation:

Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative meaning.¹⁷

Applying the model to texts, the process of interpretation starts with cognitive skills that are needed for reception and understanding. In this field, the constituents of the teaching interlock and serve as the didactic framework. Texts exist in different forms and contexts; they can be written, spoken or aural texts. They may be institutional or private texts like norms or contracts between private customers. Such reflections about the presentation of texts can be seen as rather formally descriptive, but actually they already put legal texts into a cultural dimension, because different text structures in German court decisions, for example, are to be understood as cultural differences.

The interpretation of texts in terms of reception and recipients locates them in a social context. The reader of a text is himself or herself a part of social communities which are culturally bound. So the way a text is read and interpreted is dependent, among other things, on prevailing collective conventions or a person's education. This interpretative process is again embedded in the wider context of memory and history. These aspects are represented here by a jurisdiction seen as the sum of text interpretation through time.

¹⁷ Geertz, C. (1973) *The Interpretation of Cultures*. New York: Basic Books, p. 5.

The significance of this model is not to provide “the correct interpretation” of legal texts, but to supply parameters to construct dynamic interpretations of texts and especially to make these processes of interpretation transparent. Furthermore, it allows us to understand legal texts of our own culture as well as those of another culture adequately. Then the inherent methods of legal sciences are used to understand texts and acknowledge specific cultural features.

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III CONTRACTUAL INDETERMINACY

Risks Leading to Misinterpretation of International Contracts

ALESSANDRA FAZIO, AMELIA BERNARDO¹

The aim of this study is to analyze juridical issues of a contractual nature emerging from commercial and sports legal texts (i.e., awards and contracts) in international settings, where it is assumed that a breach of contract is usually generated by and/or strictly linked to the problem of interpreting legal rules. Therefore, we will investigate a possible common ground of reflection between linguists and jurists on the urgent and crucial need for clear and coherent expression.

First, we will provide the theoretical background and the definition of “juridical interpretation”. Then, a descriptive linguistic analysis will be carried out on a limited corpus of international sports arbitration awards and contracts in order to evaluate the most frequent legal misunderstandings and the various implications of misinterpretation. Finally, concluding remarks will point out the tendency of jurists towards: 1) strictly disciplining all details in the negotiation relationship, and 2) using standard contracts to achieve this. However, in both cases, there is still a high risk of internal contradiction and misinterpretation.

1. Introduction

In this paper we address the problem of interpretation in specific legal texts dealing with juridical issues of a contractual nature: international commercial contracts and sports arbitration awards. This is a first attempt to investigate such subject matter from both a linguistic and juridical point of view. For this reason this paper is the fruit of a collaboration between two research institutes: Centro di Ricerca Applicata in Diritto d’Impresa (CERADIS) - LUISS “Guido Carli” and Università degli Studi di Roma “Foro Italico”- Research Unit of Rome within the PRIN national project “Tension and Changes in English Juridical Genre”.

2. Theoretical background

It is essential to describe the theoretical background and underlying connections to the problem of interpretation in juridical contexts. Considering the results achieved in a previous study on significant frequency distribution of key concepts in the sports arbitration awards corpus, we started to investigate the problem of interpretation, comparing data from a limited and specifically selected corpus related to the language of contracts. International sports awards dealing with contractual issues and contracts were selected and analyzed. We then focused on the definition of juridical interpretation to establish its essence and its application to legal texts. Finally, a joint effort between jurists and linguists will be applied to the problem of clear and coherent communication in legal texts.

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2.1. Key concept distribution in sports-related awards corpus

From the results achieved in the previous study mentioned above, the data showed that the two main recurrent issues in sports disputes are *doping* and *breach of contract*. Quantitative statistical analysis was undertaken to establish and compare the significant frequency of key words and concept distribution (in terms of keyness) between Court of Arbitration for Sport (CAS corpus) awards and European Court of Justice (ECJ corpus) judgments.

The data in Figure 1 show the recurrent trend of representing the problem of interpretation in terms of keyness. From the statistical analysis in terms of keyness, the difference between *questions of fact* and *questions of law* clearly emerges: namely, *doping* represents a *question of fact*, while *breach of contract* is a *question of law*.

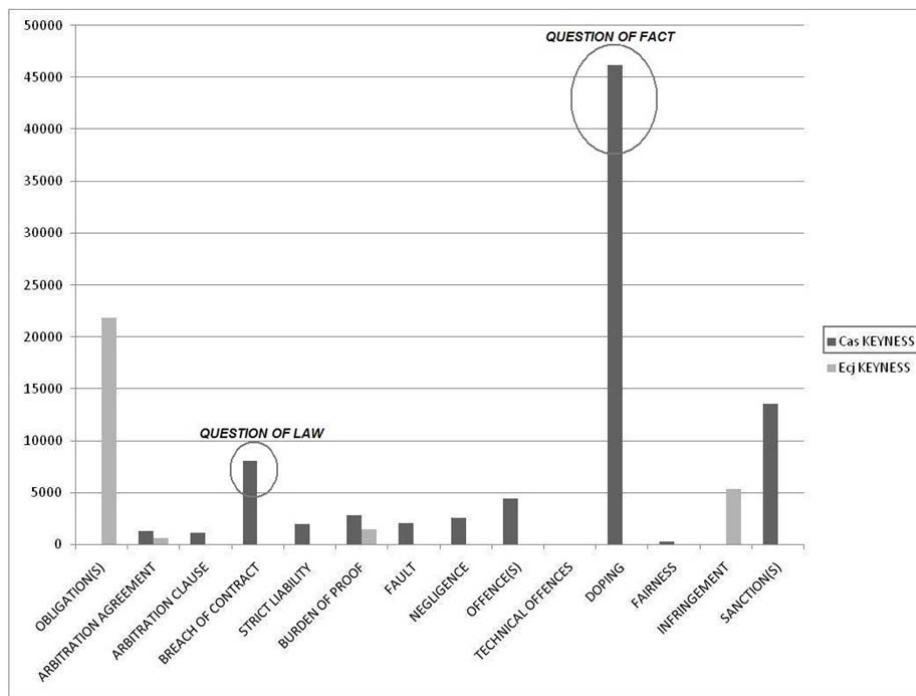


Figure 1. Question of fact and question of law emerging from a statistical analysis in terms of keyness.

From these data and for the purposes of this study, we decided to focus our attention on sports disputes of a contractual nature so as to compare them with commercial/contractual international issues in order to verify and evaluate to what extent failures of comprehension due to language interpretation affect “judicial failures”.

The most frequent legal issues here taken into account are linked to cases of *breach of contract* that are strictly related to the issue of the currently accepted interpretation of the rule of law. The contract, on the other hand, is a “legal contract” intended to regulate legal relationships through legal norms. Taking into account that the rule of law or norm stems from the contract and expresses the interpretation of the intent to negotiate legal relations (the contract or “legal contract” is the normative source between the parties), we intend to emphasize that a possible common ground of reflection between linguists and jurists is urgently needed and crucial to effective communication.

2.2. Legal reasoning and its implications

Being aware of the distinction between the *rule* or *norm* in *civil law* and in *common law*, where the former is the product of a deductive syllogism while the latter is based on reasoning by analogy, we will follow legal reasoning as a method of application and interpretation of law.

The jurist's reasoning can be represented in his/her conclusions as a syllogism, the so-called "juridical syllogism".² In fact, both legal acts and judgments are generally structured as follows: minor premise, major premise, and conclusion respectively representing facts, legal rule and decision (in the case of a judgment or "formal judgment") or conclusion (in the case of an "act of parties"). The judgment is the product of a logical deductive process through a major premise (abstract rule) and a minor premise (concrete facts) leading to the conclusion (that is, the final decision and/or judgment).

In Vandeveldel's³ analysis, "In the legal reasoning, the major premise states a rule of law applicable to a class of situations described in the factual predicate, the minor premise characterizes a particular situation as either satisfying or not satisfying the elements of the factual predicate, and the conclusion states whether the general rule has therefore been shown to apply to the particular situation (p.67)".⁴ This basic model of syllogistic reasoning assumes that the lawyer can apply the law to the facts by reference solely to the language of the legal rule, an approach that is sometimes called textualism (because of the exclusive focus on the text of the rule) or formalism. In effect, the lawyer examines the words of the rule and attempts to decide whether the general facts set forth in the rule embrace specific facts of the client's situation.

The formal properties of the syllogism ensure the validity of the deduction and the demonstrative value of reasoning. However the jurist's reasoning is not limited to the "syllogistic technique" and its formal properties are not exhaustive in that they do not fully express the essence of the jurist's interpretative approach, which consists of premise *re-construction*: the "law" must be distinguished from the "rule of law" applied to concrete situations. The latter, the rule of law, is the product of the process of interpreting written texts, i.e., the law. In other words, the rule of law is the jurist's interpretation of the law. The law and its provisions are "meaningless" unless the interpreter attributes meaning to the content. The law is a sort of empty storage box to which the interpreter has to give meaning by "filling" it with the content. In textual terms, law without interpretation has no implicit

² Visentini, Gustavo (2008) *Lezioni di teoria generale del diritto*, Padova: Cedam (Wolters Kluwer Italia), pp.130-138.

³ Vandeveldel, Kenneth J (1996) *Thinking like a lawyer: an introduction to legal reasoning*, Colorado: Westview Press, pp. 67-68.

⁴ "That is, the major premise announces a rule of law, the minor premise describes the facts of the client's situation, and the conclusion states whether or not the right of duty described in the rule of law has been demonstrated to exist under the facts of client's situation. [...] having formulated the major premise the lawyer must next formulate a minor premise that characterizes the facts of the client's situation. The minor premise characterizes the facts as either satisfying or not each of the elements of the factual predicate of the rule. [...] One may think of the lawyer's treatment of the facts as a process of categorization. The rule creates a category of facts that gives to a legal consequence. The lawyer must decide whether the client's situation is included in the category or excluded from it." See *supra* note 3.

meaning. The rule of law is not developed by the legislator; it is always re-created and re-constructed during its application.

In conclusion, the jurist's reasoning is an interpretative process.

2.3. *The definition of juridical interpretation: what does it consist of?*

Many different theories of interpretation have been developed over the years, and, although this is not the main object of the current study, we must emphasize that this investigation is based on the concept of interpretation as juridical argumentation, quite distinct from the two credited theoretical extreme positions known as *cognitive* or *skeptic* theories. An essential reference is Perelman and Olbrechts-Tyteca's *Treatise*⁵ on juridical argumentation, where law is considered an "argumentative" discourse and, consequently, argumentation is the study of discourse techniques.

From this point of view, the rule applied to the case in question is never evident: each rule or provision, even the most seemingly obvious, can be "read" in more than one way as illustrated in the classic example⁶ of a statute that bans vehicles from a park obviously intended for cars. We might argue about the ambiguity of the statement "No vehicles in the park." What does the utterance mean? Does "No vehicle" mean "no cars", or "no cars or bicycles"? What about an ambulance or a wheelchair for the disabled, a pushchair, or a skateboard? Does the prohibition apply to them as well? According to Castignone⁷, problems arising from vocabulary interpretation and related utterances are highly relevant in the practical application of norms and rules.

The debate about vehicles in the park raises the question of the ever-present potential for conflict between the letter of the law and what would otherwise be the best and fairest resolution of a legal dispute or the best answer to a legal question. In Hart's⁸ words, the so-called "open texture theory" of the rule of law refers to the potential vagueness and ambiguity of words. Therefore, due to vague language, polysemy and textual ambiguity, legal sources can be interpreted in many and various ways. These ambiguous characteristics of words also apply to the language of law, which is obviously a linguistic phenomenon with its own linguistic register.

It stands to reason that the clearer the text exposition, the fewer the number of possible interpretations. According to Hart's⁹ moderate position within the two above-mentioned extreme cognitive and skeptic theories there are "core" and "penumbra" areas of interpretation, as seen in the example of banned vehicles in the park: the "core" of this statute is clearly to forbid the entry of cars into the park, while the "penumbra" area might include bicycles, roller skates, skateboards, etc.; the "penumbra of uncertainty" surrounds all legal rules.

⁵ Perelman, Chaïm, Olbrechts-Tyteca, Lucie (2001) *Trattato dell'argomentazione. La nuova retorica*, Einaudi.

⁶ Hart, Herbert L.A. (1961), *The Concept of Law*, Oxford: Clarendon Press, pp. 121-144.

⁷ See Castignone, Silvana (1998) *Introduzione alla filosofia del diritto*. Bari: Laterza, pp. 5-10.

⁸ See *supra* note 5.

⁹ See *supra* note 5.

Hart postulates that a norm can convey different meanings, but interpretation has to be found through a careful reading and understanding of the text, which is itself a “guide” to the interpreter in his/her effort to decode the correct textual meaning (i.e., “guided” interpretation through the text itself). Hart defines the areas of interpretation respectively as “core” or light zones where textual meaning is clear, “penumbra” or grey zones where textual meaning is uncertain, and “dark” zones where textual meaning is obscure. The three areas indicate various degrees of interpretation ranging from more comprehensible juridical issues to those areas where the meaning is more obscure and difficult to identify. Hart’s theory emphasizes the open structure of law. In fact, legal language is characterized by general and abstract statements that can be applied to a wide variety of issues. Concrete facts are always more detailed and precise than norms. In order to apply a rule of law or a norm to real but varying facts, it is necessary to write abstract and general utterances so as to allow for more flexible application.

Clarity in legal texts is becoming more and more important in terms of efficacy in the law-making process, in terms of sources of law. The law is not the product of the jurist’s arbitrary interpretation; it is the product of the legislator’s pre-defined rule in either *civil law* or *common law*. Legal terminology as described by Sabatini¹⁰ appears to be highly binding according to the levels on the scale (see Table 2 below).

GENERAL CATEGORY	SUB-CATEGORIES & FUNCTIONS	SPECIFIC TYPES
Highly binding texts	Scientific Texts Knowledge function based on “true/false” criteria.	<i>Scientific demonstrations</i> (quantitative data analysis)
	Normative Texts Prescriptive function based on internal coherence and general principles	<i>Laws, acts, rules, etc.</i> (judgments, administrative acts, contracts, etc.)
	Technical Texts Regulative function based on needs analysis	<i>Instructions</i> (equipment, substances, medicines, etc.)

¹⁰ Adapted from Sabatini, Francesco (1998-1999) *Analisi del Linguaggio giuridico. Il testo normativo in una tipologia generale dei testi*. In M. D’Antonio (eds.), *Corso superiore di studi legislativi (ISLE)*, Padova: Cedam, p. 695.

Moderately binding texts	Explanatory Texts Explanatory function based on didactic purposes	<i>Handbooks, Essays, Encyclopedias</i>
	Information Texts Information function based on the intention to give useful information	<i>Newspapers and popularized texts</i>
Scarcely binding texts	Literary Texts Narrative function based on the sender's needs to express and compare his feelings and emotions in relation to existential questions.	<i>Literary texts: prose or poetry</i>

Table 2. Classification of Text Types

According to Sabatini, texts may be classified into three macro-areas based on the degree of binding rigidity imposed by the author on reading interpretation.

A joint effort between jurists and linguists is required if a contract is to be formulated by the jurist, legislator and private parties. It must be a clear and thorough expression of legislation constituting a 'binding law' between all parties.

3. The aim of this study

It was decided after this experimental joint experience that the specific setting of international contractual issues in the field of sport should be redesigned.

The analysis began with the critical and sensitive aspects of negotiation relationships exemplified in a series of arbitration awards. Some recurrent juridical problems were recognized as well as the expository techniques most frequently used by jurists during international contract drafting in order to prevent misinterpretation.

With regard to the juridical issues, two main issues are involved: a) defining problems that can be paraphrased as problems of synthesis, and b) identifying the legal source, i.e., the applicable law.

4. Study path: materials and method

A specific and limited corpus of international sports awards dealing with contractual issues was collected from the Court of Arbitration for Sport (CAS) archives dating from 1996 to 2010. A descriptive linguistic analysis was carried out on the selected corpus to detect and analyze legal rules and issues involving problems of interpretation. From the analysis of our award corpus, we identified comprehension failures due to language misunderstanding that caused “judicial failures”. In other words, we found that the most frequent legal misunderstandings and the crucial problems they caused were related to misinterpretation. We recognized and detected that the main risks leading to linguistic and legal misunderstanding are often due to contract drafting techniques (carelessness), above all when it becomes evident that little attention has been paid to the criteria of rhetoric, organization and accuracy in legal discourse such as **communicativeness** (clearness), **adequacy** (appropriateness), **coherence** and **synthesis**.

4.1. *Galatasaray vs. Frank Ribery*

The following example (1) has been taken from the disputes between the Turkish team Galatasaray SK and the football player Frank Ribéry. Linguistic vagueness, ambiguity and lack of clarity in the use of the modal *may* are evident in the delicate procedure dedicated to the “termination of contract” in art. 5.5 of Case (c). The vague use of the modal *may* highlights Hart’s¹¹ “penumbra of uncertainty”:

- (1) Should the player *have any demand* concerning his job he would have to follow the procedures below:
- He first shall notify the Club manager of his complaint
 - He *may* (5.5) (c) give written notice of his complaint to Club manager if:
 - Subject matter would not have been solved to satisfaction of professional football player within 10 days, player *may* lodge at the *Board of Directors* or *Committee of Club* and present claim in writing to *committee* or *sub-committee* or *secretariat*. The matter shall be taken in consideration and the Board or Committee shall convene and investigate the case within 2 (two) weeks after receipt of the notice.

Indeed, terminological vagueness due to the modal *may* is the respondent’s reference in the particularly delicate situation of termination of a contract. In addition, in case of lack of satisfaction and unsolved matters it is highly vague and unclear to whom the respondent should refer: the *Board of Directors*, the *club committee*, the *sub-committee* or the *secretariat*.

Example (1) also shows how detailed clauses are often inadequate, inaccurate and widely inapplicable.

Another example (2) taken from art. 5.1 of Case (c) that is at odds with internal coherence in contract drafting contains frequent cross-referencing between clauses, leading to useless redundancy and lack of synthesis:

- (2) 5.1. In the event that Club would be responsible of permanently *violating the provisions and conditions of this contract*, professional football player, after having utilized his rights

¹¹ See *supra* note 5.

specified in article 5.5 hereof, shall give a written notice within 3 days then shall be able to terminate this contract. Club, may oppose against such termination under the provisions of the articles 42 and 43 of the new regulation of FIFA related to statutes and transfers of professional football players.

4.2. Employment contract or private agreement

Here are further examples (3 and 4) taken from Case (a) Ionikos FC against football player “C.” where a letter sent by the Appellant’s President, Mr. Christos Kanellakis, to the player and filed in the FIFA file, expressed the following:

(3) “With this letter, **FC IONIKOS**, would like to inform you that after the **conversation** and **agreement** with Mr. Omar Medina, we propose a contract to you with the following terms:
The [duration] of the contract shall be three (3) years, thus 01/08/2005 – 30/06/2006. [sic]
The wages during the contract period shall be as follows:
1st year € # 80,000.00 # (tax free), plus 660.87€ x 14 (monthly salary),
2nd year € # 90,000.00 # (tax free), plus 660.87€ x 14 (monthly salary),
3rd year € # 90,000.00 # (tax free), plus 660.87€ x 14 (monthly salary).
During the contract period, FC IONIKOS shall provide you an apartment to stay and [airplane] tickets for you and your family (wife and three children).
BONUS (per year):
€ 10,000.00 if FC IONIKOS goes to UEFA Cup.
Moreover, all the above mentioned would be valid, provided that the football player passes through medical examinations and its results are passing and satisfactory”.

The parties signed two agreements in Greek, an employment contract (the “Employment Contract”) and a private agreement (the “Private Agreement”), which stipulated the following:

(4) The F.S.A. IONIKOS A.O., during the *validity of the contract* of collaboration, that is from 17.08.2005 until 30.06.2008, has the right to *break the contract without any financial claim from the part of the football player concerning the remaining installments of the contract or any other financial claim of any kind from this contract*. The above paragraph will not apply in case of a serious injury of the player or in case he is invited to play with his National Team.

The Employment Contract indicates August 17, 2005 as the date of the agreement; however, it is unclear when the parties actually signed this contract.

4.3. Lost in translation!

Another example of language misunderstanding leading to legal disputes is taken from Case (b) Ionikos FC v. football player “L.”. Here the legal issue is further complicated by the fact that the parties entered into negotiations culminating in the conclusion of two employment contracts, one written in English and another written in Greek. First, the parties signed an employment contract, an “English contract” in which there was no choice of applicable law and no arbitration clause. In addition to the English contract, the parties signed another employment contract in Greek, the “Greek contract”. It is unclear when the parties signed this contract. Under the Greek contract, their employment relationship was to last for the same

period of time, but under different financial conditions than those set out in the English contract.

In the following example (5), the English contract contained a clause related to termination of contract stating:

(5) *If terms of Contract do not apply, then the mentioned above terms in English shall be valid in case of legal dispute.*

In example (6) below, in the Greek contract, the parties agreed that the player would receive:

- (6) - an ordinary monthly salary of EUR 680 that would not be less than the monthly salary of an unqualified employee;
- a Christmas bonus (equal to one ordinary monthly salary);
- an Easter bonus (equal to half of one ordinary monthly salary);
- a vacation allowance (equal to the Easter bonus).
- allowances for rent
- two airplane tickets per year Athens-London-Athens.

Nevertheless, the Greek contract did not include any references to the remuneration terms for the second year of the employment relationship. In contrast, it contained the following reference (7):

- (7) In conformity with:
1. Law 2725/99, as in effect today.
 2. The Regulation concerning Registrations – *Transfers* (Regulation No. 1)
 3. The Regulation concerning the Professional Football Players (R.P.F.), as in effect today
 4. The K.A.P, as in effect today.
 5. The *Regulations U.E.F.A. – F.I.F.A.*, where they apply, in conformity with the decisions of the U.F.T. (*Union of Football Teams*).

A further issue at stake is not only interpretation, but also the basic understanding of possible problems, i.e., the use of contract translations. In this case, the lack of internal logic and coherence is, above all, due to the use of both English and Greek contract versions. In fact, the *English contract* was not replaced by but was completed by the *Greek employment contract*. Inferring from the related award, the lack of substantial contractual terms in the *Greek contract* allowed the Chamber to decide that the *English contract* could not be considered a substitution for the Greek contract but rather a complement to the *Greek contract*. Therefore, the *English contract* was considered the basis of the dispute in connection with the terms of remuneration contained in the *Greek contract*.

Furthermore, all the awards analyzed refer to general principles for all questions that are not regulated by FIFA rules. The cases we chose to examine demonstrate how there is an indispensable need for a worldwide, uniform and coherent application of the rules regulating international football. The most frequent issues regarding the application of the general principles are examples in which just cause and good faith have prevailed. In fact, the contract could only be terminated prior to the expiry date of the terms of the contract if there was “good cause”: this covers any situation in the presence of which the terminated party cannot in good faith be expected to continue the employment relationship. In this respect a grave breach of duty by the employee is a good cause. A valid reason is ascertained

according to the general principle of severity in all cases in principles of law and natural justice.

From the examples above, we can sum up by saying that careless and poor contract drafting is neither sufficient nor exhaustive; the judge (jurist) inevitably has to turn to general principles of law or to the juridical system of the specific country in question. It could be said that three main inadequacies were detected: 1) long contracts using frequent cross-reference techniques between the articles of the contracts, 2) confusing repetition and redundancy of contract conditions, and 3) vague terminology and the use of detailed clauses that were to the detriment of general principles. There is a greater risk of falling into such communicative misunderstandings when the lawyer adopts standard contracts or uses standard contract translations for specific situations rather than preparing pertinent and specific contracts *ad hoc*.

5. Concluding remarks and further development

The investigation has signaled the tendency of jurists to focus on detailed clauses in contracts for fear of appealing to general principles or to single national juridical systems, thus opening up the case at hand to further interpretation (Hart's dark zone). However, this attitude increases the risk of internal contradictions as well as difficulties in interpretation due to gaps and /or lack of coherence.

From this analysis sports contracts appeared to: a) willfully resort to irrelevant detail, and b) use stereotypes or translations inevitably facilitating instances of misinterpretation. Consequently, the higher the number of contract clauses, the greater the risk of misinterpretation. The lower the number of juridical concepts used in the contract, the **clearer**, the more **adequate** and the more **coherent** the contract will be.

In the future it may well be worth carrying out an in-depth study investigating a greater number of cases and comparing specific sports cases and general cases in jurisprudence to see whether legal reasoning can be compared between cases of similar subjects within different juridical systems (*common law* and *civil law*).

In addition, we believe that a linguistic tool such as a *vade mecum* for jurists may be useful in preventing or at least curbing language failures in contract drafting: in other words, a glossary of key concepts, encyclopedic descriptions of specific language features "in use", and "*ad hoc* glossaries" written for contract drafting.

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Indeterminacy vs. Precision in International Arbitration: The Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia

LELIJA ŠOČANAĆ¹

The paper will discuss instances of lexical indeterminacy (ambiguity and vagueness) in the English original and the Croatian translation of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, starting from the main deictic categories: space, time and person, and focusing on a crucial issue in the border dispute between the two states and its different interpretations. In addition, determiners, modifiers, modal auxiliaries and passive constructions will be analyzed in terms of vagueness vs. precision. The impact of English as the language of the Arbitration Agreement on the Croatian version of the document will also be discussed in terms of differences in the conventions of legal writing.

1. Introduction

International arbitration provides instances of mutual contacts and influences between different legal languages and cultures. Good examples are provided by analyses of the UNCITRAL Model Law as the basis of international commercial arbitration, which has proved to be fertile ground for analyses of legal discourse across different languages and cultures.²

In this paper, however, we will focus on a different type of international arbitration involving boundary disputes between states. There are incomparably fewer instances of this type of arbitration with respect to international commercial arbitration, the scope of which has been constantly growing due to globalization processes. The two types of international arbitration can be mutually related, since border disputes often result in legal uncertainty, which can give rise to international commercial disputes as well.

Since territory is one of the essential attributes of statehood, border disputes between states have existed throughout history, often giving rise to armed conflict. One could argue that in the modern globalised world and with processes of association at the regional level, state boundaries have lost their traditional, historical significance. As a result, they should no longer be regarded as lines of division, but rather links enabling the free movement of people and capital.

In spite of their permeability, however, borders retain their meaning today, defining the jurisdiction of a particular state on a certain territory. Rather than saying that we live in a world without borders, it could be said that, in the best of cases, we live in a world where borders are well-defined, as a precondition for legal and jurisdictional certainty, enabling, *inter alia*, the unobstructed flow of international commerce and investment.

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² Bhatia, Vijay; Christopher N. Candlin; Maurizio Gotti (eds.) (2003) *Legal Discourse in Multilingual and Multicultural Contexts: Arbitration Texts in Europe*. Bern: Peter Lang.

Jurisdictional uncertainty, on the other hand, results from ambiguities over whose rules and what legal protections apply to a particular transaction. It discourages shipping traffic and fishing where waterways or harbors are under dispute, investment in regions claimed by two or more governments, as well as the provision of services and infrastructure development in contested areas. The uncertainty that investors and traders face when jurisdictional boundaries are disputed contributes to greater risks, higher transaction costs, and fewer cross-border transactions.³

Moreover, territory may have symbolic, political, historical, or other kinds of significance that make it difficult for states to give it up. International boundaries involve elements of “mutual dependence and conflict, of partnership and competition.”⁴ On the other hand, well-accepted international border arrangements provide mutual benefits for states that may be very difficult for either state to realize through unilateral policies.

Regarding the question of borders, two divergent processes took place in different parts of Europe after the fall of the Berlin Wall. On the one hand, the boundary dividing Eastern and Western Europe gradually disappeared and the ideal of a united Europe ‘without borders’ became a reality. On the other hand, new borders were created following the disintegration of former communist states, such as the Soviet Union and the former Yugoslavia.

The establishment of the borders of the new states on the territory of the former Yugoslavia⁵ was based on the principle of *uti possidetis*, confirmed by the Third Arbitration Commission of the Peace Conference for Yugoslavia, the so-called Badinter Commission. The principle, which does not have the force of *ius cogens*, states that the lines dividing territorial units within former states should become the state borders on the date of succession. Both Croatia and Slovenia declared their independence on 25 June 1991.

The principle of *uti possidetis*, however, is applicable only to the land borders; the maritime borders could not be defined in the same way, since the maritime borders were clearly defined for the former state as a whole, but not for its constituent republics. As a result, the two neighbouring states have been unable to agree either on the border itself, or on the method of solving their dispute.

In this context, we should say that during the Yugoslav period the borders of the republics were completely permeable, with people often living on one side of the border and working on the other, owning land and property, and having friends and relatives on both sides. With the establishment of new borders, the way of life changed to a considerable extent. Moreover, when Slovenia joined the European Union, its border with Croatia came to divide not only two newly established states, but also the European Union, with its Schengen regime, from its non-member periphery.⁶

³ Simmons, Beth A. (2005) Rules over Real Estate: Trade, Territorial Conflict, and International Borders as Institution. *Journal of Conflict Resolution* 49, 823-848, pp. 827-828.

⁴ See *supra* p. 827.

⁵ Degan, Vladimir-Đuro (1995) Neka Pravna pitanja utvrđivanja granica sa Slovenijom. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1, pp. 1-13.

⁶ Zavrtnik Zimic Simona (2003) Constructing “New” Boundary: Slovenia and Croatia. *Revija za sociologiju* Vol. XXXIV, No. 3-4, pp. 179-188.

2. Provisions of international law

The obligation of states to settle their disputes by peaceful means is enshrined in Article 33 of the UN Charter, according to which:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The methods enumerated in the Charter range from those which are not strictly legally binding, such as negotiations between States with a view to arriving at an agreement, through enquiry by a Commission established by an international organisation and mediation involving a third party, to arbitration and judicial settlement, the latter two being legally binding and final.

In general terms, arbitration can be defined as “the determination of a dispute by one or more independent third parties (the arbitrators) rather than by a court.”⁷ The origins of international arbitration can be traced back to the Jay Treaty (1784) between the USA and the UK, which provided for the determination of legal disputes between states by mixed commissions. The Hague Conventions of 1899 and 1907 contained rules of arbitration that have become part of customary international law.

Consent to arbitration by a state can be given in three ways: 1) by inclusion of a special arbitration clause in a treaty, 2) by a general treaty of arbitration, which arranges arbitration procedures for future disputes, and 3) by a special arbitration treaty designed for a current dispute. The case at hand is an example of the third way in which a state can give its consent: a special arbitration agreement designed for a current dispute.

Under Article 3 of the 1982 UN Convention on the Law of the Sea, “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles measured from baselines determined in accordance with this Convention” (UNCLOS 1982). Under Article 15, the delimitation of territorial seas between opposite or adjacent states can be achieved by using the following methods: by agreement, by median line, or by some other line necessary by reason of historic title or other special circumstances.

3. The border dispute between Croatia and Slovenia

As already stated, Croatia and Slovenia could not reach agreement by peaceful means in accordance with the principle set forth in Article 33 of the UN Charter, as explained above. In 1991 both Slovenia and Croatia accepted the median line dividing the Bay of Piran as the maritime border. A year later, however, Slovenia claimed the whole of the bay and contact with the high sea based on the right of a maritime nation to access to international waters.

Slovenian claims are based on the argument that the country had free access to the international waters while it was part of Yugoslavia. Slovenian politicians have also

⁷ Martin, Elizabeth A.; Law, Jonathan (eds.) (2006) *A Dictionary of Law*. 6th ed. Oxford: OUP, pp. 36-37.

presented the concern that without a territorial connection with the international waters, Croatia could limit innocent passage to its ports, which would complicate Slovenia's sovereignty at sea and could cause economic damage. Because of these concerns, Slovenia invokes the principle of equity due to unfortunate geographic conditions.

Croatia, on the other hand, wants to solve the dispute through articles of international law, excluding the *ex aequo et bono* principle ('according to what is fair and equitable') on the inclusion of which the Slovenian side insists. A further point of dispute is whether this legal principle itself constitutes a part of international law or not since it has never been used by the International Court of Justice. The Statute of the Court provides that cases may be decided on the *ex aequo et bono* principle only where the parties agree to it. In the context of international commercial arbitration, Article 33 of the United Nations Commission on International Trade Law's Arbitration Rules (1976) provides that arbitrators shall consider only the applicable law, unless the arbitral agreement allows them to consider the principle of equity instead:

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. (UNCITRAL Rules, Art. 33)

This rule is also expressed in many national and sub-national arbitration laws.

Thus, both Croatia and Slovenia refer to the same international document as the legal basis for their claim: Croatia refers to Article 15 of the UN Convention on the Law of the Sea (1982), which defines a median line as the border:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.

The Slovenian side cites the continuation of the same Article:

The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances, stating it is applicable in this case. (Art. 15).

Furthermore, according to Article 13 of the above UN Convention, "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks", which would support the Croatian claim.

Thus, Croatia insists either on the median line or on retaining one third of the Bay of Piran, while Slovenia claims historic title over the whole bay, demanding contact with the high sea based on the principle of equity.

The problem with historical title is that both parties to the dispute are newly established states. Historically, the disputed territory belonged to the Venetian Republic until its fall in 1796. Between 1797 and 1805 it was under Austrian rule, followed by Napoleon's short-lived

rule (1806-1813) in coastal Croatia. After the Congress of Vienna the coastal area was integrated into the Austrian Empire (1814-1918). Between 1919 and 1947 it was annexed to Italy, and in 1945 it became part of the Federal Republic of Yugoslavia.⁸

Geographically, the Bay of Piran covers only 17.8 km² and its depth is between 11 and 18 m. Due to its size, the navigation of large ships is impossible, and it is an ecologically sensitive area. For its part, the Adriatic itself is relatively narrow, its length being 870 km, and its breadth around 159.3 km (or 86 nautical miles). The 1982 Convention recognizes 'the exclusive economic zone [as] an area beyond and adjacent to the territorial sea' 'not extend[ing] beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured' (Arts. 55 and 57). Accordingly, if Croatia and Italy both proclaimed their exclusive economic zones, there would be no high sea in the Adriatic.

Defining the delimitation of territorial sea in the Bay of Piran is made even more difficult due to the fact that maritime borders are usually defined as an extension of land borders. The land border between Slovenia and Croatia in this area is the Dragonja River, which is 28 km long and flows into the Piran Bay. The river has changed its course over time: there is a natural river bed and an artificial canal of St. Odorick which was built by Austria in 1905 to prevent frequent flooding. Over time, the canal fell into disuse so that during World War II the river returned to its natural course. The canal was reconstructed in 1952 to protect the nearby salt mines from potential floods. The area between the two river beds is between 2-3 km wide and it is very important for Slovenia because of the Portorož airport, which was built there. Thus, Slovenia claims that the border between the two states should be south of the artificial canal, while Croatia claims the natural river bed as the land border, defining the median line as the sea border between the two states. The controversy has given rise to strong nationalist feelings on both sides⁹.

Regardless of the unresolved border question, Slovenia joined the EU in 2004, while Croatia began its EU membership negotiations in October 2005. In December 2008, Slovenia blocked the opening of new *Acquis* chapters in the negotiation progress of Croatia, arguing that some documents, notably maps, which Croatia provided during its accession process, could prejudice a solution of the border dispute. Croatia insists that the border dispute is a bilateral issue and has no place in its accession process.

Finally, the Prime Ministers of both states agreed on a way of resolving the dispute. On 29 September 2009, the Slovenian parliament unblocked Croatia's EU accession negotiations with a vote in its committee on EU affairs. The arbitration agreement was signed by the Prime Ministers of Croatia and Slovenia on November 4, 2009 referring the border dispute between the two countries to an international arbitration tribunal. The Swedish Prime Minister and president of the European Council, Fredrik Reinfeldt, signed the agreement as a witness. The agreement was originally drafted in English and subsequently translated into Croatian and Slovenian.

⁸ Steindorff, Ludwig (2006) *Povijest Hrvatske: Od srednjeg vijeka do danas*. Zagreb: Naklada Jesenski i Turk; Institut društvenih znanosti Ivo Pilar. Goldstein, Ivo (1996) *Hrvatska. Europa. Svijet. Kronologija*. Zagreb: Liber.

⁹ Mazur, Nives; Činčurak, Biljana (2007) Međunarodnopravna analiza razgraničenja Republike Hrvatske i Republike Slovenije u Piranskom zaljevu. *Pravni vjesnik* 23 (1-2), pp. 221-246.

4. Determinacy and vagueness in legal drafting

The main aim of this paper is to analyze the language of the Arbitration Agreement, focusing on the tension between indeterminacy/vagueness and precision. Accuracy and precision are considered “fundamental characteristics of legal language”, resulting from the requirement for legal protection and legal certainty.¹⁰

It has been shown, however, that indeterminacy is equally important for legal style, especially in legislation, which should be general enough to include a wide variety of real life situations and circumstances and enable flexibility of interpretation. Thus the vagueness of normative texts is a result of a compromise between being determinate and being all-inclusive. Indeterminacy can be divided into linguistic and legal, and linguistic indeterminacy can be further subdivided into communicative and semantic.

Communicative under-determinacy refers to utterances which contain less information than the receiver expects and needs in a given situation. Semantic indeterminacy means that it is not possible to determine whether the sentence in which the semantically indeterminate element occurs is true or false in a specific situation.

A semantically indeterminate utterance may be ambiguous or vague. An ambiguous utterance refers to cases where the utterance is not made more precise by the situation, the context or an explanation. The receiver knows that the utterance refers to a limited number of alternatives, but does not know to which one. On the other hand, a semantically indeterminate utterance is vague if it may normally be used without being made precise and without leading to communicative under-determinacy.

For its part, legal indeterminacy covers cases where a question of law, or how the law applies to facts, has no single correct answer.¹¹

We will first focus on the English original of the Arbitration Agreement, and then try to see how instances of linguistic indeterminacy in the original are rendered in the Croatian translation, since the translation process necessarily involves matters of interpretation. We will start our analysis by focusing on the main deictic categories: place, time and person, and try to establish degrees of precision/vagueness in the text. Moreover, attention will be paid to the use of determiners, modifiers, modal auxiliaries and the passive.

4.1. Place

Spatial expressions refer to the main subject of the dispute: the course of the maritime and land boundary between Croatia and Slovenia. In this context, a crucially important term used in the Arbitration Agreement has given rise to a raging debate on both sides of the border and has attracted a great deal of media attention. The disputed term is *junction*, used in the original text of the Agreement and translated in different ways in the Croatian and Slovenian versions. The disputed term was used in Article 3 defining the Task of the Arbitral Tribunal:

¹⁰ Mattila, Heikki E.S. (2006) *Comparative Legal Linguistics*. Hampshire: Ashgate.

¹¹ Bhatia, Vijay K.; Jan Engberg; Maurizio Gotti; Dorothee Heller (eds.) (2005). *Vagueness in Normative Texts*. Bern: Peter Lang.

(1) The Arbitral Tribunal shall determine

(a) the course of the maritime and land boundary between the Republic of Croatia and the Republic of Slovenia;

b) Slovenia's junction to the High Sea;

c) the regime for the use of the relevant maritime areas. (Art. 3)

It is an established view in legal linguistics that a legal term, or a term used in a legal context, may be indeterminate: i.e., generic enough to enable its application in a number of different real-life situations, enabling flexibility and giving scope to appropriate interpretations. On the other hand, ambiguity should by all means be avoided, since it can give rise to legal uncertainty and confusion. Taking into consideration the adverse reactions it has provoked, the term *junction* in this context could be regarded as a special case of ambiguity regarding one of the most sensitive issues in the dispute. The ambiguity in this case seems to result from a lack of balance between indeterminacy and precision in the wording of the Agreement.

Since legal translation always involves interpretation, it can be said that the term was interpreted in different ways in the Croatian and Slovenian translations of the Agreement. In the Croatian version, it was translated as *veza*, a term which is partly synonymous with, but more generic than, the term *junction* and could be back-translated as *connection*, implying a functional link rather than territorial contact. In the Slovenian version, it was translated as *stik*, which is claimed to be the exact translation of *junction*, implying territorial contact.

We have tried to compare dictionary definitions of *junction* and its potential alternative, *connection*. In comparing the two terms, it can immediately be seen that *junction* has a more limited number of meanings (3)¹², most of which are concretely spatial, such as: 'the act or an instance of joining or meeting: the state of being joined'; 'a place or point of union or meeting'; 'junction point: a place or point at which carrier lines meet or interchange traffic'; 'an intersection of roads or highways esp. where one of the highways terminates'; 'something that joins', 'a place or point where two or more things are joined', 'a place or point where two or more things meet or converge', 'a place or station where railroad lines meet, cross, or diverge', 'an intersection of streets, highways, or roads', 'something that joins other things together'. Junction, moreover, is a component of a number of place names (*Grand Junction*, *Junction City*). Thus, the meaning of *junction* seems to be primarily, or mainly, concretely spatial. On the other hand, *connection* has a larger number of meanings (9), and can refer to: 'the act of connecting', 'the state of being connected or linked: alliance, union'; 'a relationship or association in thought, logical sequence, mutual dependence or involvement'; 'context, reference, occasion'; 'coherence, continuity'; 'something that connects: link'; 'a means of communication'; 'a person connected with others with a common interest', 'a social, professional, or commercial relationship', 'a political faction', 'a religious association', etc. Although *junction* and *connection* may be synonymous in the shared semantic

¹² Webster's Third New International Dictionary. Springfield, Mass: Merriam Webster Inc., Publishers, 1981.

component of ‘joining, connecting, bringing together’ *connection* seems to be less space-bound, and therefore more abstract and generic.

In addition, we have compared the frequency of the two words: a Google search resulted in 57,500,000 hits for *junction* compared with 366,000,000 for *connection*, which is thus over six times more frequent. Therefore, the choice of a term which is less generic, less frequent, more marked and more concretely spatial is open to question. The ambiguity in this case could be said to arise from the fact that a spatially specific term was used in a context where a more generic term would have been more appropriate.

The solution of this linguistic controversy, however, is inextricably bound to the resolution of the dispute, and rests exclusively with the future Arbitration Tribunal which has the sole power of interpretation.

The only completely specific indications of place in the agreement are those referring to place names: Brussels as the place of arbitration and Stockholm as the place where the Agreement was signed.

A different type of spatial term is provided by textual devices used to ensure the cohesiveness of a text, such as *hereinafter*, meaning ‘in a subsequent part of this document’, or *hereby* meaning ‘by virtue of this act’:

(2) The Governments of the Republic of Croatia and the Republic of Slovenia (hereinafter referred to as “the Parties”) [...] (Preamble to the Arbitration Agreement)

(3) The Parties hereby set up an Arbitral Tribunal. (Art. 1)

A very high degree of precision is involved in textual mapping and intertextuality involving references to articles within the same document or to other relevant documents: Article 3, Article 33, Article 102 of the *UN Charter*; also: *The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States*.

4.2. Time

Most of the temporal expressions are specific, defining procedural timelines in detail, starting from the establishment of the Arbitral Tribunal following Croatia’s accession to the EU, which is still undefined. They involve either dates, such as:

(4) No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal... (Art. 5: Critical date),

or different arbitration timelines, such as:

(5) Moreover, the President of the Arbitral Tribunal and two members should be appointed by both Parties within fifteen days. (Art. 2)

(6) The Parties shall specify the details of the subject-matter of the dispute within one month. (Art. 3)

(7) Each Party shall submit a memorial to the Arbitral Tribunal within twelve months. (Art. 6)

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(8) The Parties shall take all necessary steps to implement the award, including revising national legislation, as necessary, within six months after the adoption of the award. (Art. 7)

(9) The agreement shall enter into force on the first day of the week following the exchange of diplomatic notes with which the Parties express their consent to be bound. (Art. 11)

(10) All procedural timelines expressed in this Agreement shall start to apply from the date of the signature of Croatia's EU Accession Treaty. (Art. 11)

The temporal expressions which do not involve quantification can be considered to be less precise. Thus:

(11) Each Party has the right to comment on the memorial of the other Party within a deadline fixed by the Arbitral Tribunal. (Art. 6)

The expression *expeditiously* can be considered to be equally indeterminate as the frequently used syntagm “within reasonable time”. Such expressions are open to a range of interpretations since they belong to categories which are culturally specific and relative:

(12) The Arbitral Tribunal shall, after consultation of the parties, decide expeditiously on all procedural matters by majority of its members. (Art. 6)

(13) The Arbitral Tribunal shall issue its award expeditiously after due consideration of all relevant facts pertinent to the case. (Art. 7)

(14) The Agreement shall be ratified expeditiously by both sides in accordance with their respective constitutional requirements. (Art.11)

Temporal indeterminacy in these cases stems from the fact that it is impossible to foresee the length of time necessary for the proceedings.

4.3. Person

References to institutions and persons are precise in terms of numbers:

(15) Both Parties shall appoint by common agreement the President of the Arbitral Tribunal and two members recognized for their competence in international law within fifteen days drawn from a list of candidates established by the President of the European Commission and the Member responsible for the enlargement of the European Commission. (Art. 2: Composition of the Arbitral Tribunal)

The syntactic ambiguity contained in the first sentence of Art. 2 is resolved by ‘the knowledge of the world’ rather than by linguistic means. The correct order should obviously be: Member of the European Commission responsible for enlargement – in this respect, the Croatian translation is more precise than the original: *i člana Europske komisije zaduženog za proširenje* (Čl. 2).

Without quantification, however, references tend to be less precise:

(16) The Parties shall appoint representatives to act as intermediary between them and the Arbitral Tribunal. They may retain counsels to support their representative. (Art. 6)

The sentence may imply that each Party should have one representative although this is not explicitly stated, while the number of counsels is not defined.

The institutions referred to include: the Governments of the Republic of Croatia, the Arbitral Tribunal, the Secretariat, the European Commission, and the Presidency of the Council of the European Union, while the documents explicitly referred to are the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States and the Charter of the UN. Thus the scope of determinacy may range from institutions to individuals representing their governments.

4.4. Determiners

As can be seen from the examples above, exact quantification tends to give a high degree of precision to the language of the document. On the other hand, determiners such as *some*, *any*, *all*, *both*, *either*, *neither*, *each* and *every* imply varying degrees of precision both in general and legal language. *No* as a negative quantifier, *both* referring to two entities together, and *either* referring to two alternatives leave no scope for indeterminacy. *All*, being the most generic determiner, leaves scope for different interpretations: the expression: “all procedural matters” (Art. 6) is specific enough if the procedure is defined in every detail. On the other hand, the expression “all relevant facts pertinent to the case” (Art. 7) is much more indeterminate and depends on the interpretation of what the relevant facts in this case are.

In some cases the scope of *all* is specified to some extent, which is characteristic of common law legislation:

(17) The above applies to all documents and positions either written or submitted orally, including, inter alia, maps, negotiating positions, legal acts and other documents in whatever form, produced, presented or referred to unilaterally in the framework of the EU accession negotiations. (Art. 8)

Moreover, *all* is specific when its scope is defined and limited by the document itself:

(18) All procedural timelines expressed in this Agreement shall start to apply from the date of the signature of Croatia’s EU Accession Treaty. (Art. 11)

Any involves greater indeterminacy:

(19) Both Parties shall refrain from any action or statement which might negatively affect the accession negotiations. (Art. 9)

(20) The Arbitral Tribunal has the power to order, if it considers that circumstances so require, any provisional measures it deems necessary to preserve the stand-still. (Art. 10)

4.5. Modifiers

In general terms, quantification involves greater determinacy than qualification, which, in itself, implies different degrees of precision. Most of the examples in our corpus are descriptors, involving different degrees of indeterminacy/precision. *Critical date*, for instance, is specified within the Arbitration Agreement itself:

(21) No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance [...] (Art. 5: Critical Date)

The meaning of adjectives used in expressions such as *oral hearings*, *individual or dissenting opinions*, *definitive settlement* or *equal terms* is highly specific and precise.

The degree of determinacy of adjectives such as *relevant* or *necessary* depends on the context: *necessary steps* may be specific if all the steps in the procedure have been defined; otherwise it remains vague. Defining what the *relevant facts pertinent to the case* are is left to the Arbitral Tribunal. What exactly constitutes *due consideration* would be even more difficult to specify:

(22) The Arbitral Tribunal shall issue its award expeditiously after due consideration of all relevant facts pertinent to the case. (Art. 7)

Moreover, ethical adjectives such as *good neighbourly relations*, *fair and just result*, and *vital interests* are necessarily vague and can be interpreted in different ways.

4.6. Modality

Another indicator of different degrees of determinacy/vagueness is the use of modal auxiliaries. Many modal auxiliaries have epistemic or dynamic as well as deontic values. The vaguest modal auxiliaries are those expressing probability (*may*, *might*), tentative possibility (*could*), tentative assumption (*should*) or hypothetical prediction. Some of them, namely *should* and *would* are rare in legal contexts.¹³

In the Arbitration Agreement *would* is not used at all, while *should* appears only once, expressing tentative assumption:

(23) If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of a member, it shall be filled in accordance with the procedure prescribed [...] (Art. 2)

May can cause vagueness since it can express both deontic permission and epistemic possibility. It is often used “to indicate a discretionary act: the conferring of a right, power or privilege, a special kind of permission”¹⁴:

(24) The Arbitral Tribunal may seek expert advice and organize oral hearings. (Art. 6)

(25) They may retain counsels to support their representative. (Art. 6)

(26) The Arbitration Tribunal may at any stage of the procedure with the consent of both Parties assist them in reaching a friendly settlement. (Art. 6)

¹³ Gotti, Maurizio (2005) Vagueness in the Model Law on International Commercial Arbitration. In Vijay K. Bhatia et al. (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang (p. 238).

¹⁴ Solly, Martin (2005) Vagueness in the Discourse of Insurance: The Case of the Marine Insurance Act 1906. Vijay K. Bhatia et al. (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang, 313-337 (p. 330).

Might is used to denote a more remote possibility:

(27) Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal. (Art. 10)

As opposed to the above mentioned modal auxiliaries, *shall* has had a predominant position in prescriptive texts for centuries.¹⁵ Its frequent use can be accounted for by its capacity to express obligation and futurity, both of which are implicit in the very nature of regulative acts and also because of its ‘depersonalized’ nature with respect to *will*. In negative contexts it is often adopted to express prohibition. Another use of *shall* in prescriptive texts has been in non-deontic, predicative contexts. *Shall* denotes ‘mandatory intent’ which means that non-compliance is punishable by sanction. It can appear in definition provisions, declaratory provisions, and rights and entitlements.

By far the most frequent modal auxiliary in the text of the Agreement is *shall* (30 occurrences), compared to *may* (3), *cannot* (2), *should* (1), and *might* (1).

MODAL AUXILIARY	NUMBER OF OCCURRENCES
shall	30
should	1
may	3
might	1
can(not)	2

Out of 30 occurrences of *shall*, 21 have been translated into Croatian by using the future, which can be accounted for partly by the fact that in most instances *shall* combines its deontic function with prediction. Namely, all provisions specified in the text of the Agreement refer to a future date when Croatia becomes an EU member and an Arbitration Tribunal is established to deal with the boundary dispute. In eight out of the remaining nine instances *shall* was translated by using the present, and in one by explicitly expressing obligation:

(28) The Parties shall specify the details of the subject-matter of the dispute within one month. (Art. 3)

(29) Stranke su dužne specificirati pojedinosti predmeta spora u roku od mjesec dana. ('Parties are obliged to specify [...]') (Čl. 3)

On the other hand, the use of the future is so widespread in the Croatian translation that in one instance it is used to translate a sentence where *shall* was not used in the original, although it would be expected in this position, especially since it was used in a very similar context in the preceding Article:

¹⁵ Williams, Christopher (2005) Vagueness in Legal Texts: Is There a Future for Shall? In Vijay K. Bhatia et al. (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang, 201-227.

(30) Both Parties shall refrain from any action or statement which might negatively affect the accession negotiations. (Art. 9)

(31) Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal. (Art. 10)

(32) Obje stranke uzdržat će se od bilo kakvog postupka ili izjave [...] (Čl. 10)

It should be noted that the future tense in Croatian is formed by using the elliptic present of the verb *htjeti* ‘want’ and the infinitive of the main verb, whereas a construction comparable to the English *shall* does not exist. Using the future to express obligation is obviously a result of the influence of English.

Thus, while there has been a strong tendency within the Plain English movement to expel *shall* from English legal texts, there might be a growing trend in other languages to use an analogous construction due to a massive syntactic interference resulting from a large number of legal texts which are first drafted in English and then translated into other languages.

4.7. Passive

The use of passive sentences with a non-human grammatical subject and in which no agent is clearly mentioned introduces a high degree of vagueness because it may be difficult to establish “who is to be responsible for the actions, permissions, obligations mentioned in the text”.¹⁶ As a result, there is a tendency within the Plain English movement to reduce passive constructions. On the other hand, however, they are increasingly being used in other languages as a result of translation from English as the source language. This tendency is evident in Croatian, where passive constructions are very rare and should be avoided according to normative grammatical rules, but are encountered more and more often in translations from English. As part of a general tendency, in the translation of the Arbitration Agreement most of the passive constructions have been translated literally, without recourse to impersonal reflexive constructions characteristic of the target language.

5. Conclusion

In order to be effective, legal drafting should strike a balance between indeterminacy and precision, since a lack of balance can easily result in ambiguity, as exemplified in the text under consideration. As to other instances of vagueness vs. precision, it could be said that precision is achieved to a large extent by quantification, characterizing procedural issues which should be carefully specified as far as possible, while the main substantive issues, due to the nature of the case, should be left indeterminate so as not to prejudge the resolution of the dispute.

¹⁶ Gotti, see *supra* note 12, p. 242.

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Petitions as Social Semiotic

The Struggle of Australian Aboriginal Peoples to Participate in Legal Discourse Relating to Land Rights

THOMAS CHRISTIANSEN¹

Discrimination against Australian Indigenous groups, including the right to own traditional lands, has received increasing attention, culminating in the referenda campaigns for full citizenship rights in the 1960s, the Mabo judgement (1992) and Prime Minister Kevin Rudd's apology to the Stolen Generations (2008). The issue is not just one of deliberate dispossession and subjugation but also the clash of two groups of cultures (on the one hand, that of the British-led colonisation; on the other, those of the various Indigenous populations grouped together under the blanket term *Aborigines and Torres Strait Islanders*).

In this paper we will discuss how, regarding specifically property rights, the two sets of cultures used not only different conceptual systems but different rituals, both linguistic and semiotic, for establishing and recording these rights. We will examine how Aborigine peoples, once subject to a culturally alien legal system which manifested itself in ways that were both linguistically and semiotically unrecognisable for them, came, at first tentatively, to use the system as a means for securing redress and partial compensation. Legal discourse is viewed as part of a wider set of options within the social semiotic concerned (Halliday 1978, Hodge and Kress 1988), where meaning at all levels is not stable or fixed but subject to Peircean infinite semiosis.

To this end, we examine various petitions (reproduced in Attwood and Markus 1999), penned either by or on behalf of Aborigines, dating from the earliest periods of colonisation up to the 1970s, including the Yirrkala Bark Petition (1963), which sought to combine elements of both Aboriginal and Anglo-Australian legalistic semiotic / linguistic codes. The perspective is that of the function of such texts and their component parts seen as moves in the discourse within the cultural context, and on direct and indirect speech acts (Searle 1969, 1975).

1. Introduction²

The central tenet of social semiotics is that language, and the discourse through which it is manifested, makes sense only in the context of the specific culture (i.e., the social situation and social reality³) in which it occurs.

Given that circumstances may change and that society and culture (including the associated social interests and ideologies) are constantly changing, it follows that at no level is meaning fixed; rather it is a conceptual process subject to constant or "infinite" semiosis in the Peircean sense as established signs give birth to new signs as they are reinterpreted⁴. This

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² The author thanks Prof. Dolce of the *Fondo Hickey / Commonwealth Library* (Università del Salento, Italy) for access to materials used in this research, many of them donated by the Government of South Australia.

³ See Halliday, Michael A. K. (1978) *Language as social semiotic: The social interpretation of language and meaning*. Maryland: University Park Press (p. 2).

⁴ See Peirce, Charles S. (1931–1936) *The Collected Papers*. Volumes 1–6. Charles Hartshorne and

process is not only diachronic; the same discourse may mean radically different things to different participants when they do not share the same social reality and perceive what Malinowski called the *context of situation*⁵ in different ways.

Furthermore, such a process requires a negotiation not just of meaning in the narrow linguistic sense but also in the broader semiotic sense. Communication – language use in a particular context – is achieved through “language games”, as described by Wittgenstein⁶, in which participants use words not merely to represent states of affairs to each other but to achieve concrete goals. Here, it is the rules of the game that are fundamental as they determine how it is played, as Pears states:

It is Wittgenstein’s latter doctrine that outside human thought and speech there are no independent, objective points of support, and meaning and necessity are preserved only in the linguistic practices which embody them. They are only safe because the practices gain a certain stability from rules. But even the rules do not provide a fixed point of reference, because they always allow divergent interpretations. What really gives the practices their stability is that we agree in our interpretations of the rules.⁷

Such rules can take a variety of forms (and as they change, so may the nature of the game in question). Austin, Searle, Grice, and Sperber and Wilson are among the many scholars who have looked into the fundamental conventions that underlie communicative exchanges (i.e., respectively: direct and indirect speech acts, conversational implicatures, and the centrality of the concept of relevance).

In the field of law and related matters, there has long been recognition of the fact that the “letter of the law” (which may be equated with the linguistic concept of *text*) is open to different interpretations; Wittgenstein’s approach leads to the conclusion that the “spirit” (which corresponds to with the concept of *discourse*), rather than being inherent and stable as implied by the definition “the real meaning or intention of something as opposed to its strict verbal interpretation”⁸, is, by contrast, a socially-determined construct. Such a thing has become increasingly apparent as ethnic minority groups, and other similar groups from outside the political mainstream, have learned to use legal processes to seek redress in matters of concern to them, their societies and culture, thus affecting the negotiation of meaning which typifies semiosis.

An obvious example of this is the growth of Aboriginal and Indigenous peoples’ rights movements across the world. Russell emphasises the importance of law and legal discourse in the colonialist enterprise:

As Robert Williams has put it. ‘Europe’s conquest of the New World was a legal enterprise.’⁹ Law has provided the justifying discourse in taking over other people’s lands. Aboriginal thinkers have often been struck by the way law has served as a kind of magic, so devoutly and

Paul Weiss (eds.). Cambridge, MA: Harvard University Press.

⁵ Malinowski, Bronislaw (1923) *The Problem of Meaning in Primitive Languages*. In Ogden, Charles K. and Ivor A. Richards (eds.).

⁶ Wittgenstein, Ludwig (1953) *Philosophical Investigations*. Oxford: Blackwell.

⁷ Pears, David (1971) *Wittgenstein*. Glasgow: William Collins and Sons (p. 168).

⁸ *Concise Oxford Dictionary*, 11th edition.

⁹ Williams, Robert A. Jr. (1990) *The American Indian in Western Legal Thought: The Discourses of Conquest*. New York: Oxford University Press (p. 6).

reverently have European authorities and their legal cadres believed in its self-redeeming powers.¹⁰

Inevitably, as Russell notes¹¹, seeking to make sense of and then use the dominant groups' legal discourse entails compromise:

Adopting the white man's political means to achieve Aboriginal ends is a deeply ironic process. It means the colonized people's greatest success in reducing, if not completely overcoming, their subjugation is achieved by adopting much of the colonizers' political methods and culture. [...] The very vocabulary through which Indigenous leaders come to articulate their aspirations – referring to their societies as 'nations,' asserting an original 'sovereignty,' and claiming 'title' to their lands and waters is the vocabulary of the dominant society."

In semiotic terms, a text can also take a variety of non-linguistic forms (e.g., artwork, rituals, behaviour). In this article, we shall concentrate on the linguistic but refer also to the semiotic because, as captured in the notion of intertextuality¹², texts cannot be seen in isolation. As Thwaites *et al.*¹³ put it, "each text is influenced by the generic rules in the way it is put together; the generic rules are reinforced by each text". Anglo-Australian legal discourse can be described in predominantly linguistic terms, as is normal in a culture that has built up a legal system that relies on verbal exchanges and written documents. In contrast, in the cultures of Aboriginal peoples¹⁴, other semiotic means are used to encode aspects of law. In participating in discourse with people of a broadly Anglo-Australian background, albeit on their terms, Aboriginal people will nonetheless bring their own set of generic rules taken from a wide variety of semiotic sources.

So diverse are the texts comprising the underlying intertextuality of the broader discourse between Aborigines and the authorities in the pursuance of land rights that they do not constitute a linguistic *genre* as such. If they did, one would expect to be able to make reliable predications typical of genre analysis¹⁵. Furthermore, in the corpus analysed in Section 6, the petitioners (the Aborigines) and the petitionees (the authorities) do not together constitute a single discourse community; among other things, as a group, it fails to meet at least one of the six criteria that Swales outlines, namely, it does not have "a threshold level of members with a suitable degree of relevant content and discursual expertise"¹⁶. Separately, however, the petitioners and petitionees may constitute distinct discourse communities each within its own particular sphere, this being precisely what

¹⁰ Russell, Peter H. (2005) *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism*. Sydney (NSW): University of New South Wales Press, Sydney (p. 31).

¹¹ See *supra* note 9 (p. 131).

¹² See Kristeva, Julia (1980) *Desire in Language: A Semiotic Approach to Literature and Art*. New York: Columbia University Press.

¹³ Thwaites, Tony, Lloyd Davis and Warwick Mules (1994) *Tools for Cultural Studies: An Introduction*. South Melbourne: Macmillan (p. 100).

¹⁴ On the concept of 'Aborigine', Attwood notes: "The peoples living here prior to British Colonisation were not a homogeneous group implied by the name 'Aborigines'. Instead they only came to have a common, Aboriginal consciousness in the context of colonisation." Attwood (2003) *Rights for Aborigines*. Crows Nest (NSW): Allen and Unwin (p. xii).

¹⁵ See: Bhatia, Vijay K. (1993) *Analysing genre: Language use in professional settings*. London: Longman; and Swales, John M. (1990) *Genre Analysis*. Cambridge: Cambridge University Press.

¹⁶ See *supra* note 14 (p. 27).

makes these petitions, as attempts by one community to initiate discourse with another, so interesting.

2. Brief Background to Aboriginal Land Rights in Australia

Indigenous peoples' land rights have been sources of contention wherever conquest has led to settlers enforcing their customs and laws. Within the context of the British Empire, Australia presents an extreme case because, compared to the USA, Canada and New Zealand, Indigenous peoples were afforded the fewest rights, even though the amount of land set aside for them was greatest¹⁷.

This harsher treatment arose from a combination of factors which aggravated tendencies present in the other three countries. First of all, since New South Wales was envisaged as a penal colony, initial settlers were concentrated in greater numbers in fewer areas. They were thus more self-sufficient than were early settlers in North America or New Zealand.

Secondly, in the cultures of the elusive Aboriginal societies encountered by the first settlers in New South Wales, technology and the material took second place to the spiritual. The first settlers saw nothing in such societies worthy of preservation. Later on, social Darwinism argued for treating the "Aboriginal race" as inferior and destined for extinction.

Finally, in Australia, liberal tendencies both from within and without were counteracted by the greater influence of powerful self-interested settlers. As elsewhere, imperial and colonial authorities had tried to establish rules for the treatment of Indigenous peoples and for the expansion of settlement in accordance with established international practices. In North America, in line with the so-called *Law of Nations*, George III's Royal Proclamation (1763) and the Treaty of Niagara (1764) with representatives of various Indigenous peoples established that tribal lands could only be ceded to the Crown, and not directly to settlers, a precedent which was followed in New Zealand (Treaty of Waitangi 1840) and the various provinces of Canada. In Australia, this principle was adhered to only intermittently and inconsistently — more often when it was convenient, as in the rebuttal of the so-called Batman Treaty (see Section 3). Above all, the balance of military power being so firmly in the settlers' favour, even with irregular forces, meant that there was less incentive to go through even the pretence of negotiation with the Aboriginal peoples. Consequently, imperial and colonial authorities' edicts carried little weight in the hinterland of Australia, where powerful squatters occupied Aborigines' land without permission from the Crown and were influential in local administrations.

In short, the concept of *terra nullius* was assumed to be applicable to the whole continent, despite the fact that legally, even initially in imperial eyes as Russell notes¹⁸, Australia was clearly a conquered and not a settled colony. However, it was the myth of *terra nullius* that was to remain in the national psyche until the landmark Mabo Judgement (1992) eventually debunked it.

¹⁷ Maddock, Kenneth (1983) *Your Land Is Our Land: Aboriginal Land Rights*. Ringwood (Vic.): Penguin Books, cited in Russell: see *supra* note 9 (p. 157).

¹⁸ See *supra* note 9 (p. 79).

3. Fabricating a discourse: the Batman Treaty

One case that is particularly symbolic in the treatment of Aborigines in Australia and illustrative of the contradictions of the whole approach by colonial authorities at various levels is the so-called Batman Treaty (1835), which Attwood¹⁹ uses as the central theme of his work on the possession of Australia. Apart from supposedly serving as a precedent for the applicability of *terra nullius*, it constituted one of the most blatant attempts to impose a certain kind of discourse on an uncomprehending Aboriginal people. In his discussion of events surrounding Batman's dealings with the Kulin people in the Port Philip area (Victoria), Attwood stresses how, even if Batman's account had been accurate, it is unlikely that the Kulin people could have understood the significance of the various legalistic acts that he performed. Batman had prepared a deed bearing "a strong resemblance to those found in the standard conveyancing manuals of the period."²⁰ Thus, by Batman's own account, there must have been far less negotiation than the word *treaty* implies. In fact many of the basic concepts and notions underlying the kind of feoffment proposed by Batman were foreign to the Kulin, even if, as Attwood notes, by coincidence, some elements were superficially familiar to the Kulin ritual of *tanderrum* whereby they granted temporary access to resources in their territory. At heart there were inescapable differences between the two parties to the Batman "treaty", central among these the way that the idea of property and possession is perceived, as Attwood states:

Finally, and most importantly, even had the Kulin *ngurungaeta* [leaders] grasped the nature of the ceremony of possession that Batman sought to perform, they would not have accepted it. As we have already observed, the concept of buying and selling land had no place in their world since they did not conceive of ownership in these terms. Instead, the Kulin had strongly developed concepts regarding the use of resources and the sharing of these. Alienating the land was literally unthinkable to them.²¹

Such dysfunctional discourse may, however, lead to the negotiation of new meanings, illustrative of dynamic semiosis, to cite Attwood:

As the historian Richard White has remarked of cross-cultural encounters in North America, very different peoples often misinterpreted and distorted the meanings of the other people's actions but from those misunderstandings new, shared meanings could arise.²²

4. Land Rights from the perspective of Aborigines

As the Batman episode shows, settlers either assumed that their concepts of property, possession and ownership were universal or that they were superior. In any case, coming as conquerors, they were unconcerned about the concepts of the Indigenous peoples; in the uncompromising words of US Chief Justice John Marshall (1755-1835): "conquest gives a title that the courts of the conqueror cannot deny"²³.

¹⁹ Attwood (2009) *Possession: Batman's Treaty and the Matter of History*. Melbourne (Vic): Melbourne University Press.

²⁰ See *supra* note 18 (p. 44).

²¹ See *supra* note 18 (p. 52).

²² See *supra* note 18 (p. 56).

²³ See *supra* note 9 (p. 32).

For Aborigines, attachment to a particular territory or area is fundamental to the tribe's identity. Given the nature of the environment in many parts of the continent, the group's land was more a habitat than a territory in a proprietary sense, knowledge of which was vital for such a community's survival. In this sense it is perhaps more accurate to speak of the group belonging to the land than *vice versa*. This attachment was manifested in religious beliefs: continued occupancy or access to certain sites was crucial for the performance of certain ceremonies and for maintaining links with the ancestors.²⁴

Traditionally, title in Aboriginal societies can be assigned to a corporate group or community or, in some cases, to an individual, and passed down according to criteria so complex that anthropologists continue to disagree about them²⁵ relating to such things as tribal moiety or descent, whether patrilineal or matrilineal. However, such title is not based on *corpus* (physical control) in the Roman law sense, as Russell states, citing Young²⁶:

The Aboriginal relationship to country or territory was “expressed not through absolute control of a distinct area, but rather through responsibility for sections of Dreaming tracks representing the travels of ancestral beings.”²⁷

Nor did it entail *animus* (the intention to exclude others), as Attwood says:

They [The Aborigines] also had a sense of ownership in regard to the land but they conceived of that prerogative as a right to *use* the *resources* on particular parts of the landscape for a particular purpose – to fish, gather, hunt and so forth – and they did not necessarily regard these rights as being exclusive or permanent.²⁸

In an earlier study of mine,²⁹ a brief analysis is attempted of the way in which the notions of property and possession are conceptualised in English and in Aboriginal languages. Standard reference works on Aboriginal languages³⁰ establish that in Aboriginal languages the concept of possession is encoded within the grammar in highly complex ways. In particular, I find that in the representative word lists compiled from the various Aboriginal languages recorded in Thieberger and McGregor³¹, words relating to possession and property do appear. Both of these facts dispel the myth that traditionally Aborigines cannot conceive of either possession or property³². What seems to be different, I conclude, is the degree of centrality of these

²⁴ See Broome, Richard (2001) *Aboriginal Australians, Black Responses to White Dominance 1788-2001* (3rd ed.). Crows Nest (NSW): Allen and Unwin (pp. 18-19): “The essence of this religious belief was the oneness of the land and all that moved upon it. It was a view of the world in which humans and the natural species were all part of the same ongoing life force. In the Dreamtime when the great ancestors had roamed the earth, they were human, animal and bird at one and the same time: all natural things were in a unity. The ancestors still existed in the here and now.”

²⁵ Hiatt, Lester R. (1996) *Arguments about Aborigines*. Cambridge: Cambridge University Press (pp. 13-35).

²⁶ Young, Elspeth (1995) “Aboriginal Frontiers and Boundaries.” In Sutton, Peter (ed.) (p. 88).

²⁷ See *supra* note 9 (p. 77).

²⁸ See *supra* note 18 (p. 49).

²⁹ Christiansen, Thomas (2010) “The concepts of property and of land rights in the legal discourse of Australia relating to Indigenous groups.” In Gotti, Maurizio and Williams, Chris (eds.).

³⁰ E.g., Dixon, Robert (2002) *Australian Languages*. Cambridge: Cambridge University Press; Blake, Barry J. (1987) *Australian Aboriginal Grammar*. London: Croom Helm.

³¹ Thieberger, Nick and William McGregor (eds.) (1994) *Macquarie Aboriginal Words*. Macquarie (NSW): Macquarie Dictionary.

³² This view, which might in another context seem to celebrate the Aborigines' distinct identity and culture, in fact has often been used to justify the notion of *terra nullius*.

concepts within the broader culture. In the Aborigines' less materialistic, less individualistic, less anthropocentric view of the universe, possession exists, as it would seem to do in most languages, in terms of the asymmetrical relationship identified by Langacker³³, where the possessor serves as a reference point through which to identify the target: the item possessed. As I emphasise, in the specific area of the relationship between 'human' and 'land' in Aboriginal languages, the roles of the reference point and target may be viewed as more flexible, even interchangeable.

5. Finding a voice within legal discourse

As Attwood and Markus³⁴ note, there were initially few effective formal means for Aborigines to seek redress, and many of their attempts have probably not been recorded. Petitions do, however, survive. These were perhaps the easiest and most economical means to engage in legal discourse at the Aborigines' disposal. Although petitions of a formal nature constitute a specific genre and would require expertise to draft, at the informal end, they are less formulaic and could be penned by a non-expert. Russell³⁵ underlines the important function of petitions in the legal discourse between Aborigines and those in political power.

Petitions are interesting from the social semiotic point of view, as they consist of macro-speech acts³⁶ which are essentially *directive* in nature, according to Searle's system of categorisation (designed to cause the addressee to take some action³⁷), although, at the level of utterance, they may be composed of a whole variety of speech-act types.

Attwood and Markus feature the following documents which correspond to the definition of petitions above³⁸ and which relate, in whole or in part, to issues related to land rights (Table 1):

		Petitioner(s)	Petitionee	Words
1	1846	Flinders Island residents	Queen Victoria	518
2	1881	Maloga residents	Governor (NSW)	318
3	1886	William Cooper	Representative, State Legislature (NSW)	203
4	1887	Maloga residents	Governor (NSW)	251
5	189	Maloga residents	Premier (NSW)	174

³³ Langacker, Ronald W. (2000) *Grammar and Conceptualization*. Berlin: Mouton De Gruyter (p. 176).

³⁴ Attwood, Bain and Andrew Markus (1999) *The Struggle for Aboriginal Rights*. Crow's Nest (NSW): Allen and Unwin (p. 3).

³⁵ See *supra* note 9 (p. 130).

³⁶ See van Dijk, Teun A. (1977) *Text and Context*, London, Longman; and van Dijk (1980) *Macrostructures*. Hillsdale (NJ): Lawrence Erlbaum Associates.

³⁷ See Searle (1975) "Indirect speech acts." In *Syntax and Semantics, 3: Speech Acts*. In Cole, Peter and Jerry L. Morgan (eds.); Searle (1976) "A classification of illocutionary acts." *Language in Society*.

³⁸ This selection was carried out by us. Some of these are found reported verbatim within contemporary newspaper articles. Others which we excluded, were incomplete.

	0			
6	189 4	Poonindie residents	Native Protector (SA) (?)	144
7	189 4	Point Pierce residents	Commissioner of Public Works (SA)	278
8	191 1	Mat Kropinjere	Legislative council (SA)	612
9	192 7	Australia Aboriginal Progressive Association	Premier (NSW)	319
1 0	193 3	William Cooper	King George V	400
1 1	193 5	Aboriginal representatives, South Australia	Government (SA)	251
1 2	193 8	Deputation from <i>Australian Abo Call</i>	Prime Minister	668
1 3	196 3	Yirrkala residents	Prime Minister	296
1 4	196 7	Gurindji representatives	Governor General	865
1 5	197 1	Yirrkala residents	Prime Minister	219
1 6	198 8	Chairs of Northern and Central Land Councils	Prime Minister	344
Total				5860

(?) indicates that the information is presumed, not confirmed

Table 1. Aboriginal Petitions featured in Attwood and Markus (1999)

As can be seen, in three of the 16 petitions, the petitioners are individuals (3, 8, 10)³⁹; in the rest, they are collectives, either loose groups usually linked to a specific locality or tribes or associations. In the next section, we will analyse these petitions from the perspective of the speech acts manifested within them and thus of *move*⁴⁰ in the language game in which the petitioners are participants.

6. Analysis of petitions

All the petitions listed in Table 1 either request a grant of land or compensation for the loss of some land. What is interesting in the context of conflicting perceptions of land rights and ownership is the basis for such claims. In Table 2 we collect all the parts of the various petitions that lay the basis for the Aboriginal petitioners' land claims:

³⁹ Among these is William Cooper, the subject of Attwood and Markus (2004) *Thinking Black: William Cooper and the Australian Aborigines' League*. Canberra: Aboriginal Studies Press. Cooper also features among the Maloga residents. A copy of Cooper's 1933 petition to King George V (10), the original having been lost by the authorities and never forwarded, was presented by Aboriginal leaders to Prince William on his recent private visit to Sydney (January 2010).

⁴⁰ Not by coincidence, our use of this term is similar to its use in genre analysis: see Swales (1981) *Aspects of article introductions*. Birmingham (UK): The University of Aston, Language Studies Unit.

			Basis for Claim	Type
1	1846	1.1	The humble petition of the free Aborigines Inhabitants of V.D.L. now living upon Flinders Island, in Bass's Straits &c &c &c. Most humbly sheweth, That we Your Majesty's Petitioners are your free Children that we were not taken Prisoners but freely gave up our Country to Colonel Arthur then the Govr after defending ourselves.	NS
		1.2	Your Petitioners humbly state to Y[our] M[ajesty] that Mr. Robinson made for us & with Col. Arthur an agreement which we have not lost from our minds since & we have made our part of it good.	NS
2	1881	2.1	That all the land within our tribal boundaries has been taken possession of by the Government and white settlers.	PO
3	1886	3.1	I do trust you will be successful in securing this small portion of a vast territory which is ours by Divine right	SA
4	1887	4.1	[...] always bearing in mind that the Aborigines were the former occupiers of the land.	PO
5	1890	5.1	White people ought to be very good to us for they got our good country for nothing.	CP
7	1894	7.1	We, as children of the original owners of the land, presume that we have a right to be considered in the disposal of the land	PO
		7.2	It was after years of hard labour and self-sacrifice that has made Point Pearce what it is.	CO
8	1911	8.1	Firstly, I would touch upon the fact of which you are all aware, and which has been so forcibly expressed by the hon. J. Lewis, when he said "that they had taken away their country, and had given them very little in return."	CP
		8.2	[...] and that the sense of British justice, under which we are so happy and content to abide, will prompt you to make some reparation	CP
10	1933	10.1	Whereas it was not only a moral duty, but also a strict injunction included in the commission issued to those who came to people Australia that the original occupants and we, their heirs and successors, should be adequately cared for;	PO
11	1935	11.1	That the small remnants of the tribes who occupied the State when the white race came to South Australia have a strong moral claim to proper treatment from the white race. That race today is occupying our lands and in return we are forced to accept charity.	CP
13	1963	13.1	[...] 4. That the land in question has been hunting and food gathering land for the Yirrkala tribes from time immemorial; we were all born here.	PO
		13.2	[...] 5. That places sacred to the Yirrkala people, as well as vital to their livelihood are in the excised land, especially Melville Bay.	SA
14	1967	14.1	On the attached map, we have marked out the boundaries of the sacred places of our dreaming, bordering the Victoria River from Wave Hill Police Station to Hooker Creek, Inverway, Limbunya, Seal Gorge, etc.	SA
		14.2	We have begun to build our own new homestead on the banks of beautiful Wattie Creek in the Seal Yard area, where there is permanent water.	CO
		14.3	This is the main place of our dreaming only a few miles from the Seal Gorge where we have kept the bones of our martyrs all these years since white men killed many of our people.	SA
		14.4	On the walls of the sacred caves where these bones are kept are the paintings of the totems of our tribe.	SA
		14.5	We have already occupied a small area at Seal Yard under Miners Rights held by three of our tribesmen. We will continue to build our new home there (marked on the map with a cross),	CO
		14.6	These we will use to build up a cattle station within the borders of this ancient Gurindji land.	PO

		14.7	If the question of compensation arises, we feel that we have already paid enough during fifty years or more, during which time, we and our fathers worked for no wages at all much of the time and for a mere pittance in recent years.	CP
		14.9	But we are ready to show initiative now. We have already begun. We know how to work cattle better than any white man and we know and love this land of ours.	CO
15	1971	15.1	The land and law, the sacred places, songs, dances and language were given to our ancestors by spirits Djangkawu and Barama.	SA
		15.2	We gave permission for one mining company but we did not give away the land.	NS
16	1988	16.1	We, the Indigenous owners and occupiers of Australia,	PO
		16.2	[...] - to permanent control and enjoyment of our ancestral lands;	PO
		16.3	[...] - to compensation for the loss of use of our lands, there having been no extinction of original title;	PO/CP
		16.4	[...] - to protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;	SA
		16.5	And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom.	PO

Table 2. Basis for claim for land in corpus of petitions

There is a striking coherence in the basis for the claims from the earliest petitions to the most recent, although two petitions (6 and 12 – not featured on Table 1), request a grant of land purely on the grounds of fairness and necessity, not by right.

In essence, five different elements emerge in this basis for claim as evidenced in the 14 petitions given in Table 1. In alphabetical order according to the abbreviations used, they are: because the petitioners currently occupy the land (CO); because the petitioners occupied the land prior to the arrival of the settlers (PO); as compensation (CP); the fact the land had been given up as part of some sort of negotiated settlement (NS); and finally because there is some kind of spiritual attachment between the petitioners and that piece of land (SA).

The relative figures for these different categories are summarised in Table 3 (for ease of reference we also list the petitioners in abbreviated form):

			CO	CP	NS	PO	SA	Total
1	1846	Flinders Island			2			2
2	1881	Maloga				1		1
3	1886	William Cooper					1	1
4	1887	Maloga				1		1
5	1890	Maloga		1			1	2
6	1894	Poonindie						
7	1894	Point Pierce	1			1		2
8	1911	Mat Kropinjere		2				2
9	1927	APPA						
10	1933	William Cooper				1		1
11	1935	Aboriginal reps SA		1				1
12	1938	<i>Abo Call</i>						
13	1963	Yirrkala				1	1	2
14	1967	Gurindji	3	1		1	3	8

15	1971	Yirrkalá			1		1	2
16	1988	N. and C. Land Councils		1		4	1	6
Total			4	6	3	10	8	31

Table 3. Relative figures for categories of Basis of Claim for land in corpus of petitions.

As is apparent, the most common basis for claim is specifically prior occupancy (PO), most of which occur in 16 and then in 2, 4, 7, 10, 13 and 14. Not coincidentally, Petition 16 dates from the period in which Aboriginal land rights had become a major political and judicial issue in Australia and the issue of prior occupancy was beginning to be identified as an effective basis for claim. PO is, however, cited throughout the period, and it is instructive to contrast it with spiritual attachment (SA), which becomes a feature only in later petitions (except for an early citation of “Divine Right” (3.1), an ambiguous turn of phrase that may not refer to SA as such). A spiritual attachment to the land lies at the heart of the concept of Dreamtime as briefly mentioned in Section 4. However, Aboriginal communities are traditionally secretive about such beliefs⁴¹, which may explain why SA is cited as a basis for claim only in later petitions once taboos had been sufficiently relaxed⁴². This constitutes yet another adoption of Anglo-Australian values on the part of Aborigines.

Negotiated settlement (NS) is an interesting category because it occurs only at the beginning of the corpus and near the end. Indeed, in the first petition it is the sole basis for claim. The idea that Aboriginal peoples had somehow ceded the land to settlers on a temporary or at least a not irrevocable basis not only implicitly asserts prior ownership but also stresses that the process of appropriation, not least according to the conqueror’s rules, should have involved formal negotiations. As Petition 1 makes clear, some agreement was made in the particular context in question, but it was of the verbal sort, which for the petitioners was valid, but which, it is claimed, the Anglo-Australian parties then chose to ignore. For many commentators, among them Aborigines, it is this failure to reach negotiated settlements (something stipulated in the written instructions originally given to Capt. James Cook⁴³) that contributed to the subsequent maltreatment of Aborigines. Interestingly, the issue of the absence of negotiated settlements is not taken up until 15.2, which was written 140 years later. This time, however, the settlement mentioned draws upon the Aboriginal notion that granting access to a piece of land to use a particular resource does not involve renouncing ownership of it or control over other uses of that land (see Section 4).

The issue of compensation (CP) – either payment for or restitution of the land - is intrinsic to the issue of ownership as the latter provides the justification for the former. This issue is pursued only intermittently in the corpus of petitions. This is understandable given that native

⁴¹ See Dean, Colin (1996) *The Australian Aboriginal ‘Dreamtime’*. West Geelong, Geelong (Vic): Gamahucher Press (p. 5).

⁴² Crucial in this process has been the development of anthropology in Australia (the first department being founded at the University of Sydney in 1926), whereby experts could not only investigate and document but also mediate between the settlers and various Indigenous cultures. Among such scholars was Prof Elkin, a professor at Sydney and government advisor from the 1930s to the 1960s: see Russell, *supra* note 9 (p. 128).

⁴³ “[...] with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain; or if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and inscriptions as first discoverers and possessors” (Russell 2005: 42).

title has only been formally recognised in Australia recently⁴⁴, and until it had been established, compensation could not be settled. Indeed, the issues of compensation and/or restitution have recently become highly contentious with the potential to radically reorganise Australia's system of land ownership, with all the attendant social and economic effects that this would have⁴⁵.

Current occupancy (CO) is significant because it represents a claim to title based not on the past or tradition, but the present. Of all the bases for claim, this is the one which corresponds most closely with that of Anglo-Australian law, resting as it does on physical possession and implying also the exclusion of others. This basis for claim is most frequent in Petition 14 (14.2, 14.5, 14.9).

Significantly, in Petition 14, a map is included (see 14.1). Yet again, this represents the adoption of a settler's instrument in the establishment of a claim. As Attwood points out:

Creating a proprietary claim in the colonial world was often done by way of maps and surveys as these were commonly regarded as signs of possession.⁴⁶

A map in such a context is not so much a way of encoding specific information (i.e., the location of a site, its boundaries and its area), as a means in itself of pegging a claim. In this light, it constitutes a symbolic artefact and an element in the discourse at a semiotic level.

From this perspective, Petitions 13 and 15 (both penned by Yolngu residents of Yirrkala) are especially interesting. Both have versions in English and in an Aboriginal language (in the case of 13 in Yolngu matha / Gumatj, and of 15 in Gupapunyngu). Petition 13, the "Yirrkala Bark Petition", is even more significant in that it includes a traditional bark painting and thus represents an attempt by an Aboriginal group to present a petition in a form that not only conforms to the dominant settler norms but also their own, incorporating traditional designs and representations which are not merely decorative but form integral elements of the claim, as Attwood explains:

In works of [Yolngu] art, the relationship between the painters and the land is encoded in two ways, Howard Morphy⁴⁷ [1983: 118] notes 'through clan designs, which precisely signify the class ownership of a painting, and through representing features of the topography of the landscape'. As such, paintings can be regarded as both title deeds to and maps of the land.⁴⁸

Such symbols are believed to be handed down from the Dreamtime. Consequently, art (including dance, chants, music, etc.), tradition, spirituality and land title are inextricably

⁴⁴ The Aboriginal Land Rights (Northern Territory) Act 1976 allowed Aborigines in the Northern Territory to register a claim to land on the basis of traditional occupancy (thus, in effect, overturning the Gove Land Rights Case Judgement of 1971, which had upheld *terra nullius*) and the Native Title Act 1993 (subsequent to the Mabo Judgement 1992).

⁴⁵ Up to 2008, 11% of Australia's land mass was covered by native title determinations (some of which are in cities such as Perth), with a further 504 open applications. See: "A fair go is the key", *Koori Mail* 431: 22.

⁴⁶ See *supra* note 18 (p. 46).

⁴⁷ Morphy, Howard (1983) "Now You Understand": An Analysis of the Ways Yolngu Have Used Sacred Knowledge to Retain their Autonomy. In Peterson, Nicholas and Marcia Langton (eds.).

⁴⁸ See *supra* note 13 (p. 229).

linked, and the art becomes both a vehicle for the expression of a spiritual attachment to the land and a religious instrument by which that bond can be strengthened.

Finally, by adopting a format that incorporates elements of the semiotic system of Yolngu culture, the Bark Petition also constitutes a proclamation of Yolngu law. As such, it sets down a public challenge (albeit an unsuccessful one) to the Commonwealth authorities in Canberra⁴⁹. In this sense, there are parallels between the Bark Petition and the Batman Treaty, as each constitutes an attempt by one discourse community to impress its discourse models upon another.

Another concept that is alien to Aborigines is the requirement to alter the land in some permanent physical way in order to justify a claim, as is the practice in Anglo-Australian Law (see Section 4). As Attwood notes:

A clear set of *actions* was also required in order to claim real possession. For Englishmen, Seed⁵⁰ points out, it was either agricultural or pastoral labour—digging a piece of turf, planting a garden, grazing domestic animals—or ordinary physical objects—building a house, erecting a fence, growing hedges—that created rights to land, the first by improving it, the second by putting boundaries around it. Of these, the house and more especially the garden were the most important symbols of possession.⁵¹

In Table 4, we collect all the parts of the various petitions that refer to the possible uses to which the land claimed by the petitioners will be put.

			Land Use	Type
2	1881	2.1	2. We, the men of our several tribes are desirous of honestly maintaining our young and infirm, who are in many cases the subjects of extreme want and semi-starvation; and we believe we could, in a few years, support ourselves by our own industry were a sufficient area of land granted us to cultivate and raise stock.	AGR
3	1886	3.1	I am anxious to get a home and make some provisions for my wife and daughter & as I am an honest hard-working man, the land will be applied to a legitimate use.	U
4	1887	4.1	Such a provision would enable them to earn their own livelihood, and thus partially relieve the State from the burden of their maintenance.	U
5	1890	5.1	We have been hunted about a good deal from one place to another, and we find it hard to get a living for ourselves and the children, but if we get the chance and some help from the Government we might in time get a living.	U
		5.2	... and we want boats and nets for fishing,	HF
6	1894	6.1	If this is given we propose to live on it and cultivate and work the land among ourselves.	AGR
		6.2	With this and what we can earn by shearing, fishing and getting the guano, we can support ourselves and our families.	AGR/HF
7	1894	7.1	We consider that the land on Point Pearce is now being put to its best use.	U

⁴⁹ As Attwood details (see *supra* note 46 [pp. 229-30]), the Yolngu people were already well known for their art.

⁵⁰ Seed, Patricia (1995) *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640*. Cambridge: Cambridge University Press.

⁵¹ See *supra* note 18 (p. 47).

8	1911	8.1	I will only add the sincere desire of our people that you will do all in your power to obtain these additional lands for our use, so that there will be no doubt whatever in regard to our mission being placed upon a self-supporting basis.	U
9	1927	9.1	That all capable aborigines shall be given in fee simple sufficient good land to maintain a family.	U
12	1938	12.1	7.- We recommend that a special policy of Land Settlement for Aborigines should be put into operation, whereby Aborigines who desire to settle on the land should be given the same encouragement as that given to Immigrants or Soldier Settlers, with expert tuition in agriculture, and financial assistance to enable such settlers to become ultimately self-supporting.	AGR
14	1967	14.1	We have already occupied a small area at Seal Yard under Miners Rights held by three of our tribesmen. We will continue to build our new home there (marked on the map with a cross), then buy some working horses with which we will trap and capture wild unbranded horses and cattle.	AGR/HF/M
		14.2	These we will use to build up a cattle station within the borders of this ancient Gurindji land.	AGR
		14.3	And we are searching the area for valuable rocks which we hope to sell to help feed our people.	M

Table 4. Use of land claimed in corpus of petitions.

As is apparent, alteration of land, in terms of use of all types, is mentioned predominantly in the early petitions and can be seen as symptomatic of a perceived need on the part of the petitioners to justify their claim to the land in a way recognisable to Anglo-Australian petitionees.

In the petitions, three different categories of use of land are cited in alphabetical order: agriculture (crops and/or livestock) (AGR), hunting / fishing (HF), mining (M), and unspecified use (U).

The relative figures for these different categories are summarised in Table 5:

			AGR	HF	M	U	Total
1	1846	Flinders Island					
2	1881	Maloga	1				1
3	1886	William Cooper				1	1
4	1887	Maloga				1	1
5	1890	Maloga		1		1	2
6	1894	Poonindie	2	1			3
7	1894	Point Pierce				1	1
8	1911	Mat Kropinjere				1	1
9	1927	APPA				1	1
10	1933	William Cooper					
11	1935	Aboriginal reps SA					
12	1938	<i>Abo Call</i>				1	1
13	1963	Yirrkala					
14	1967	Gurindji	2	1	2		5
15	1971	Yirrkala					
16	1988	N. and C. Land Councils					
Total			5	3	2	7	17

Table 5. Relative figures for categories of use of land claimed in corpus of petitions.

From Table 5, it emerges that the most common use cited is unspecified (U), which occurs especially in early petitions, mostly in 6 and 14. Of specific uses, agriculture (AGR) is the most commonly cited, again mostly in early petitions, followed by hunting and fishing (HF) and mining (M).

Linking a claim to land to the concepts of the “legitimate” or “best” use to which it will be put (see Table 4, 3.1 and 7.1) adheres to John Locke’s idea that title “could be established only through mixing one’s labour with the land.”⁵² Again, this strategy borrowed from settlers is used less often in later petitions, where, as shown in Tables 2 and 3, claims increasingly rest on prior occupancy and spiritual attachment, both of which represent justification by tradition and not by use. Among the recent petitions, it is used only in 14, where, as seen in Table 2, it is also notable for being the main source for claims based on current occupancy; indeed, both 14.1 and 14.2 in Table 4 also contain an element of CO and appear also in Table 2 as 14.2 and 14.5 respectively.

Related to the ideas of the “legitimate” or “best” use of land is the concept of the positive ‘civilising’ effect that the title to and use of the claimed land will have on the petitioners. In Table 6, we collect all the parts of the various petitions that refer to the assimilation of the petitioners as a justification for the claim:

			Assimilation
2	1881	2.1	We have been under training for some years, and feel that our old mode of life is not in keeping with the instructions we have received, and we are honestly desirous of settling down to more orderly habits of industry,
5	1890	5.1	... we would like our boys and girls to learn to read and write like white children,
		5.2	... and we want boats and nets for fishing, so we can get money for our work and learn to live like Christians.
8	1911	8.1	Firstly, I would touch upon the fact of which you are all aware, and which has been so forcibly expressed by the hon. J. Lewis, when he said “that they had taken away their country, and had given them very little in return.” Now you have, through means of education and civilisation, enabled us to see this matter in the light just referred to [...]
9	1927	9.1	E. That the control of aboriginal affairs, apart from common law rights, shall be vested in a board of management comprised of capable educated aboriginals.
12	1938	12.1	8.- In regard to uncivilised and semi-civilised Aborigines, we suggest that patrol officers, nurses, and teachers, both men and women, of Aboriginal blood, should be specially trained by the Commonwealth Government as Aboriginal Officers, to bring the wild people into contact with civilisation.

Table 6. Assimilation of Aborigines cited in relation to land claims in corpus of petitions.

In Table 6, the topic of assimilation is used in only five out of the 16 petitions and more frequently in those at the beginning of the period. In one case, 8.1, the issue of assimilation is used ingeniously to make a case for a claim based on prior occupancy and for compensation. The last mention of assimilation is in 1938 by a deputation from a short-lived publication (which some Aboriginal activists saw as detrimental to their cause⁵³). That the issue of assimilation does not play a more prominent part must be attributable to the fact that native title was predominantly an issue that affected Aborigines who had no aspirations or occasion to adopt the settlers’ life style. For many indeed, native title is a way to preserve traditional

⁵² See *supra* note 9 (p. 41).

⁵³ See *supra* note 18 (p. 60).

culture and lifestyle, which accounts for the persistence of claims based on prior occupancy throughout the corpus and increasingly on spiritual attachment to the land, as evidenced in Table 2.

Of the examples in Table 6, five of the six (2.1, 5.1, 5.2, 9.1 and 12.1) are classifiable in Searle's terms⁵⁴ as *commissives*, by which the speaker commits him- or herself in varying degrees to a certain cause of action. As such, they can be seen as moves whereby the petitioner offers something in return for the land being requested. Example 9.1 is somewhat ambiguous as it could also be seen as directive, a request for Aborigines to manage their own affairs and be free from outside control; however, the Aborigines who are nominated to act as managers are specified as "capable and educated", thus representing a commitment to continuing assimilation on the part of the petitioners. Finally, in 8.1, assimilation is mentioned, but not as a commissive; instead it is *representative*, a proposition to the truth of which the speaker commits him- or herself, in this case to make a subtle point at the expense of settler society.

Similar to the commissives relating to assimilation listed in Table 7 are occasions when the petitioners attach conditions to their claims either in the form of commitments taken upon themselves (I) or imposed on some third party (III). These are listed in Table 7:

			Conditions	Type
3	1886	3.1	I want a grant of land that I can call my own so long as I and my family live and yet without the power of being able to do away with the land.	I
5	1890	5.1	We don't want them to pay us for it, but they ought to help us to live.	III
14	1967	14.1	We are prepared to pay for our land the same annual rental that Vestey's now pay.	I
		14.2	If you can grant this wish for which we humbly ask, we would show the rest of Australia and the whole world that we are capable of working and planning our own destiny as free citizens.	I
		14.3	We will also accept the condition that if we do not succeed within a reasonable time, our land should go back to the Government.	I
		14.4	Some of our young men are working now at Gemfield and Montejinnie Cattle Stations for proper wages. However, we will ask them to come back to our own Gurindji Homestead when everything is ready.	I

Table 7. Conditions attached to claims in corpus of petitions.

Conditions are imposed in only three petitions, two at the beginning of the period and one towards the end. Of these conditions, all but one (5.1) are first person. These (3.1, 14.1-4) are all commissives, even 3.1, which does not commit the speaker to a cause of action, but rather to renounce a right.

Example 5.1 is third person and, as an illocutionary act, representative. However, at the level of perlocutionary act⁵⁵, the intention is to have the petitionee make that which is represented come about. In this way, it can be seen as indirectly directive towards the petitionee and ultimately towards the third person participants referred to.

Example 14.1 could either be interpreted as an undertaking (a concession to the petitionee perhaps) or merely as an act of informing the petitionee of a future course of action (a

⁵⁴ See supra note 36.

⁵⁵ Austin, John L. (1962) *How To Do Things With Words*. Oxford: Clarendon Press.

unilateral decision taken without the consent of either the petitionee or other interested parties). In either case, it is commissive.

Conditions of the kind cited in Table 7 represent an attempt at negotiation and imply at least partial parity between petitioner and petitionee. The fact that no such attempt at negotiation occurs in the 13 other petitions indicates that apparently, at the interpersonal level of communication, there is a greater imbalance between the relative status of petitioners and petitionees, at least in the eyes of the former. Such an analysis is, however, based largely on an Anglo-Australian model of power-relationships between discourse participants and Anglo-Australian norms for negotiations. Alternatively, two other possibilities seem worthy of consideration: firstly, in the other petitions, the Aboriginal petitioners may seek to negotiate less because they are unfamiliar, or less comfortable with, the norms for doing so (the latter for cultural reasons); secondly, the Aboriginal petitioners may not wish to compromise or negotiate on such an important question as their land rights. However, the fact that Aborigines have gone to the trouble of, for the most part, peacefully organising themselves and penning petitions on the non-Aboriginal Australians' terms, often using standard formulae such as "Most humbly sheweth" and "will ever pray as in duty bound", belies any such intransigence.

7. Conclusion

From analysis of the corpus of petitions in Section 6 and the various categories of moves related to the establishment and supporting of a claim for native title as outlined in Tables 2-7 (Basis of claim; land use, assimilation and setting conditions), a picture emerges of both continuity and evolution in the set of strategies used by Aboriginal petitioners.

Continuity comes about in the continued citation of prior occupancy as the chief justification for the claim for land or compensation for it. Evolution comes initially in the adoption of Anglo-Australian criteria for property rights: current occupancy and land use. Similarly, justification of land claims on the grounds of promoting assimilation into Anglo-Australian society occurs in early petitions but drops off prior to the 1940s. In more recent stages, there is recourse to traditional Aboriginal criteria for title, namely spiritual attachment. The desire to negotiate and set conditions, even those that commit the petitioner to some *quid per quo* arrangement, is also apparent in specific sections of the corpus, mainly in the middle period.

Indeed at the extremes of the period, there are similarities, namely the citing of the lack of or disregard for a negotiated settlement as justification for a land claim. In this sense, it seems that the Aboriginal petitioners come almost full circle from appealing for justice on the grounds of prior occupancy and (verbal) negotiated settlements to continuing to cite prior occupancy, increasingly linked to spiritual attachment and striving to arrive at some new kind of negotiated settlement. The general pattern here is then of initial incomprehension followed by a long period of attempts to learn and conform to the discursual model of the all-powerful Anglo-Australian authorities. When this fails to achieve the desired results, there is a gradual reversion to a discursual model based on Aboriginal concepts of land rights. This shows that, over the period covered by the petitions, the Aboriginal petitioners remain clearly focussed on the same fundamental issues and ultimately prove adept at changing their game-plan and identifying the correct moves to achieve their ends. As Attwood documents⁵⁶, the history of

⁵⁶ See *supra* note 13.

the various Aboriginal Rights movements is one of increasing political expertise both in dealing with authorities and rival political forces and in fostering public support, both Aboriginal and non-Aboriginal, and pushing the issue of Aboriginal rights in general from the darkened wings of the Australian political agenda to centre-stage.

Demands for formal negotiations leading to some kind of formal treaty between Aboriginals and non-Aboriginals are moves that represent a marked change in the nature of the interpersonal relationship between the petitioners and petitionee. In the last two petitions, the texts consist of a series of demands, “the people of Yirrkala want ...” (Petition 15) and “We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights” (Petition 16). Consequently, the overall style is so different as to share with the other 14 documents only the underlying purpose (to petition someone in authority for land). The reasons for such a change lie partly in greater awareness of minority and civil rights around the world, and in particular Indigenous rights in other settler democracies, and cooperation between Indigenous rights activists internationally.

That Aboriginal groups have been calling for some kind of treaty or negotiated settlement at the level of the Aboriginal “nation” and the non-Aboriginal “nation” is in itself a powerful symbol, contributing to the discourse at the semiotic level⁵⁷. In contrast to early settlers and adventurers like Batman who tried to conduct negotiations on a one-sided basis, involving both prejudice and premeditated deception, this process has involved taking on elements of Anglo-Australian discourse, adapting them to Aboriginal needs, and using them to redefine the underlying power relationships and thus actively setting the terms for future dialogue.

Particularly illustrative of this is the way in which elements of Aboriginal culture have been introduced into the discourse of land rights and the way that Aboriginal petitioners have learnt to integrate Aboriginal art forms and rituals into their discourse with the Anglo-Australian authorities, the Yirrkala Bark Petition being a case in point. Elsewhere within more conventional petitions, it can be seen how sacred totems, carvings have been used as signs of occupancy and thus arguably are themselves documents with legal status (see Table 2, 14.4), as such signs were to prove decisive in the Mabo Case (1992). At the level of dynamic semiosis, it is interesting to see how, as in the other settler democracies, sympathetic politicians have learnt to adopt/appropriate the symbolism of Indigenous people in acts of reconciliation such as Prime Minister Gough Whitman ceremoniously pouring soil into the hands of Gurindji elders in 1975. Such gestures are more than photo-opportunities, because they constitute the introduction of new rules which change the nature of the game and constitute infinite semiosis at the level of discourse.

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Towards More Effective Settlement of Disputes in the Space Sector

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For decades, spacefaring entities remained few in number and could hardly constitute any practical hindrance to each other's activities. Differing opinions in space law meant little else but disputes of an academic nature. The strategic relevance of space exploration and an emphasis on state sovereignty made stakeholders very reluctant to commit themselves to settle even more substantive disagreements in a legally binding manner.

The space sector has since expanded considerably. Private entities now play a key role. However, UN space treaties do not even mention private enterprises. Other legal instruments cannot remedy the situation sufficiently. The space sector needs an international dispute resolution mechanism which is binding and detailed enough to be effective, and which also accommodates non-state actors.

This paper introduces some international legal instruments available for the settlement of space-related disputes. Furthermore, it examines possibilities for creating better mechanisms for this purpose. The most promising candidate in this respect appears to be arbitration.

1. Introduction²

The core of United Nations (UN) space law consists of five treaties negotiated in the 1960s and the 1970s. These treaties contain few provisions for dispute settlement. They only call for consultation procedures, not for binding third party dispute resolution. The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (hereinafter "the Outer Space Treaty", or OST) and the 1972 Convention on International Liability for Damage Caused by Space Objects (hereinafter "the Liability Convention") will be examined in more detail below.

Another important regulator of space activities is the UN-sponsored International Telecommunication Union (ITU) which strives to guarantee undisturbed telecommunication activities, including those that are space-based. In ITU dispute resolution, the last resort is binding settlement by arbitration. However, the ITU system is essentially geared toward prior coordination of telecommunication satellite activities and thereby the prevention of disputes. It has no formal dispute settlement body, and no steps will be taken for resolving disputes unless ITU member states vote for such action. In practice, this is never done.³ In fact, although a significant number of contracts in the telecommunications sector (also beyond

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² This article is largely based on the author's research previously published in Viikari, Lotta (2008) *Dispute Resolution in the Space Sector: Present Status and Future Prospects*. Rovaniemi: Lapland University Press.

³ See von der Dunk, Frans G. (2002) Space for Dispute Settlement Mechanisms – Dispute Resolution Mechanisms for Space? A few legal considerations. 2001 IISL/ECSL Symposium Legal Aspects of Dispute Resolution Mechanisms, Vienna, 2 April 2001. In *Proceedings of the 44th Colloquium on the Law of Outer Space*, IISL, 1-5 October 2001 (Toulouse), AIAA, 442-452 (p. 451).

space telecommunications) call for arbitration, it is seldom used. Instead, the most common dispute resolution method is negotiation.⁴

Outside the UN framework, there are numerous more specific international legal instruments for limited but important fields of space cooperation. They include those governing the activities of operational space organizations such as the European Space Agency (ESA). A different type of cooperative arrangement is the International Space Station (ISS). On one hand, such activities necessitate international cooperation; on the other, states have a strong desire to be involved.⁵ In order to facilitate smooth cooperation, the legal instruments of international space organizations contain relatively exhaustive dispute resolution systems. Typically, they call for binding third party settlement of conflicts, usually by arbitration.⁶ However, recourse to arbitration tends to be a last resort only.

UN space law and legal instruments of space organizations do not constitute a comprehensive dispute settlement system for space activities. Private enterprise usually – even at best – still remains only an object.⁷ The more favourable fora for the private sector are dispute settlement mechanisms offered by national jurisdictions. However, they remain constrained at the domestic level and may entail problems in disputes involving transboundary elements. Moreover, they can vary significantly from jurisdiction to jurisdiction. Heterogeneity is an obvious problem also with dispute settlement mechanisms of bilateral space-related agreements.⁸

2. Outer Space Treaty and Liability Convention

The 1967 Outer Space Treaty is the “constitution” of international space law. Nevertheless, as regards settlement of disputes, it goes no further than emphasizing co-operation and demanding consultations (Art. IX). Furthermore, the consultations refer to a technique to *avoid* conflicts rather than to solve them.⁹ In addition, Article III provides that:

States Parties to the Treaty shall carry on activities in the exploration and use of outer space [...] in accordance with international law, including the Charter of the United Nations, in the

⁴ Hill, R. and J. Watkinson (general eds.) (1999) *Telecommunications Disputes: specificities, problems and solutions*, White Paper (pp. 20-21).

⁵ See Stojak, Lucy (1997) Commentary at the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court. In Peck, C. and R. S. Lee (eds.): *Increasing the Effectiveness of the International Court of Justice*, Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court, Legal Aspects of International Organization, Vol. 29. The Hague, Boston, London: Martinus Nijhoff Publishers, 452-455 (p. 453).

⁶ See Böckstiegel, Karl-Heinz (1994) Arbitration of Disputes Regarding Space Activities. In *Proceedings of the 36th Colloquium on the Law of Outer Space*, IISL, 16-22 October 1993 (Graz), AIAA, 136-143 (pp. 137-138).

⁷ Interestingly, the ITU has started to treat private parties as having their own independent status within the organization. von der Dunk (2002) *supra* note 3 (p. 446).

⁸ For a short overview of dispute settlement provisions of bilateral treaties, see Cocca, Aldo Armando (1992) Law Relating to Settlement of Disputes on Space Activities. In Jasentuliyana, N. (ed.): *Space Law: development and scope*. Westport (Connecticut), London: Praeger, 191-204 (pp. 196-197).

⁹ Jasentuliyana, Nandasiri (1983) Conflict Resolution in Outer Space: new approaches – old techniques. In Dupuy, R.-J. (ed.): *The Settlement of Disputes on the New Natural Resources*, Workshop, The Hague, 8-10 November 1982. The Hague, Boston, London: Martinus Nijhoff Publishers, 229-241 (p. 233).

interest of maintaining international peace and security and promoting international co-operation and understanding.¹⁰

Thereby the OST indirectly refers the question to the traditional methods of international dispute settlement listed in the UN Charter.

However, no dispute settlement procedure resulting in a legally binding decision is compulsory under the UN Charter either. The Statute of the ICJ (being part of the UN Charter) *allows* states to declare themselves subject to the Court's compulsory jurisdiction, either on a case by case basis (Art. 36.1) or by making a unilateral declaration accepting the Court's compulsory jurisdiction over future disputes (Art. 36.2).¹¹ Only a few states which can truly be labeled "spacefaring" have submitted a declaration under Article 36.2. Furthermore, the fact that the ICJ only hears disputes between states (Art. 34.1) disqualifies a vast number of the entities participating in space activities today.

The 1972 Liability Convention is the other broadly ratified UN space treaty addressing the issue of dispute settlement. As is noted in the preamble of the convention, "notwithstanding the precautionary measures to be taken by States and international intergovernmental organizations involved in the launching of space objects, damage may on occasion be caused by such objects" (para. 3). If damage occurs, there is an obvious need for rules on liability. It may also well be that liabilities cannot be determined without third-party intervention, hence the need for dispute resolution mechanisms.

Pursuant to the Liability Convention, all states launching a space object ("launching states") together are jointly and severally liable for any damage caused by it (Art. V).¹² The convention allows states to assert liability claims on their own behalf and on behalf of their corporations or individuals (Art. VIII.1). Claims must be presented to the liable launching state(s) through diplomatic channels¹³ within one year of the date on which the damage occurred (Art. X.1) or within one year following the date when the state suffering damage learned (or could reasonably be expected to have learned) of the occurrence of the damage or the identity of the liable launching state (Art. X.2). Starting from the presentation of claims, there is another one-year time limit for reaching a settlement. If the dispute is not resolved within that time, the parties must, at the request of either one of them, establish a Claims Commission (Art. XIV).

¹⁰ The ambiguous wording was the result of the divergent views of the US and the USSR. The US proposed that disputes concerning the interpretation and application of the OST could be referred to the International Court of Justice, whereas the USSR was willing to accept nothing beyond a consultation requirement. van Traa-Engelman, Hanneke Louise (1989) *Commercial Utilization of Outer Space: legal aspects*. Rotterdam (p. 232).

¹¹ On the competence and jurisdiction of the ICJ in more detail, see, e.g., Collier, John and Vaughan Lowe (1999) *The Settlement of Disputes in International Law: institutions and procedures*. Oxford: Oxford University Press (pp. 124-154).

¹² The term "launching state" is problematic. Pursuant to Art. I, it means "(i) A State which launches or procures the launching of a space object; (ii) A State from whose territory or facility a space object is launched". Such a broad definition can also encompass states which are in no way able to control a particular space mission in practice.

¹³ Claims can also be presented through the UN Secretary-General or with the help of another state, in case the launching state and the claimant state do not maintain diplomatic relations (Art. IX).

The Claims Commission is composed of one member chosen by each state party to the dispute and a chairman chosen jointly by them (Art. XV.1). If the parties cannot agree on a chairman, either one of them can ask the UN Secretary-General to appoint the chair (Art. XV.2). The Claims Commission decides by majority vote (Art. XVI.5) on the merits of the case and the amount of compensation (Art. XVIII). The Claims Commission has another one-year time limit to make its decision (Art. XIX.3). The decisions are public (Art. XIX.4) but only recommendatory in nature, unless the parties have agreed beforehand to the contrary (Art. XIX.2).

The non-binding nature of the Liability Convention dispute resolution mechanism has often been criticized. Its dispute settlement technique has been depicted as conciliation only, at least if the parties have not agreed that the Claims Commission's decision will be binding on them (or if they have done so only after the commission's decision).¹⁴ Where the parties have made such an agreement prior to the commencement of the procedure, the Claims Commission could be considered as an ad hoc tribunal.¹⁵ It has also been described as a "semi-arbitration court".¹⁶

Even if some launching states were willing to accept the decisions of the commission as compulsory, this would not be sustainable in practice. The modern space sector is highly competitive, and joint space ventures are more of a rule than an exception. This, combined with the joint and several liability established by Article V, makes it unfeasible for a launching state to declare acceptance of the compulsory nature of the Claims Commission rulings if the other launching states (or most of them, at least) do not do the same. The recommendatory nature of the awards is somewhat cushioned by the requirement that the parties are to consider a Claims Commission decision in good faith and that it must be rendered promptly and made public (Art. XIX).¹⁷ Moreover, international public opinion could make it difficult for a state to refuse to pay compensation decided by the commission.¹⁸

The Liability Convention explicitly permits the taking of legal action in domestic venues as well: "nothing in this convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching state" (Art. XI.2). While proceeding on the national level, states are, however, prohibited from submitting claims pursuant to the Liability Convention's procedures (Art. XI.2). This, combined with the one-year time limit for presenting a claim for compensation to a launching state, can in practice compel the claimant to choose between domestic procedures

¹⁴ Cocca, Aldo Armando (1980) To what extent are further procedures for the settlement of space law disputes considered necessary? In Böckstiegel K.-H. (ed.): *Settlement of Space Law Disputes: the present state of the law and perspectives of further development*, Proceedings of an International Colloquium, Munich, 13-14 September 1979, SLW, Band 1. Köln, Berlin, Bonn, München: Heymann, 137-150 (p. 139).

¹⁵ Jasentuliyana (1983) *supra* note 9 (pp. 235-236); Böckstiegel, Karl-Heinz (1993b) Settlement of Disputes Regarding Space Activities. *Journal of Space Law*, Vol. 21, No. 1, 1-10 (p. 3).

¹⁶ Supancana, Ida Bagus Rahmadi (1998) *The International Regulatory Regime Governing the Utilization of Earth-Orbits*. Leiden: Rijksuniversiteit te Leiden (p. 187).

¹⁷ Gorove, Stephen (1991) *Developments in Space Law: issues and policies*, Utrecht Studies in Air and Space Law, Vol. 10. Dordrecht, Boston, London: Martinus Nijhoff Publishers (p. 237).

¹⁸ Kerrest, Armel (2002) Dispute Resolution Mechanism for Damage Caused by Space Objects, IISL-ECSL Symposium, UNCOPUOS Legal sub-committee meeting, Vienna, 1 April 2001. In *Proceedings of the 44th Colloquium on the Law of Outer Space*, IISL, 1-5 October 2001 (Toulouse), AIAA, 462-469 (pp. 465-466).

and the Liability Convention system: a domestic claim for compensation for space-related damages can rarely be expected to be resolved within a year.¹⁹

Another obvious weakness is that private parties and intergovernmental organisations (IGOs) must rely on the cooperation of states to assert any claims. This can be detrimental to their interests as governments may not always be willing to act on their behalf due to political reasons, for instance.²⁰ Even if claims are presented, the diplomatic negotiations may proceed for an indefinite period of time: the Claims Commission is formed only if one of the parties so requests. Its awards are recommendatory only. It is also possible that the private entity suffering damage is not satisfied with the amount of compensation which the “home” state is willing to disburse to it from the sum recovered from the launching state.²¹

On the whole, the dispute resolution system of the Liability Convention involves significant uncertainties: not all disputes which arise will ever be introduced into the process; it can last very long, and the decisions rendered may be far from satisfactory and, most likely, not even enforceable.²² Thus far this has not been a major problem because there has been little use for the convention. The only claim ever presented under the Liability Convention has been that of Canada in the *Cosmos 954* case, where a Soviet nuclear-powered satellite disintegrated over remote northern areas of Canada in 1978. The initial Canadian claim was based on, i.a., the Liability Convention.²³ However, even this conflict was not ultimately resolved under the Liability Convention. In 1981, Canada and the USSR signed a protocol²⁴ which establishes only that the Soviet Union agrees to pay three million Canadian dollars (and that Canada in turn accepts this sum) “in full and final settlement of all matters connected with the disintegration of the Soviet satellite Cosmos 954 in January 1978”. There is no reference to the Liability Convention in the protocol.²⁵

3. International Telecommunication Union

Pursuant to the Constitution of the ITU:

Member States may settle their disputes on questions relating to the interpretation or application of this Constitution, of the Convention or of the Administrative Regulations [of the

¹⁹ Ibid. (pp. 463-464).

²⁰ See Gorove (1991) *supra* note 17 (p. 232).

²¹ Gorove, Stephen (1980) Dispute Settlement in the Liability Convention. In Böckstiegel, K.-H. (ed.): *Settlement of Space Law Disputes: the present state of the law and perspectives of further development*, Proceedings of an International Colloquium, Munich, 13-14 September 1979, SLW, Band 1. Köln, Berlin, Bonn, München: Heymann, 43-50 (p. 44).

²² See also White, Wayne N. Jr. (1993) Resolution of Disputes Arising in Outer Space. In *Proceedings of the 35th Colloquium on the Law of Outer Space*, IISL, 28 August – 5 September 1992 (Washington, DC), AIAA, 183-191 (pp. 185-186).

²³ Statement of the Canadian Claim, paras. 14-24.

²⁴ Protocol Between the Government of Canada and the Government of the Union of Soviet Socialist Republics 1981.

²⁵ Interestingly, a later bilateral Agreement between Canada and the United States of America on Liability for Loss or Damage from Certain Rocket Launches (concluded in 1974) stipulates that “in the event that a claim arising out of these launches is not settled expeditiously in a mutually acceptable manner, the [Governments] shall give consideration to the establishment of a Claims Commission such as that provided for in Article XV of the [Liability Convention] with a view to arriving at a prompt and equitable settlement” (emphasis added).

ITU] by negotiation, through diplomatic channels, or according to procedures established by bilateral or multilateral treaties concluded between them for the settlement of international disputes, or by any other method mutually agreed upon (Art. 56.1).

Hence the ITU dispute resolution system allows the parties to resort very freely to any method “mutually agreed upon”. If none of the above methods is adopted, an arbitration procedure is available as a last resource: “any Member State party to a dispute may have recourse to arbitration in accordance with the procedure defined in the Convention” (Art. 56.2).

Further details of the ITU arbitration procedure are elaborated in the ITU Convention. Disputing parties can decide whether the arbitration is entrusted to individuals, administrations or governments (Art. 41.2).²⁶ However, the system is reserved for states only. The arbitral decision is “final and binding upon the parties to the dispute” (Art. 41.10), but there is no effective enforcement mechanism. In practice, the ITU dispute resolution system has remained a dead letter. However, the most likely reason for this is that arbitration is only the last resort. Most parties have successfully settled their disputes through other means (allowing more privacy) than the official ITU forum.²⁷

4. Other legal arrangements

The commercial space industry has long used clauses providing for arbitration, even in contracts with state institutions and IGOs. One can expect that the popularity of arbitration will only increase and the parties (public and private) will typically resort to the established rules and institutions for it.²⁸ In particular, the International Chamber of Commerce (ICC) – although blamed for excessively high fees, based on a percentage of the amount in dispute²⁹ – has been a popular forum for arbitration in space activities.³⁰

The legal instruments of international space-related organizations are also interesting. For instance, the ESA provides for final and binding resolution of disputes through arbitration in a variety of instruments related to its activities, both as concerns disputes between member

²⁶ If they are not able to agree about this within one month after notice of submission of the dispute to arbitration, the arbitration will be entrusted to governments.

²⁷ Noll, Alfons A. E. (2002) The Various Approaches to Dispute Settlement Concerning International Telecommunications. In The International Bureau of the PCA (ed.): *Arbitration in Air, Space and Telecommunications Law: enforcing regulatory measures*, Papers emanating from the Third PCA International Law Seminar, 23 February 2001, The Permanent Court of Arbitration Peace Palace Papers. The Hague, London, New York: Kluwer Law International, 161-192 (pp. 170-171).

²⁸ See Böckstiegel (1994) *supra* note 6 (pp. 137, 140-141).

²⁹ Bostwick, Phillip D. (1995) Going Private with the Judicial System: making creative use of ADR procedures to resolve commercial space disputes. *Journal of Space Law*, Vol. 23, No. 1, 19-42 (p. 33). In space activities, this can amount to particularly high fees as the sums in dispute very often are considerable. van den Hout, Tjaco T. (2002) Introduction. In The International Bureau of the PCA (ed.): *Arbitration in Air, Space and Telecommunications Law: enforcing regulatory measures*, Papers emanating from the Third PCA International Law Seminar, 23 February 2001, The Permanent Court of Arbitration Peace Palace Papers. The Hague, London, New York: Kluwer Law International, xiii-xx (p. xv).

³⁰ Ravillon, Laurence (2004) Space Law and Mechanisms for Dispute Settlement. *ECSL News*, No. 28 (December 2004), 2-3 (p. 2).

states as well as those arising in the external relations of the ESA.³¹ Disputes between member states, or between any of them and the agency, concerning interpretation or application of the ESA Convention will be submitted to arbitration at the request of any disputing party (Art. XVII.1). The same applies to disputes which arise from damage caused by the agency (Annex I, Art. XXVI). Unless the parties to a dispute otherwise agree, the arbitration procedure has to be organized in accordance with the conditions outlined in Article XVII and additional rules adopted by the ESA Council (Art. XVII.2).

The arbitration tribunal consists of three members (Art. XVII.3), of each party nominates one. The two parties together nominate the third arbitrator (the chair). Other ESA member states (which are not parties to the dispute) may also intervene in the proceedings if the tribunal agrees to that (Art. XVII.4). The tribunal determines its seat and establishes its rules of procedure (Art. XVII.5). Awards are made by majority vote. An award is binding and cannot be appealed; it must be complied with without delay (Art. XVII.6). The ESA Council Rules of Procedure define in more detail, e.g., how the arbitral tribunal is to be set up, the procedure to be applied, and the documentation needed.

In the same vein, Annex I to the ESA Convention directs the agency to provide for arbitration when making contracts.³² The arbitration clause or agreement must specify the applicable law and place of arbitration (Annex I, Art. XXV.1). Accordingly, the “General Clauses and Conditions for ESA Contracts” contains a standard clause, Clause 13, for this purpose. It provides that in case no other stipulation is made, a dispute “shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the [ICC]” (Clause 13.3).

Cooperation agreements between the ESA and other international organisations, institutions and governments consistently resort to arbitration. They contain provisions for consultation, but, as a second step, they envisage the establishment of an arbitration tribunal for the final resolution of disputes. Even the legal instruments of large-scale international projects refer to arbitration as a means of resolving disputes, albeit only after the exhaustion of a multi-layer consultation process. For instance, pursuant to the Agreement on the Civil International Space Station (ISS), disputes should, in the first instance, be settled through consultations, either between the relevant space agencies (Art. 23.1) or at the level of governments (Art. 23.2). Even multilateral government-level consultations are possible (Art. 23.2). Finally, “if an issue not resolved through consultations still needs to be resolved, the concerned Partners may submit that issue to an agreed form of dispute resolution such as conciliation, mediation,

³¹ Interestingly, the Convention for the Establishment of a European Space Research Organization (ESRO), which is – along with the European Organization for the Development and Construction of Space Vehicle Launchers (ELDO) – a predecessor of the ESA, provided that a dispute which was not settled by the good offices of the ESRO Council will be submitted to the ICJ, unless the disputing member states agree on some other mode of settlement. See Bohlmann, Ulrike M. (2002) Experience of the European Space Agency with Dispute Settlement Mechanisms. In The International Bureau of the PCA (ed.): *Arbitration in Air, Space and Telecommunications Law: enforcing regulatory measures*, Papers emanating from the Third PCA International Law Seminar, 23 February 2001, The Permanent Court of Arbitration Peace Palace Papers. The Hague, London, New York: Kluwer Law International, 157-160 (p. 158).

³² Pursuant to Annex I, Art. IV, the ESA enjoys far-reaching immunity from jurisdiction and execution as an international organization. This is counterbalanced by the obligation to provide for arbitration in the contracts it concludes. Farand, André (2002) The European Space Agency’s Experience with Mechanisms for the Settlement of Disputes. In *Proceedings of the 44th Colloquium on the Law of Outer Space*, IISL, 1-5 October 2001 (Toulouse), AIAA, 453-461 (pp. 454-456).

or arbitration” (Art. 23.4). Binding dispute settlement is thus possible only if all parties concerned agree. This requires the conclusion of a specific agreement defining the dispute resolution method. Arbitration is specifically mentioned as one option, but it is up to the disputing parties to decide which form of dispute settlement they prefer.³³

More limited international agreements in space telecommunications than the ITU system also typically contain arbitration provisions, even compulsory ones.³⁴ One reason may be that such arrangements often are predominantly technical and thus relatively seldom involve politically sensitive issues.³⁵ This is likely to make states more inclined to accept even binding settlement of disputes. Furthermore, the important financial implications typical of space telecommunication conflicts can make states more receptive to compulsory arbitration.³⁶ Obviously, political and social homogeneity of states is likely to help, as is similarity in economic and legal systems.³⁷ Furthermore, the fewer states that are involved in a cooperative arrangement or international organization, the lesser their hesitation to submit to binding dispute settlement mechanisms tends to be.³⁸

On balance, mandatory dispute settlement methods (normally arbitration) are usually found only in legal instruments of organizations that are either regional or operate in a specific, limited area of space activities.³⁹ The need for dispute settlement has been somewhat reduced in space activities thanks to the wide-spread practice of applying cross-waiver of liability clauses. Nevertheless, many forms of space activity carry significant political undertones which both generate disputes and make their resolution problematic. The ever growing number of space activities and the considerable economic interests at stake are likely to make the weaknesses of dispute resolution systems in the space sector increasingly evident.

5. ILA draft convention on the settlement of disputes related to space activities

The International Law Association has taken an important tentative but comprehensive step in the settlement of international space-related conflicts by adopting an “ILA Draft Convention on the Settlement of Space Law Disputes”. The system envisioned by the ILA emphasizes the possibilities of private entities to utilize dispute settlement mechanisms on as equal a footing as possible with states.

³³ For a more detailed assessment, see Farand (2002) *supra* note 32 (pp. 458-459).

³⁴ For a more detailed assessment, see Viikari (2008) *supra* note 2 (pp. 69-72).

³⁵ See Williams, Sylvia-Maureen (1997) Dispute Settlement and Space Activities: a new framework required? In *Proceedings of the 39th Colloquium on the Law of Outer Space*, IISL, 7-11 October 1996 (Beijing), AIAA, 61-67 (p. 61).

³⁶ For instance, although the USSR (and other socialist countries) used to be generally opposed to compulsory dispute resolution internationally, they decided to accept compulsory arbitration in the context of the INMARSAT (International Maritime Satellite Organization), because of the financial and technical nature of the organization. However, this concerned only “material claims”, not application and interpretation of the legal instruments of the organization (as that, in the Soviet view, involved relations among sovereign states). Jasentuliyana (1983) *supra* note 9 (p. 237).

³⁷ See *ibid.* (pp. 236-238). The Agreement of the Arab Corporation for Space Communications even provides for adjudication in the settlement of disputes by the General Body of the Arab Corporation for Space Telecommunications (Art. 19), i.e., not by a court or arbitral tribunal, but by a body of an international space telecommunication organization.

³⁸ See Bohlmann (2002) *supra* note 31 (pp. 157-158).

³⁹ See Böckstiegel (1993b) *supra* note 15 (p. 7).

Pursuant to Article 10.2, all dispute settlement procedures envisaged by the Draft Convention are open not only to states and IGOs but also “to entities other than High Contracting Parties unless the matter is submitted to the International Court of Justice”. This refers to private enterprises, above all, for whom the possibility of binding resolution of disputes by arbitration tends to be of particular importance. If they so wish, private entities can even have direct access to an International Tribunal for Space Law. Non-governmental organisations are also allowed to be parties to the dispute settlement procedures of the Draft Convention. Such an opening of proceedings to entities beyond the governmental sector represents a very modern approach in international law to grant access to international legal forums for dispute resolution also to non-state actors.⁴⁰

The Draft Convention has a relatively wide scope of application as well: it applies to all activities in or with effects in outer space, if carried out by states or IGOs parties to the convention or nationals of contracting states or from the territory of such states (Arts. 1.1, 69). Hence even activities conducted on Earth may fall into the scope of the Draft Convention, as long as they have “effects” in outer space. It is easy to imagine that problems of interpretation may emerge.

The ILA Draft Convention, like most international conventions, is based on reciprocity: it only allows a party to benefit from the convention “insofar as it is itself bound” (Art. 1.3). Furthermore, the Draft Convention is a secondary instrument in the sense that it does “not apply to disputes which the parties have agreed or may agree to submit to another procedure of peaceful settlement, if that agreement provides for a procedure entailing binding decisions” (Art. 1.5). Additionally, there is an exclusion clause, according to which any contracting party can either exclude from the applicability of the convention certain kinds of space activities or limit the convention’s applicability to specific space activities or areas of space law, or declare that it will not be bound by some sections of the convention (Art. 1.2).

As regards dispute resolution methods, the ILA Draft Convention draws heavily on the 1982 United Nations Convention on the Law of the Sea (UNCLOS) – adapted, of course, to a different scope of application, and constructed in a somewhat simplified manner. It offers a variety of non-binding and binding dispute resolution procedures to which the disputing parties may resort, but eventually provides for compulsory third-party dispute settlement, choosing arbitration as the preferred subsidiary method. However, the UNCLOS and the ILA Draft Convention are not entirely alike. For instance, the ILA Draft Convention includes no provisions comparable to those of the UNCLOS dealing with the International Seabed Authority, the Seabed Disputes Chamber, and Special Arbitration.⁴¹ Furthermore, it gives no

⁴⁰ However, this has also been identified as the very reason why the ILA Draft Convention “has been unable to build up a true momentum”. Hulsroj, P. (1999) Space Community, Space Law, Law. In *Proceedings of Third ECSL Colloquium on International Organisations and Space Law*, Perugia, 6-7 May 1999, ESA SP-442, 69-75 (p. 71). According to this author, the Draft Convention has “gone, at least, one bridge too far [...] in the sense that it encompasses both inter-state and state-domestic entity conflicts and seeks to set up an International Tribunal for Space Law in the modus of the International Tribunal of the Law of the Sea”.

⁴¹ See Böckstiegel, Karl-Heinz (1997) Presentation at the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court. In Peck, C. and R. S. Lee (eds.): *Increasing the Effectiveness of the International Court of Justice*, Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court, Legal Aspects of International Organization, Vol. 29. The Hague, Boston, London: Martinus Nijhoff Publishers, 446-451 (p. 449).

possibility to withdraw from binding dispute settlement even in the politically most sensitive cases, unlike the UNCLOS.⁴²

6. Improving resolution of disputes in the space sector

It is common practice among private enterprises in international trade and investment to use arbitration to resolve their differences. It does not seem necessary (or even feasible) to provide for a completely new dispute settlement mechanism for their needs in the space sector. At worst, a new dispute resolution mechanism for the private space industry might even constitute a step backwards because countries worldwide have accepted a multilateral system of enforcement of arbitral awards by ratifying the 1958 New York Convention.⁴³

Nevertheless, the rules and procedures of international commercial arbitration could be adjusted to suit the space sector better. It would elucidate the situation if the established arbitral institutions expressly defined space law disputes as a category of claims which they accept for arbitration. This would appear quite feasible. A more profound challenge is that proceedings in some of these institutions may produce less successful awards in space-related conflicts because these institutions usually are relatively unfamiliar with space activities and space law. Rapid and reliable access to a list of arbitrators with special expertise in the space sector could help.⁴⁴ There might even be demand for some kind of space-specific arbitration rules.

The ILA Draft Convention constitutes an important step forward in this respect. It proposes the establishment of a list of specifically qualified arbitrators and a detailed set of rules concerning arbitration in space-related conflicts (Section V). The Draft Convention also envisions a list of experts (and another set of procedural rules) to be used in space-related conciliation (Section IV). Smooth conciliation by qualified experts enhances the possibility of settling disputes at an early stage, with no need to resort to more formal procedures like arbitration.

A general feature of arbitration is that, normally, arbitral decisions are not published. Often even the fact that a dispute exists and is being arbitrated is kept secret.⁴⁵ Hence arbitration cannot provide precedents or case law for future use in the same way as court rulings can. Sometimes arbitrators are not even required to give the disputing parties themselves a written rationale for their decision. Consequently, at worst, even the parties to a dispute may not understand how they should govern their conduct in future in order to avoid further controversies.⁴⁶

Nevertheless, arbitral awards are in fact published in many areas – usually, however, without the names of the parties. This has been the practice at least in maritime arbitration (shipping),

⁴² See UNCLOS Arts. 297-298 concerning disputes over sea boundary limitations, military activities, rights of coastal states with respect to fisheries of the Exclusive Economic Zone, marine scientific research, etc.

⁴³ See Böckstiegel, Karl-Heinz (1993a) *Developing a System of Dispute Settlement Regarding Space Activities*. In *Proceedings of the 35th Colloquium on the Law of Outer Space*, IISL, 28 August – 5 September 1992 (Washington, DC), AIAA, 27-35 (p. 34).

⁴⁴ See Hill, R. and J. Watkinson (1999) *supra* note 4 (p. 29).

⁴⁵ Ravillon (2004) *supra* note 30 (p. 2).

⁴⁶ White (1993) *supra* note 22 (p. 189).

institutional arbitration in East-European countries at the time they were under the socialist regime, and some trade-related arbitration. Some professional organizations have even codified the usages evinced by the published arbitral decisions. Furthermore, many arbitral decisions concerning disputes which have arisen out of state contracts or have been awarded by the International Centre for Settlement of Investment Disputes (ICSID) or the ICC have been published, often with commentaries. Consequently, more recent arbitration awards are sometimes explicitly based on earlier ones. Thus arbitral awards can also constitute a significant source of law in practice.⁴⁷

Space law is a young branch of international law, with numerous unsettled questions. Published legal opinions would thus be particularly valuable for its continuity and development.⁴⁸ Because court cases in this sector are relatively rare, it is primarily arbitral awards which should provide for well-reasoned – albeit, of course, non-binding – precedents. However, arbitration has also been of limited precedential and norm-generating value in the space sector. This is quite understandable, given that confidentiality is an essential characteristic of arbitration.⁴⁹ Another salient reason for the limited usefulness of space-related arbitration awards as precedents is the simple fact that space activities, particularly those of a commercial nature, have attained a considerable volume only recently. Consequently, arbitral practice remains relatively scarce.⁵⁰

Despite the focal role of discretion in arbitration, some kind of procedure for the publication of the legal findings of arbitral proceedings in the space sector would be welcome. It could significantly enhance predictability and transparency in the resolution of space-related controversies. At the same time, protection of the privacy and anonymity of the parties and the confidentiality of the information revealed in the course of arbitration is absolutely essential.⁵¹ Otherwise at least the private sector is likely to abandon arbitration.⁵² Even very selective publicity can be viewed as a threat in the space sector, where the number of stakeholders is relatively limited and their cooperation is often intense. Designing a system which allows for sufficient publicity yet preserves adequate privacy can be quite challenging.⁵³ Another useful improvement could be the publication of innovative dispute

⁴⁷ Fouchard, Philippe (1999) Definition and Sources (Part I). In Fouchard, P., E. Gaillard and B. Goldman: *On International Commercial Arbitration*. The Hague, Boston, London: Kluwer Law International, 5-189 (pp. 188-189).

⁴⁸ Böckstiegel (1993a) *supra* note 43 (p. 31).

⁴⁹ See Havel, Brian F. (2002) International Instruments in Air, Space and Telecommunications Law: The Need for a Mandatory Supranational Dispute Settlement Mechanism. In The International Bureau of the PCA (ed.): *Arbitration in Air, Space and Telecommunications Law: enforcing regulatory measures*, Papers emanating from the Third PCA International Law Seminar, 23 February 2001, The Permanent Court of Arbitration Peace Palace Papers. The Hague, London, New York: Kluwer Law International, 11-57 (p. 12).

⁵⁰ See Böckstiegel (1994) *supra* note 6 (p. 136).

⁵¹ White (1993) *supra* note 22 (p. 189).

⁵² See Ravillon, Laurence (2003) Arbitral Disputes in the Space Activities Sector. *International Business Law Journal*, No. 7, 801-829 (pp. 818-819).

⁵³ See Bruce, Robert R., R. Macmillan, T. St. J. Ellam, H. Intven and T. Miedema (2004) *Dispute Resolution in the Telecommunications Sector: current practices and future directions*, Discussion Paper, ITU, The World Bank. Geneva (p. 17). This obviously applies to states as well. See Romano, Cesare P. R. (2000) *The Peaceful Settlement of International Environmental Disputes: a pragmatic approach*, International Environmental Law and Policy Series, Vol. 56. The Hague, Boston: Kluwer Law International (p. 44).

resolution procedures themselves. Publicity of this type should have far lesser impact on confidentiality and thus be more acceptable.⁵⁴

One more proposal worth consideration is that if a new space law tribunal is established, it should also be able to give advisory opinions. Advisory opinions could provide another way to enhance predictability in the resolution of space-related controversies.⁵⁵ In all likelihood, they would also diminish the need to resort to binding resolutions of disputes as some controversies would already be settled in compliance with an advisory opinion. An analogous example from the law of the sea is the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS). It has been entrusted with the task of giving advisory opinions “at the request of the Assembly or the Council [of the International Seabed Authority] on legal questions arising within the scope of their activities” (UNCLOS, Art. 191). Individual states, let alone other stakeholders, do not have the authority to request advisory opinions.

In the space sector, the roles and possibilities of the various stakeholders need to be carefully considered. The type of disputing parties and choices entrusted to them will largely determine the feasibility of different dispute resolution mechanisms. Compared to conflicts taking place solely within the private sector, dispute settlement tends to be far more complex when public international law is concerned.⁵⁶ At the level of public international law, state-versus-state disputes are the classical type of controversies – and the ones most suitable for being resolved there.⁵⁷ In general, the treatment of disputes among states differs considerably from the resolution of conflicts within the private sector. Traditionally, states have been reluctant to submit to binding mechanisms of dispute settlement, especially in advance of any conflict.⁵⁸ Most states view such arrangements as constraints on their sovereignty.⁵⁹ Compulsory dispute resolution mechanisms are also out of favour as concerns conflicts between states and international organizations. The particular difficulties in resolving controversies among entities of public international law derive largely from the fact that such conflicts may involve considerable political friction.⁶⁰

The lack of effective dispute resolution mechanisms in public international law is increasingly evident in the space sector. In state-to-state conflicts, there is no prevailing practice of resorting to arbitration, for instance. The use of adjudication is even rarer. As long as no general agreement establishing a binding procedure for the settlement of disputes in space activities exists, it is probable that most states will continue to settle their disputes through diplomatic channels. However, diplomatic conflict resolution may be demanding, especially in particularly sensitive areas of space activity, such as remote sensing and direct broadcasting.⁶¹

The current trend of increasing relativism of state sovereignty seems to promise some changes in this respect. Arbitration is already common in international business, including the

⁵⁴ See Bruce et al. (2004) *supra* note 53 (p. ix).

⁵⁵ Report of the 68th Conference of the International Law Association (1998) Taipei, Taiwan (Republic of China), 24-30 May 1998 (p. 248).

⁵⁶ See Williams (1997) *supra* note 35 (p. 63).

⁵⁷ See von der Dunk (2002) *supra* note 3 (p. 447).

⁵⁸ Böckstiegel (1994) *supra* note 6 (p. 137).

⁵⁹ See Williams (1997) *supra* note 35 (p. 63).

⁶⁰ Report of the 68th Conference of the International Law Association (1998) *supra* note 55 (p. 242).

⁶¹ See Williams (1997) *supra* note 35 (p. 63).

space business, and also in relations that involve state entities. There even exists an arbitral regime, the ICSID, designed specifically for disputes between states and private parties. It seems likely that the enormous interests at stake in the space sector are eventually bound to make states willing to accept an effective (binding) general dispute settlement system.⁶² An interesting example from an analogous area, air law, is the system of the International Civil Aviation Organization (ICAO). Pursuant to the Convention on International Civil Aviation, if disputes concerning the interpretation or application of the convention (or its annexes) cannot be settled by negotiation, they are to be resolved through the ICAO Council (Art. 84). The ICAO Council is a permanent body of the organization, composed of 36 contracting states elected every three years by the ICAO Assembly (Art. 50(a)). Decisions of the ICAO Council may be appealed, either to an ad hoc arbitral tribunal or to the ICJ (Arts. 84-86).⁶³ However, it does not seem probable that states in the space sector would be ready to accept a mechanism which leaves them with so little discretion and freedom of choice.

The ILA Draft Convention addresses the concerns of states at least to some extent. It does not impose on them a single method of binding dispute resolution but gives a range of options to choose from. Considering the variety of space-related disputes and the different political, legal and other circumstances which may be relevant in such conflicts, it seems quite improbable that one method of settling controversies could be equally suitable in all cases.⁶⁴ In particular, it does not appear realistic to expect most states to accept any international court as the exclusively competent organ. Accordingly, the ILA Draft Convention puts forward arbitration as a strong candidate for the preferred method of resolving space-related controversies, but other options are also available. The experience of the UNCLOS presents a forceful argument in favour of a solution of this type: a combination of adjudication by a court (even by an international tribunal for space activities) and arbitration (ad hoc or administered).

An interesting example of administered arbitration in the space sector is an International Space and Aviation Arbitration Court set up by the French Air and Space Law Society.⁶⁵ The rules of the court call for a binding award which cannot be appealed. The award is strictly confidential, as is the handling of the dispute. The court has to render its award within one year of the commencement of arbitration.⁶⁶ An interim arbitration procedure is also possible. Furthermore, the rules provide for arrangements for appointing experts listed according to their areas of specialization and recommended by the court. The fees of arbitrators and experts are determined on the basis of a lump sum per day when a hearing or meeting is held.

⁶² Ibid. (p. 65).

⁶³ The judicial machinery of the ICAO has been invoked very seldom. For a more detailed assessment, see, e.g., Maniatis, Dimitri (1995) *Conflict in the Skies: The Settlement of International Aviation Disputes: From the Law of the Jungle to the Rule of Law*. *Annals of Air and Space Law*, McGill, Vol. XX, 167-233 (pp. 202-206).

⁶⁴ Böckstiegel, Karl-Heinz (1980) Which method of dispute settlement in space law can be considered as being the most effective and which has the greatest chances of realization? In Böckstiegel K.-H. (ed.): *Settlement of Space Law Disputes: the present state of the law and perspectives of further development*, Proceedings of an International Colloquium, Munich, 13-14 September 1979, SLW, Band 1. Köln, Berlin, Bonn, München: Heymann, 151-158 (p. 152).

⁶⁵ On the creation of the International Space and Aviation Arbitration Court of the French Air and Space Law Society, see Bourelly, Michel G. (1994) *Creating an International Space and Aviation Arbitration Court*. In *Proceedings of the 36th Colloquium on the Law of Outer Space*, IISL, 16-22 October 1993 (Graz), AIAA, 144-149.

⁶⁶ Bostwick (1995) *supra* note 29 (pp. 33-34).

This should make the costs much lower than the fees of the ICC, for instance – and even lower than in lawsuits in many domestic courts.⁶⁷ Apparently, however, the services of the court have not been used. This may indicate that an instance of this kind cannot meet the demands of the modern space sector. However, given the overall sluggish pace of the development of space law and its dispute resolution mechanisms, such a conclusion may be premature.

In any case, arbitration cannot be the only alternative in space-related dispute resolution. Pursuant to the ILA Draft Convention, parties to a dispute should be allowed to choose between adjudication and arbitration but with an obligation to accept one of them. A similar system is provided by the UNCLOS, which includes a general submission to binding third-party settlement of disputes but provides for high flexibility in letting the disputing parties select the method or body of their preference. A mechanism of this type could have a realistic chance of getting approved by a majority of states in the space sector as well.

Another way to make states more receptive to binding dispute settlement could be to give them the right to withdraw their submission to binding resolution of disputes. Of course, if applied unconditionally, such a right could easily water down the conflict resolution system: if allowed to withdraw their submission at any time and with the withdrawal taking effect at once, states could, in effect, completely avoid binding dispute resolution. Hence withdrawal should be possible only as concerns future conflicts, and in any case not after a dispute has already been submitted to a dispute settlement body. A further requirement could be that withdrawal of submission to binding dispute resolution takes effect only after a certain period of time.⁶⁸

It is likely to take a while before any new international regulation in the space sector enters into force. In the meantime, possibilities for strengthening the role of the International Court of Justice could be considered.⁶⁹ One suggestion has been to establish a special chamber of the ICJ for space law disputes, similar to the chamber established in 1993 for environmental matters.⁷⁰ Utilization of chambers of the ICJ to resolve space law controversies is no new idea.⁷¹ Apparently, the idea enjoys relatively wide support among space lawyers.⁷² The

⁶⁷ Diederiks-Verschoor, I. H. Philepina (1998) The Settlements of Disputes in Space: new developments. *Journal of Space Law*, Vol. 26, No. 1, 41-49 (pp. 42-43); Bostwick (1995) *supra* note 29 (pp. 33-34).

⁶⁸ See Böckstiegel, Karl-Heinz (1978) Arbitration and Adjudication Regarding Activities in Outer Space. *Journal of Space Law*, Vol. 6, No. 2, 3-18 (p. 18).

⁶⁹ For a more detailed assessment of such possibilities (and problems related to them), see, e.g., Böckstiegel (1997) *supra* note 41, and Vereshchetin, Vladlen (2001) The International Court of Justice as a Potential Forum for the Resolution of Space Law Disputes, in Benkö, M. and W. Kröll (eds.): *Luft- und Weltraumrecht im 21. Jahrhundert / Air and Space Law in the 21st Century*, Liber Amicorum Karl-Heinz Böckstiegel. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG, 476-483. Interestingly, when the Outer Space Treaty was being drafted in the 1960s, the US proposed a clause pursuant to which disputes arising from the interpretation or application of the OST could be referred to the ICJ. Stojak (1997) *supra* note 5 (p. 452).

⁷⁰ The ICJ established a special seven-member Chamber of the Court for Environmental Matters in 1993. For a more detailed assessment of the chamber, see Romano (2000) *supra* note 53 (pp. 122-125).

⁷¹ See, e.g., Cocca (1980) *supra* note 14 (p. 140). Of more recent authors, see, e.g., Williams (1997) *supra* note 35 (p. 64).

⁷² See Report of the 68th Conference of the International Law Association (1998) *supra* note 55 (p. 247).

formation of chambers of the ICJ is possible under Article 26 of its Statute, either “for dealing with particular categories of cases” (like environmental matters, Art. 26.1)⁷³ or “for dealing with a particular case” (Art. 26.2). Hence a space disputes chamber could, in principle, be formed either on a permanent basis as a standing chamber, or as an ad hoc chamber to hear a particular case. Pursuant to the Statute of the ICJ, cases are “heard and determined by the chambers ... if the parties so request” (Art. 26.3). The option of referring a case to the full court thus always remains.

An even more extensive chamber structure has been proposed for the possible global space law tribunal. It has been envisioned as having a variety of chambers which are tailored to try different kinds of disputes.⁷⁴ There could, for instance, be a chamber for disputes concerning contracts in the space sector, another one for space-related insurance disputes, and one for conflicts caused by space debris. However, it may not be easy to determine what kinds of special chambers would be needed. In order to enable the space law tribunal to function efficiently, the establishment and operation of its chambers should be kept as simple as possible. If no suitable chamber exists for a given dispute, an ad hoc chamber could hear the case. On the other hand, the possibility of resorting to the full court should remain. The tribunal could itself determine whether a case is to be tried by a chamber or by the full court, or this could be up to the disputing parties to decide. If well-designed, such a multi-chamber court could provide an institutionalized way to introduce well-focused special expertise in the resolution of conflicts in the space sector.

Some tribunals allow disputing parties to select some or all of the judges of a chamber. In practice, this comes close to arbitration.⁷⁵ For instance, pursuant to Article 26.2 of the Statute of the ICJ, “[t]he number of judges to constitute [an ad hoc] chamber shall be determined by the Court *with the approval of the parties*” (emphasis added). Despite the temperate language of the provision (“with the approval”), it in fact permits the views of the disputing parties concerning the composition of the chamber to be decisive. Apparently, this has increased the attractiveness of the ad hoc chambers of the ICJ.⁷⁶

However, a system involving numerous and various kinds of chambers, combined with wide discretion of the disputing parties in selecting the body to hear a case, sounds overly complicated. The UNCLOS can again work as an example. Within the International Tribunal for the Law of the Sea, there is a special Seabed Disputes Chamber (Art. 186). Additionally, Annex VI of the UNCLOS provides for a possibility of establishing ad hoc chambers (called “special chambers”) of the ITLOS for “dealing with particular categories of disputes” (Art. 15). Disputes can be heard by these chambers at the request of the disputing parties (Annex VI, Art. 15.4). Moreover, the Seabed Disputes Chamber can form “sub-chambers” (ad hoc chambers) of its own (Annex VI, Art. 36).⁷⁷ Hence, in addition to the chambers of the main

⁷³ The examples given in the article for the application of this paragraph are “labour cases and cases relating to transit and communications”. The Statute of the ICJ has “inherited” the reference to these particular types of disputes from its “predecessor”, the Statute of the Permanent Court of International Justice (Arts. 26-27). Apparently, such cases appeared as the most salient international disputes in the early 20th century, when the Statute of the Permanent Court of International Justice was adopted. Today, however, environmental disputes, for instance, have greater importance. Romano (2000) *supra* note 53 (pp. 122-123.)

⁷⁴ Cocca (1980) *supra* note 14 (p. 147).

⁷⁵ See Böckstiegel (1993b) *supra* note 15 (p. 5).

⁷⁶ See Romano (2000) *supra* note 53 (p. 124).

⁷⁷ For a more detailed treatment, see, e.g., Collier and Lowe (1999) *supra* note 11 (pp. 84-95).

tribunal (ITLOS), there can even be “third-level” chambers, namely chambers within a chamber (the Seabed Disputes Chamber) of the ITLOS. Already during the negotiations leading to the adoption of the UNCLOS, the Seabed Disputes Chamber did not prove very popular among the industrialized states. Many of them called for dispute settlement by arbitration instead.⁷⁸ The entire ITLOS was the compromise result of protracted negotiations, and it has not been put to full use since its creation. States seldom resort to the tribunal, and the few cases which have been submitted to it are relatively insignificant (a total of sixteen cases, at the time of this writing, of which as many as nine have concerned the prompt release of vessels).

The environmental chamber of the ICJ has proven even less popular: no state has yet opted to have a dispute heard by it. Apparently, the reasons for this are manifold. They include the general reluctance of states to settle their international disputes (particularly those concerning environmental matters) by adjudicative means. Moreover, unlike in the case of the ad hoc chambers of the ICJ, the disputing parties are not allowed to determine the composition of the environmental chamber. Also the procedure of the environmental chamber is very similar to that of the full court. States may not even be able to agree very easily that their dispute is an environmental one. For instance, in the *Gabcikovo-Nagymaros* case, Hungary repeatedly appealed to principles of international environmental law, whereas Slovakia (and the ICJ, in its decision) focused rather on the law of treaties.⁷⁹

Indeed, many international disputes involve various aspects of international law. It is not always easy to say which of them are decisive. Such diversity – even unpredictability – in how disputes are addressed may prompt states to turn to the full court instead of a specialized chamber.⁸⁰ Even if a special space disputes chamber of the ICJ were established, there is no particular reason to expect a considerable number of disputes (if any) from the space sector to be presented to the ICJ. Thus there is hardly a pressing need for such a chamber. As regards the proposals concerning an entire international space law tribunal, they appear unfeasible partly for the same reasons as does a space law chamber of the ICJ.

An interesting comparison in this respect can be made to proposals concerning the establishment of an international tribunal specialized in environmental disputes. Arguments presented in favour of an international environmental court include the abundance of pressing environmental problems today and the need for a body of experts in international environmental law to consider such problems, the need for better access to environmental justice for individuals and groups at the international level, and the need for dispute settlement procedures where international organizations can also be parties.⁸¹ In a similar manner, there are pressing specialized legal problems in the space sector calling for experts to solve them. There certainly is an increasing need for space-related dispute resolution mechanisms which recognize persons (natural and juridical), groups and international organizations on an equal footing with states.

⁷⁸ Oxman, Bernhard H. (1983) Some Reflections on Relying on Customary International Law and Ad Hoc Agreements Among Limited Participants. In Dupuy, R.-J. (ed.): *The Settlement of Disputes on the New Natural Resources*, Workshop, The Hague, 8-10 November 1982. The Hague, Boston, London: Martinus Nijhoff Publishers, 85-101 (p. 78).

⁷⁹ *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia). 25 September 1997. 1997 ICJ Reports 7.

⁸⁰ Vereshchetin (2001) *supra* note 69 (p. 481).

⁸¹ Hey, Ellen (2000) *Reflections on an International Environmental Court*. Kluwer Law International (p. 3).

Furthermore, the arguments presented against the establishment of an international environmental court sound familiar. For instance, some fear that the proliferation of international tribunals in general contributes to the fragmentation of international law. Furthermore, it has been argued that the existing dispute resolution mechanisms are, or at least can be, equipped well enough to handle environmental cases as well. One more argument is that conflicts concerning international environmental law involve other aspects of international law as well, and therefore a specialized tribunal would not be needed, or even useful.⁸²

Obviously, if fragmentation of international law is a problem, a space law tribunal would contribute to it just like any other specialized international court. One may also well argue that existing dispute resolution mechanisms can at least be made better suited to space activities. Moreover, most space law disputes can be defined in terms of other areas of international law as well, such as trade law or the law of treaties, for instance. It could be difficult to assure that a tribunal specialized in the law of outer space would have sufficient expertise to deal with the other legal questions which may be relevant in space-related disputes.⁸³ Hence, instead of establishing new specialized international tribunals, it might be more feasible to try to guarantee that sufficient expertise in the different areas of international law is available on the benches of existing dispute settlement forums.⁸⁴

Improvements in adjudication procedures of the ICJ and other tribunals could help with some of the current problems related to dispute resolution in the space sector. However, this approach appears to be far more demanding than that of establishing better arbitration-based mechanisms. Besides, the process of many international courts – the ICJ in particular – remains insensitive to the needs of other entities than states. Considering the focal role of international organizations and the private sector in space activities, the ICJ risks being excluded from much of the litigation in this area. Furthermore, regardless of any reshaping of adjudication procedures, a salient problem related to all court judgments internationally would still remain: even if states were receptive to adjudication as a dispute resolution mechanism, compliance with the rulings of a court might nevertheless prove unacceptable to them.⁸⁵ International enforcement of arbitral awards might also be problematic, but to a significantly lesser degree.

Another proposal which has been put forward is that the space sector could resort to the other facility whose home is in the Peace Palace of the Hague, the Permanent Court of Arbitration, to settle its disputes.⁸⁶ Despite its name, the PCA is in fact not a court at all, but a facility with a list of arbitrators available for resolving disputes. The only truly permanent feature of the PCA is its International Bureau, headed by a Secretary-General. The system of the PCA grants the disputing parties wide discretion as to the selection of arbitrators, the procedural rules to be applied, and the use of the services of the PCA in general.

The PCA might be more suitable than the ICJ for resolving many space-related controversies, given that acceptance of the private sector and IGOs is of major importance today.

⁸² Ibid.

⁸³ Of course, the same problem also concerns non-space tribunals when space-related aspects are involved in a dispute heard by them.

⁸⁴ See also Hey (2000) *supra* note 81 (p. 9).

⁸⁵ On international enforcement in more detail, see, e.g., Collier and Lowe (1999) *supra* note 11 (pp. 263-273).

⁸⁶ The Peace Palace also serves as the seat of the International Court of Justice.

Acceptance could be gained by giving the private sector and IGOs equal access to dispute resolution mechanisms (with the exception of the possibility to avail themselves of the ICJ). The PCA has granted limited access to IGOs and even private parties. It adopted a new series of dispute protocols (the Permanent Court of Arbitration Optional Rules) between 1992 and 1996. Pursuant to them it now offers arbitration also in disputes in which only one party is a state,⁸⁷ in which one party is a state or an international organization and the other is an international organization,⁸⁸ and in which one party is an international organization and the other is a private entity.⁸⁹ Hence, the PCA allows for both public and mixed public/private arbitration. Consequently, it has been increasingly involved in international commercial arbitration between states, IGOs and private entities.

However, as concerns the most common type of disputes arbitrated – purely private disputes between two private parties – even the PCA continues to play a very limited role: in international commercial arbitration where neither party is a state or state entity, the role of the PCA is confined to offering some assistance at most. Above all, it often operates as an agency to select arbitrators for controversies of this type.⁹⁰ The UNCITRAL Arbitration Rules present another interesting formula in this respect. They do not entrust the PCA with the task of directly appointing arbitrators. Instead, if the disputing parties cannot agree on an arbitrator(s), either party can request the Secretary-General of the PCA to designate an “appointing authority”. The appointing authority then selects the arbitrator(s) (Arts. 6-7).

The PCA can be used in the resolution of a dispute when its rules so allow and the disputing parties agree to it. Additionally, jurisdiction of the PCA can be established by bilateral or multilateral arbitration agreements for particular types of disputes which may arise in the future. It has been suggested that the space sector could adopt agreements accepting binding arbitration by the PCA, even for all disputes in this area.⁹¹ An interesting precedent from a partly analogous field of activity is provided by the European Organization for the Safety of Air Navigation (EUROCONTROL). The EUROCONTROL Convention Relating to Cooperation for the Safety of Air Navigation refers to the Optional Rules of the Permanent Court of Arbitration for dispute settlement.⁹² Moreover, there is a EUROCONTROL Draft Arbitration Policy which complements the PCA Optional Rules. In addition to referring disputes to arbitration under the auspices of the PCA, it posits a newly-conceived instrument, a preliminary advisory opinion, as a tool for enforcing regulatory measures (EUROCONTROL Draft Arbitration Policy, Art. 5).

In addition to offering a dispute settlement mechanism which can, to some extent, accommodate actors other than state-actors, the framework of the PCA is able to reconcile considerable flexibility with certainty. Interestingly, arbitration clauses that refer to the PCA can be found in many conventions dealing with environmental protection, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Art. XVIII) and the Convention on Migratory Species of Wild Animals (Art. XIII). Furthermore, the PCA has two sets of optional rules for environmental disputes.⁹³ Pursuant to the PCA,

⁸⁷ PCA Optional Rules for Arbitrating Disputes Between Two Parties of which Only One is a State.

⁸⁸ PCA Optional Rules for Arbitration Involving International Organizations and States.

⁸⁹ PCA Optional Rules for Arbitration Between International Organizations and Private Parties.

⁹⁰ See Havel (2002) *supra* note 49 (pp. 46-48).

⁹¹ See Hulsroj (1999) *supra* note 40 (pp. 71-72).

⁹² The PCA applies various sets of optional arbitration rules, based on the 1976 UNCITRAL Arbitration Rules.

⁹³ Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment

“[t]hese [r]ules provide the most comprehensive set of environmentally tailored dispute resolution procedural rules presently available”.⁹⁴ The PCA also has Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements to assist the negotiators of environmental treaties.⁹⁵ In addition, there is a specialized PCA panel of arbitrators which is, in practice, a list of environmental experts worldwide. There is still another panel of “scientific and technical experts who may be appointed as expert witnesses”.⁹⁶ The parties to a dispute can use the PCA panels when selecting arbitrators, conciliators and expert witnesses. However, they are also free to choose persons from outside the lists (panels) of the PCA.

Similar sector-specific means could provide for increasingly efficient settlement of space-related controversies. For instance, “PCA optional rules for arbitration of space-related disputes” and a list of experts specialized in this area could meet many of the demands of the modern space sector. It has been proposed that the settlement of international controversies before permanent arbitral tribunals should even be made mandatory in the space sector. If no supranational forum with special expertise in space issues is established, the PCA could be a strong candidate to handle these disputes. This would seem particularly feasible if the PCA established specialized panel(s) of experts available for space-related conflicts. Given the salient role of the private sector in space activities today, however, other stakeholders than states and IGOs should be afforded full and equal participation in the dispute settlement system. Obviously, the PCA thus cannot be used to resolve all disputes in the space sector, but it could provide a feasible framework for the settlement of many conflicts.⁹⁷

7. Conclusion

There is an obvious need for a more effective mechanism of dispute resolution in the modern space sector. A precondition for effectiveness is that the mechanism is acceptable to a majority of the relevant entities. Some disputes in this area are already covered by relatively functional settlement systems. However, there is no general system which would apply to all space-related disputes and all types of stakeholders. The existence of such a mechanism could provide a strong incentive for finding solutions to conflicts without even having to resort to the dispute resolution system.

In practice, the establishment of totally new means for dispute settlement in the space sector does not appear likely, or even feasible. Private enterprises have proven relatively efficient in handling their mutual controversies – typically by resorting to arbitration. Problems arise when the public sector is involved. Experiences from international arbitration seem promising in this respect as well. Agreements in space telecommunications, for instance, already commonly resort to compulsory arbitration. In a similar vein, the 1975 European Space Agency Convention provides recourse to arbitration both as concerns disputes between the

adopted in 2001 and Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment adopted in 2002.

⁹⁴ <http://www.pca-cpa.org/showpage.asp?pag_id=1058> [21.2.2010].

⁹⁵ Sands, Philippe and Ruth MacKenzie (2000) *PCA Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements*, 1998, updated 2000, <<http://www.pca-cpa.org/upload/files/envannex1.pdf>> [21.2.2010].

⁹⁶ These panels have been established pursuant to the Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment (Art. 8.3).

⁹⁷ For a detailed treatment of the issue, see Havel (2002) *supra* note 49.

ESA and its space industry suppliers, as well as those between the ESA and its member states. Interestingly, even the Claims Commission mechanism of the UN Liability Convention resembles the procedures of international arbitration. Considering, furthermore, experiences from the law of the sea, it seems that arbitration combined with other dispute resolution methods to constitute a system which offers a certain freedom of choice but eventually results in a binding settlement of conflicts could be a feasible solution. Such a mechanism has been proposed by the ILA Draft Convention.

Furthermore, disputes in the space sector can involve many other stakeholders besides the immediate disputing parties. The interests of all humanity, including future generations, may even be at stake. Despite its capability to accommodate different kinds of stakeholders, arbitration remains in essence a bilateral procedure. In a way it is a bilateral mechanism even more distinctively than court proceedings, because arbitration agreements typically do not allow even third states whose interests may be directly involved to intervene.

Obviously, most dispute resolution systems are not very good at dealing with the interests of other entities than the immediate parties to a dispute. Where some kind of general interests of humankind are concerned, dispute settlement mechanisms face even more considerable challenges. Accordingly, conflicts regarding the use and condition of outer space and its resources, for instance, seem to call for something other than the traditional bilateral and adversarial means offered by most international legal instruments.

Some multilateral environmental treaties have expanded the opportunities available within their dispute resolution mechanisms in this respect. Significantly, they have granted third states that have a legal interest in a particular dispute the right to intervene in an arbitral process. For instance, pursuant to the appendix regulating arbitration of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention):

[...] any Party to this Convention having an interest of a legal nature in the subject-matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal (Appendix VII, Art. 15).

Similar examples include the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Annex IV, Art. 15) and the 1992 Convention on the Transboundary Effects of Industrial Accidents (Annex XIII, Art. 15), both of which have borrowed the wording of the relevant provision directly from the Espoo Convention. Earlier agreements with provisions to the same effect include the 1973 MARPOL Convention.⁹⁸

Such right of intervention reflects an increasing awareness of the unity of the global environment.⁹⁹ Considering the inherent unity of the space environment and the interrelatedness of the international spacefaring community, a similar opportunity to intervene for the purpose of protecting the legal interests of a third state could be appropriate at least in some disputes in the space sector. Moreover, it could facilitate more comprehensive resolution of disputes. Any intervening party introduces its own version of the controversy, thus in all likelihood allowing the tribunal deciding the case to get a less polarized view of the situation than what is provided by the involvement of only the two adversarial parties. An interesting precedent in the space sector is the arbitration tribunal

⁹⁸ International Convention for the Prevention of Pollution from Ships, Protocol II, Art. VII. For more examples, see Romano (2000) *supra* note 53 (pp. 107-108).

⁹⁹ *Ibid.* (p. 43).

established pursuant to the ESA Convention: in addition to the parties of a dispute, other member states of the ESA can intervene in the proceedings if the tribunal so agrees (Art. XVII.4).

The law of the sea provides an interesting example of extending even international adjudication beyond states. The International Tribunal for the Law of the Sea permits non-state entities (including state enterprises, natural or juridical persons, and the international organization International Seabed Authority) to take part in its proceedings in limited, well-specified instances concerning disputes relating to activities in the international deep seabed (UNCLOS, Art. 187). A similar system has been suggested for the space sector by the ILA Draft Convention and its space law tribunal. The jurisdiction of the international space law tribunal in respect of private entities would be even more extensive than that of the ITLOS. The establishment of such a new international judicial body seems, however, rather unlikely.

On balance, the most suitable candidate for the resolution of space-related disputes today appears to be arbitration. It seems like the most promising and feasible method of dispute settlement for the needs of the modern space sector. Even arbitration has its limitations, however. For instance, inter-state arbitration is hardly acceptable for the disputing parties in conflicts which involve highly political, as well as military, aspects.¹⁰⁰ Such aspects are by no means unfamiliar in the space sector. Moreover, even where international arbitration is accepted in principle, diversity in the cultural and legal backgrounds of states and other stakeholders may contribute to abuse and manipulation of the procedure.¹⁰¹

In the end, the resolution of a conflict depends on the will of the disputing parties to put a stop to their dispute. The most elaborate treaty provisions establishing a comprehensive dispute resolution system are of little use if the parties are not willing to live by those rules. Apparently, a general will to put to full use even the existing means of dispute settlement does not exist in the international space sector at the moment. A yet more serious problem is, however, that the dispute resolution mechanisms available do not suit the needs of the modern space sector in an optimal way. Of course, this can partly explain also the reluctance to resort to these mechanisms in the first place.

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¹⁰¹ See *ibid.* (pp. 306-307).

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Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon

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Arbitration between a private party and a State is always contentious for one main reason: whether the State in arbitration will raise the defence of sovereign immunity. A private party wants the State to behave like any other commercial partner when entering into a commercial deal. On the other hand, a State keeps its ultimate defence of sovereignty as and when its sovereignty is at stake. During the evolution of arbitration as a method of dispute resolution, a trend was seen that States imposed self restraint in invoking sovereign immunity in arbitration. The equilibrium has been maintained for all these years in international commercial arbitration, and the issue has become almost settled. However, it has recently been resurrected in the Court of Appeal case *FG Hemisphere Associates LLC and Democratic Republic of Congo and ors.* In this case, the defence of sovereign immunity was raised by the Democratic Republic of Congo (DRC) at the enforcement stage when an arbitral award was brought for enforcement in Hong Kong. Although the case is pending before the Court of Final Appeal for final disposal on the issue, this paper examines the issue of sovereign immunity in the context of enforcement of arbitral awards in general and particularly with reference to Hong Kong, which is a special administrative region of China, which is the sovereign authority for Hong Kong. This paper will first examine the enforcement mechanism for arbitral awards and then examine the position of sovereign immunity in enforcement in arbitration as well as enforcement proceedings. A State and a private party which have agreed to arbitration have the intention to arbitrate, but the same intention is interpreted differently when the award emanating from that arbitration comes up for enforcement. In order to highlight this issue, the paper will show how professional players in the same field – i.e., law – such as scholars and lawyers of public international law, ardent supporters of international commercial arbitration and judges of national courts involved in the enforcement of awards view the issue of sovereign immunity so differently, and invariably through their litigative lens, thus compromising the integrity of the arbitration process as an alternative to litigation. The paper will then argue for the use of the sovereignty defence, particularly the timing or stage of using such a defence, in a consistent manner during the whole arbitration process, including the enforcement of awards.

1. Introduction

Arbitration between a private party and a State is always contentious for one main reason: whether the State in arbitration will raise the defence of sovereign immunity. A private party wants the State to behave like any other commercial partner when entering into a commercial deal. On the other hand a State keeps its ultimate defence of sovereignty as and when its sovereignty is at stake. During the evolution of arbitration as a method of dispute resolution, a trend was seen that States imposed self restraint in invoking sovereign immunity in arbitration. The same position was fortified through the International Convention of Settlement of Investment Dispute (ICSID) Convention dealing with investment arbitration between a State and a private party.² The Convention explicitly states that a disputing State will not raise the defence of sovereign immunity.³ The equilibrium has been maintained for all these years in international commercial arbitration, and the issue has become almost

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² The ICSID Convention was formulated by the Executive Directors of the World Bank. It came into force on 14 October 1966. See ICSID Convention, Article 1(2).

³ ICSID Convention, Articles 25-27.

settled.⁴ However, the issue has recently been resurrected in the Court of Appeal case *FG Hemisphere Associates LLC and Democratic Republic of Congo and others* (hereinafter “the FGH case”).⁵ In this case, the defence of sovereign immunity was raised by the Democratic Republic of Congo (DRC) at the enforcement stage when an arbitral award was brought for enforcement in Hong Kong. The same defence was not raised at the arbitration stage, which was conducted according to the Rules of the International Chamber of Commerce (ICC) in Switzerland and France.⁶ Although the case is pending before the Court of Final Appeal for final disposal on the issue, this paper examines the issue of sovereign immunity in the context of enforcement of arbitral awards in general and particularly with reference to Hong Kong, which is a special administrative region of China, which is the sovereign authority for Hong Kong. This paper will first examine the enforcement mechanism for arbitral awards and then examine the position of sovereign immunity in enforcement in arbitration as well as enforcement proceedings. A State and a private party which have agreed on arbitration have the intention to arbitrate, but the same intention is interpreted differently when the award emanating from that arbitration comes up for enforcement. In order to highlight this issue, the paper will show how the professional players of the same field – i.e., law – such as scholars and lawyers of public international law, ardent supporters of international commercial arbitration and judges of national courts involved in the enforcement of awards view the issue of sovereign immunity so differently, and invariably through their litigative lens, thus compromising the integrity of the arbitration process as an alternative to litigation. The paper will then argue for the use of the sovereignty defence, particularly the timing or stage of using such a defence, in a consistent manner during the whole arbitration process, including the enforcement of awards.

2. Arbitral Award: The Cart before the Horse

It is the general duty of an arbitral tribunal to give an award which is enforceable; otherwise the whole purpose of arbitration will be frustrated.⁷ Parties to arbitration are also mindful of this fact; therefore, they select a place of arbitration which is a party to the New York Convention on Recognition and Enforcement of Arbitral Awards (hereinafter “the NYC”).⁸ The NYC makes enforcement of arbitral awards much easier, faster and more effective than court judgments.

An arbitral award, under the NYC process, is easy to enforce. The party has to submit the arbitration agreement and a certified copy of the award to the enforcement court.⁹ The court

⁴ The USA adopted the Foreign Sovereign Immunity Act (1974), and the UK legislated the State Immunity Act (1978), which set the trend that a State cannot claim immunity for its commercial activities. This may be said to be the established approach, at least in the Common Law. In Civil Law countries, though absolute immunity was practiced, an exception was created for commercial activities.

⁵ CACV373/2008 & CACV 43/2009.

⁶ The parties to the arbitration — i.e., the DRC — agreed to use the ICC Rules for the arbitration.

⁷ An arbitral tribunal is only required to do everything according to arbitral procedure to ensure that an award rendered by it is not refused from enforcement. However, the tribunal is not obliged to make sure that the parties fulfill their obligations under an award. It is up to the parties to discharge their obligations under an award.

⁸ The NYC came into force in 1958 and so far has played a significant role in the development of arbitration as a method of dispute resolution. So far 144 countries have signed the Convention.

⁹ NYC, Article III.

recognizes the award and then issues the order to the other party to satisfy the claim awarded in the arbitral award. If the opposing party has any objection, it can argue its case using the grounds listed in Article V of the NYC. If the party succeeds in its argument, the court may refuse to enforce the award. The enforcing court can still enforce the award even if the opposing party has successfully argued its case; this is because Article V of the NYC contains the word “may”, which gives discretion to the courts; this discretion can be exercised in favour of the enforcement of awards. The pro-enforcement policy of the NYC has been used even in situations where an award was set aside in the court where the award was made.¹⁰ However, it is interesting to note that the NYC does not list sovereign immunity as a ground for refusing to enforce an award rendered where one of the parties is a State.

Some arbitration institutions have incorporated a special rule which, in effect, prevents a State from raising sovereign immunity during enforcement once it agrees to arbitrate under their rules. The ICC is one of the leading arbitration institutions which have incorporated such a rule. The relevant rule states: “Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”.¹¹ The contentious question in this regard is that by submitting to arbitration, does a State also waive its sovereign immunity defence at the enforcement stage? Scholars have analyzed this issue by proposing two-stage approaches.¹² This may suggest that consent to arbitration by a State is different from consent or waiver of sovereign immunity at the enforcement stage by the State. However, some scholars argue that once a State consents to arbitration, the waiver of sovereign immunity at the enforcement stage is deemed to have been given, so that the arbitration can lead to its logical and practical conclusion through enforcement.¹³ In general, at the execution stage (i.e., after recognizing the award) if the Court attaches the bank account or diplomatic property of a State, then the State is entitled to raise sovereign immunity.¹⁴ However, if the bank account or property of the commercial arm of the State is attached for the execution, then the State is not allowed to raise the defence of sovereign immunity.¹⁵ Therefore, a State which has consented to international commercial arbitration is deemed to have consented to enforcement (or to not raising the defence of sovereign immunity at the enforcement stage) as long as sovereign funds or property are not affected. In other words, State property used for purely State functions cannot be subject to the enforcement of an award to satisfy claims.

¹⁰ Article V (1)(e) of the NYC says that a court may refuse the enforcement of an award if the award has been set aside in the court of the country where it was made. However, in few cases the court allowed enforcement of an award where the original award had been set aside. See *Hilmarton Ltd. v Omnium de traitement et de valorization (OTV)* Revue de l'arbitrage Vol. XX (1995) *Yearbook of Commercial Arbitration* 663 and *Chromalloy Aeroservices Inc. v Arab Republic of Egypt*, 939 F. Supp 907 (D.D.C 1996).

¹¹ ICC Rules, Article 28(6).

¹² See in general Fox (2008) *The Law of State Immunity*. 2nd ed. Oxford University Press.

¹³ Toope, Stephen J. (1990) *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons*. Cambridge University Press (pp. 146-150), as cited in FGH Case, para. 140.

¹⁴ Diplomatic, military, and cultural heritage or its archives and property forming part of an exhibition of objects of scientific, cultural, or historical interest of a State are accorded special immunity status. See the UN Convention on the Jurisdictional Immunities of States and Their Property 2004 (hereinafter 2004 Convention), Articles 21(1)(d) and (e). The first two have long been given special immunity status, but the last two kinds of property were given such status in the 2004 Convention.

¹⁵ The 2004 Convention is largely based on the principle of restrictive immunity.

The only question remaining is whether a State which adheres to the principle of absolute sovereignty can raise the defence of sovereign immunity at the enforcement stage. A State which follows absolute immunity may claim immunity for pure state functions or commercial functions. This paper argues that in order to give effect to arbitration, a State, once it has agreed to arbitration, should not be allowed to raise the defence of sovereign immunity either during the arbitration process or during enforcement, except in a situation where diplomatic property or funds are involved.

3. The Hong Kong “hungama”

The *FGH case* has created a “hungama” in Hong Kong with regard to enforcement of an arbitral award against a sovereign state, i.e., the DRC. Hong Kong was targeted by FGH because a few Chinese entities that have a commercial presence in Hong Kong were required to transfer certain funds (called “entry fees”) to the DRC, and FGH wanted to obtain injunctions to prevent those entities from making any payment to the DRC.¹⁶

FGH, a New York-based company, was the beneficiary of two arbitral awards because the original party to the arbitration, Energoinvest, a Yugoslav company, assigned FGH the entire benefit of principal and interest payable by the DRC under the award rendered in Switzerland and Paris. The arbitration was conducted as per the ICC rules. FGH, before coming to Hong Kong, had initiated several enforcement proceedings in different jurisdictions.¹⁷ It should be noted that the DRC is not a signatory to the NYC; therefore, FGH did not try to go to the DRC for enforcement; rather it approached courts in countries which are parties to the NYC and collected part of the award.¹⁸ Knowing the good political and economic relationship between China and the DRC and the Chinese government’s plan to make massive investments in the DRC mainly for mineral exploitation rights in the DRC for which Chinese companies are supposed to pay a fee, FGH took out an originating summons seeking leave to enter judgment to enforce the awards against the consortium of the Chinese enterprises and seeking an injunction to prevent them from making those payments to the DRC. Those consortiums are established in Hong Kong as a limited liability company (but are wholly-owned subsidiaries of Chinese Railway Group Limited, a company incorporated in China with limited liability) and their stocks are listed in the Hong Kong Stock Exchange.¹⁹

In the Court of First Instance, among many other issues, one issue raised was whether the DRC had waived immunity by submitting to arbitration. Other related issues were whether after 1997 Hong Kong common law recognized the doctrine of restrictive sovereign immunity or whether immunity from suit was absolute. Although the Court of First Instance did not dwell upon the applicable principle of immunity, it did rule against FGH (and in favour of the DRC) on the issue of waiver of immunity.²⁰ The question before the Court of Appeal was:

¹⁶ Those entities are also parties in the *FGH case*; they are: China Railway Group (Hong Kong Ltd.), China Railway Resources Development Limited, China-Railway Sino-Congo Mining Limited, and China Railway Group Limited.

¹⁷ See *FGH Case*, paras. 3-7.

¹⁸ FGH has so far recovered US\$2.78 million through enforcement proceedings in other jurisdictions. See *FGH Case*, para. 7.

¹⁹ See *FGH Case*, paras. 8-9.

²⁰ See *FGH Case*, paras. 21-22.

Whether an application for leave to enforce an arbitral award made under the New York Convention against a State impleads that foreign state; whether the law of Hong Kong requires application of the doctrine of absolute state immunity from jurisdiction and execution, as opposed to the restrictive doctrine; and whether by agreeing to refer a dispute to arbitration in a New York Convention country, to be conducted according to the Rules of the International Chamber of Commerce (ICC), a foreign State which is not a party to the Convention waives such state immunity from jurisdiction and execution to which it is otherwise entitled.

In simple words, the court was asked to decide on two issues: (1) What is the current practice of Hong Kong in relation to sovereign immunity: i.e., does it practice absolute immunity or restrictive immunity? and (2) By agreeing to refer a dispute to arbitration in an NYC country and as per the ICC rules, does a State also waive immunity to jurisdiction and execution?

The Court of Appeal is of the opinion that the doctrine of restrictive immunity currently continues to apply in Hong Kong.²¹ The Court of Appeal has explicitly said:

In my judgment, the application for leave to enforce the foreign arbitral award is an application that seeks to invoke the jurisdiction of the court and which, when directed at an award made against a foreign State, is an application that seeks to implead that State, so that the question of immunity from that jurisdiction is one which at that stage has to be raised and addressed [...] [A]bsent legislation to a broader effect, the submission of a foreign State to arbitration “operates solely to remove state immunity from the first stage of arbitration in which the national courts exercise supervisory powers”, so that in this case, the submission of the DRC to the ICC arbitration did not constitute waiver to the jurisdiction of the Hong Kong courts to consider an application for leave to enforce those awards, or waiver against execution.²²

The opinion of Justice Stock VP was supported by Justice Yuen JA, who, in a separate opinion, reached the same conclusion, albeit via a different route. Justice Yuen concluded that restrictive immunity is a customary international law and part of the common law tradition which is now applicable in Hong Kong since 1997. Therefore, the DRC is subject to restrictive and not absolute immunity.²³

However, Justice Yeung JA respectfully disagreed with Justices Stock and Yuen and opined that from a “global perspective, and bearing in mind the constitutional provisions of the Hong Kong SAR as well as the unequivocal foreign policy of the PRC, DRC, in my view, enjoys absolute immunity.”²⁴ Justice Yeung also said clearly that: “The absolute immunity doctrine, adopted by the PRC as part of its international legal obligation, applies to the Hong Kong SAR.”²⁵ Justice Yeung went on to provide a third reason for his decision: “the restrictive immunity doctrine is not part of the customary international law and therefore the DRC is entitled to absolute immunity [...] the DRC, despite its submission to arbitration, had not waived its right to state immunity.”²⁶

²¹ The *FGH* case was decided by a 2-1 majority. Justice Stock VP and Justice Yuen formed the majority, but Justice Yeung gave a dissenting opinion. The Court of Final Appeal has yet to give a final ruling on this issue.

²² Justice Stock VP; see *FGH* Case, para. 177.

²³ See *FGH* Case, Justice Yuen, para. 246.

²⁴ See *FGH* Case, Justice Yeung, para. 182.

²⁵ See *FGH* Case, Justice Yeung, para. 224.

²⁶ See *FGH* Case, Justice Yeung, para. 231.

The Hong Kong “hungama” thus largely centered on one crucial issue on which the Court of Final Appeal (hereinafter CFA) has to rule: whether Hong Kong follows an absolute or restrictive doctrine of sovereign immunity. While this issue is still pending before the highest court of Hong Kong, this paper will discuss this issue from an academic and arbitration practice point of view.

4. Sovereign Immunity and the New York Convention

The disciples of arbitration support the view that once a State agrees to commercial arbitration with a private party, it waives its immunity from the jurisdiction as well as from the execution of the award.²⁷ In their view, if a State is allowed to raise the defence of immunity at the execution stage, it will make the agreement to arbitrate otiose and of no value. Therefore, the agreement to arbitrate should also include the enforcement and execution of the award stage, and “unless commitment to arbitration is firm and enforceable, arbitration agreements with States are rendered pointless” and in violation of equal justice.²⁸ In countries like the Netherlands, the U.S.A and France it is generally understood that “when a State has waived its immunity by submitting to arbitration, the scope of the waiver extends to proceedings for confirmation or recognition and enforcement of resulting award”.²⁹

When we discuss the enforcement of arbitral awards, the New York Convention comes first to mind. This is the convention signed by 145 countries which have pledged to enforce arbitral awards made in any Convention country with utmost ease, and the enforcing court will proactively make sure that awards are recognized and enforced. Only in very limited circumstances should enforcement of an award be refused. In the list of those limited grounds sovereign immunity does not appear. During the drafting and adoption of the NYC, the issue of sovereign immunity was scantily raised and it was left to the national courts and states to decide. As signatories to the NYC, States are only obliged (through their courts), as Hazel Fox says, “to recognize the agreement in writing and arbitral clause and when seized of a matter relating to such an agreement to refer the parties to arbitration unless the national court finds that agreement ‘to be null and void’, inoperative, or incapable of being performed and to recognize arbitral awards as binding”.³⁰ Therefore, at the recognition stage if a State raises the defence of sovereign immunity, the national courts are allowed to deal with the matter according to their national law. This also means that the national courts can entertain the possibility of a foreign government or State raising the defence of sovereign immunity at the execution stage, as well.

The UNCITRAL Model Law on International Commercial Arbitration was the next stage after the NYC where the issue of sovereign immunity could be raised and discussed in the context of enforcement of arbitral awards, but even at that time this matter was swept under the carpet. There was an initial movement in the area when a regional consultative committee

²⁷ Tooze, *supra* note 12.

²⁸ Bachand, Frederic. Overcoming Immunity-Based Objections to the Recognition and Enforcement in Canada of Investor-State Awards. *Journal of International Arbitration*, Vol. 26, No. 1 (2009) at pp. 59-87. The same line of argument was raised by the counsel of appellant Mr. Michael Thomas in the FGC case.

²⁹ See Tooze, *supra* note 12, as cited by Justice Stock in FGH Case, para. 140.

³⁰ Fox, Hazel, State Immunity and the New York Convention. In *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*. Gaillard Emmanuel and Di Pietro, Domenico. Cameroon May (2008), pp. 829-864.

on international commercial arbitration made the proposal that “where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of arbitration pursuant to that agreement.”³¹ The proposal did not make very clear whether “sovereign immunity in respect of arbitration” includes the enforcement stage of the award, too. It is interesting to note that the UNCITRAL secretariat did make it clear that the “intention of that proposal is to prevent a government agency which has entered into a valid arbitration agreement in a commercial transaction from invoking sovereign immunity at all stages of arbitration, including the stage of recognition and enforcement of the arbitral award”.³² Nevertheless, the Model Law on International Commercial Arbitration does not state this issue anywhere. The issue was nipped by the UNCITRAL Commission as having an “obviously political and public international law character.” Some delegates even considered “that was a delicate matter which could not be settled by means of a protocol to the NYC”.³³ However, later it was noted that the issue of immunity requires “more long term consideration and possible resolution in either an additional protocol or annex to the UNCITRAL Model Law.”³⁴

In the *FGH case*, the point was raised that the DRC is not a signatory to the NYC; therefore, it cannot be assumed that the DRC, like signatories of the NYC, has implicitly consented not to raise sovereign immunity at the time of enforcement: i.e., signatory States will follow restrictive immunity when it comes to enforcement of an award.³⁵ However, it should be noted that for the purposes of enforcing an award even a non-signatory may benefit by agreeing to select the seat of arbitration in a signatory State, so that the resulting award will be considered as a convention award that can be enforced in any convention State. That was perhaps one of the reasons for the commercial partner of the DRC (i.e., Energoinvest) and the DRC agreeing on the place of arbitration in Switzerland and France so that the award could be enforced in any convention country by using the easy process of the NYC with regard to the recognition and enforcement of arbitral awards. Therefore, in a case where a non-signatory to the NYC selects the seat of arbitration in a country which is a signatory State, it should be interpreted that the non-signatory knows and accepts the consequence that the resulting award will be enforced like a convention award in any other convention country.

5. Do the ICC Rules of Arbitration provide any Road Map for Sovereign Immunity?

Rules of arbitration, in general, govern proceedings of arbitration. However, the ICC rules are indicative of the practice of a State as a party to arbitration. According to the ICC Rules, “Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed

³¹ This proposal was made by the Asian African Legal Consultative Committee on International Commercial Arbitration in 1976 during its meeting in Kuala Lumpur.

³² As cited by Fox, *supra* note 29, p. 830.

³³ Holtzmann, Howard M. & Neuhaus, Joseph E. (1989) *A Guide to the UNCITRAL Model Law on International Commercial Arbitration-Legislative History and Commentary*: Kluwer (1989) pp. 273 and 1179.

³⁴ Fox, *supra* note 29.

³⁵ As per Justice Stock in *FGH Case*, para. 171.

to have waived their right to any form of recourse insofar as such waiver can validly be made.”³⁶

Article 24 of the old ICC Rules, which was equivalent to Article 28(6), contained the words “final” and “appeal”, which have now been changed, respectively, to “binding” and “recourse”.³⁷ It is not clear whether the ICC considered the inclusion of sovereign immunity within the ambit of Article 28(6) or not. However, a French court in *Creighton Ltd v Government of the State of Qatar* ruled that by agreeing to submit disputes to ICC arbitration, the State of Qatar had, by reason of Article 24 (the predecessor of Article 28(6)) of the ICC Rules, undertaken to carry out an award without delay and had thereby waived immunity from execution.³⁸ Article 28(6) of ICC Rules was also invoked in *Walker International Holdings Ltd v the Republic of Congo*, in which the US Appellate Court ruled that “in addition, the ROC agreed to abide by the rules of the ICC (Article 28(6)) which precludes the ROC from asserting a sovereign immunity defence.”³⁹ After citing Article 28(6) of the ICC Rules, the court concluded, “Therefore, we hold that the ROC explicitly waived its sovereign immunity. Accordingly, we need not address a potential implicit waiver”.⁴⁰ It should be noted that in the *Walker case*, the ROC agreed in the contract, stating: “the Congo hereby irrevocably renounces to claim any immunity during any procedure relating to any arbitration decision handed down by an Arbitration Court”.⁴¹ The Hong Kong court indicated that this very agreement constituted an explicit waiver of sovereign immunity as opposed to the implied waiver (by agreeing to the ICC Rules) as suggested by the French court in *Creighton*. Under US law, a waiver of sovereign immunity may be made “explicitly” or “by implication”.⁴² Therefore, the ROC in the *Walker case* could not have claimed sovereign immunity because it stated that it “irrevocably renounces to claim any immunity”, which is considered to be an “explicit” waiver under Section 1610 of the FSIA. The US court also said that agreeing to the ICC Rules on arbitration, including Article 28(6), also constitutes an “explicit” waiver of immunity. In other words, courts in the USA have considered submission to the ICC Rules as an “explicit” waiver.

The court in the *FGH case* did not agree with the decisions of *Creighton* and *Walker*. However, it agreed that the facts of the *FGH case* are similar to those of *Creighton*. The Court said:

It cannot in my judgment be said that by entering upon an ICC arbitration agreement with a private party, a foreign State that is not a party to the NYC is going beyond the making of a representation to each Convention State that it consents to the enforcement against it in the Convention State of such arbitral awards as may be made. It seems to me that jurisdiction in the forum State can, in such circumstances, only be conferred by legislation or by express representation by the foreign State to the forum State.⁴³

³⁶ ICC Rules, Article 28(6).

³⁷ Deraines, Yves and Schwartz Eric A. (2005) *Guide to the ICC Rules of Arbitration*, 2nd ed. Kluwer Law International (2005), pp. 303-328.

³⁸ French Court of Cassation, ch.civ.1; 6 July 2006.

³⁹ 395 F.3d 229 (5th Cir.) (2004).

⁴⁰ *Walker case supra* note 38, p. 234.

⁴¹ *FGH Case*, para. 158.

⁴² Foreign Sovereign Immunity Act, Section 1610.

⁴³ As per Justice Stock in *FGH Case*, para. 171.

In this statement it is clear that the court mixed two different issues: the ICC Rules and the NYC. The ICC Rules serve as the procedural rule of arbitration: by agreeing to the ICC Rules, parties undertake to carry out any award without delay and are deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. This waiver has nothing to do with the parties' (or their States') obligations towards NYC signatories. A party which is not a signatory to the NYC may agree to arbitrate at a place which is a signatory of the NYC so that it can avail itself of the benefits of the NYC regarding easy enforcement of award in other signatory States. This does not, by any means, oblige a non-signatory to be bound by the obligations of the NYC; and at the same time, due to the special application rule, the NYC can be utilized by a non-signatory by choosing a signatory State as the place of arbitration. This is a very common practice in the field of arbitration, and the *FGH case* is just one example. Many times, a private party enters into a commercial deal with a State, selects arbitration as a means of resolving disputes and selects a seat of arbitration in a Convention state, and chooses the rules of an international arbitration institution. Had FGH opted for HKIA or LCIA rules, the situation would have been different, and as far as waiver of immunity is concerned, it would not have been argued that the DRC also impliedly waived the right to invoke sovereign immunity. The very facts that the DRC agreed to arbitration and used the ICC rules for it (knowing that it requires parties to waive their right of sovereign immunity), and agreed to a Convention country as the seat of arbitration, together show that the DRC had impliedly waived its defence of sovereign immunity. Therefore, the court in the *FGH case* has wrongly combined the two issues—the agreement to use the ICC Rules and the implications thereof and the obligations on Signatory States of the NYC—and reached an incorrect conclusion.

Public international lawyers argue that at the time of enforcement, by recognizing arbitral awards, foreign courts exercise jurisdiction; therefore, at that time a State may raise the sovereign immunity defence in refusing to submit to jurisdiction: "In common law, sovereign immunity could be waived by or on behalf of the foreign State, but waiver had to have taken place at the time the court was asked to exercise jurisdiction and could not be constituted by, or inferred from, a prior contract to submit to the jurisdiction of the court or to arbitration."⁴⁴ And since a prior contract to submit to the jurisdiction of the court or arbitration is not sufficient to waive sovereign immunity, therefore the arbitration agreement or agreement to use the ICC Rules (containing an implied waiver) cannot be construed as an implied waiver by the DRC.

Arbitration lawyers find it difficult to accept this view of public international lawyers because the arbitration process, including the rendering of an award and its execution, is inherently different from a court proceeding, including the enforcement of a judgment. In the field of arbitration an agreement to arbitrate sets the arbitration into motion, and the parties, from the moment they agree to arbitrate, know and can imagine the consequences. That is, if a dispute arises, it will be resolved through arbitration at an agreed place, as per the agreed rules of arbitration, and the resulting award will be enforced by using the NYC, and at the enforcement stage the party will have only limited grounds to challenge the award. If arbitration lawyers and private parties have to deal with the issue of sovereign immunity at every stage of arbitration, they will be reluctant to enter into any commercial deals with a State. Moreover, even if arbitration lawyers take steps to deal with the sovereignty issue at the enforcement stage – for example, by including a clause in the contract preventing a State from exercising its right of sovereign immunity – it is not clear whether a foreign court will

⁴⁴ Diecy, Morris & Collins *The Conflict of Laws* 14th ed., Vol. I, para. 10-028, p. 285.

give weight to such an agreement, because prior “agreements” may not be construed as a waiver of sovereignty. Therefore, the use of public international law principles in a private international law situation will not help the commercial world and arbitration particularly in dealing with a State and the defence of sovereign immunity.

6. Is the Nature of the Asset Important?

Even proponents of the waiver of immunity through the signing of arbitration agreements are aware of the sensitivity of sovereign immunity and agree that at the execution stage of an arbitral award if the assets to be executed fall into the category of properties for pure State or public purposes or diplomatic or non-commercial use, those properties should be immune from the execution of the arbitral award.⁴⁵ If a private party encounters a situation where only State property for pure State purposes is available for execution, it has to accept the situation, and it will not amount to an assault on the principle of equal justice, which requires a State to agree to arbitration and submit to the jurisdiction of an arbitral tribunal. All States which have accepted the theory of restrictive immunity invariably adhere to the absolute immunity principle when it comes to State properties for military, diplomatic and non-commercial use.⁴⁶ At the time of executing an award, the court needs to ascertain whether a property or an account which is attached falls into the category of pure State use or commercial use. The test for the determination of the nature of the property or account is the functionality test: what the use or function of that property is, rather than how that property or account was acquired.⁴⁷ The problem comes when a State property or account is used for pure State purposes as well as for commercial purposes. In such a situation whether that State property should enjoy immunity or be subject to execution is unclear.⁴⁸

In the *FGH case*, FGH requested an injunction against the payment of an “entry fee” to the DRC by the Chinese railway consortium. FGH will have no case for enforcement if no payment is due to the DRC by the Chinese railway consortium, which has offices in Hong Kong and stocks listed in the Hong Kong stock market. The “entry fee” amounts to US\$350 million, which is payable to the DRC and Gecamines (a DRC state mining company).⁴⁹ There were few changes made in the composition of the investment vehicle, which ultimately resulted in the possibility that the entry fee of US\$144 million becomes payable to Gencamine and Congo Simco, rather than to the DRC and Gecamines as before. On the face of it, it may be possible to see the DRC as no longer being the recipient of that entry fee; however, FGH argues that Gecamines and Congo Simco are merely agents or fronts acting for the DRC. Even if that is true, if the entry fee, once collected, is put to use for the public good, it becomes a non-commercial governmental fund which will enjoy sovereign immunity. However, if the entry fee is used for commercial purposes, it will not be immune from execution as per the decision of the Hong Kong Court. Justice Yeung in the *FGH case* said, “It must be recognized that the seizure and sale of a state’s assets in order to satisfy a judgment against it constitutes a particularly dramatic interference with its interests and could

⁴⁵ See the provisions of the 2004 Convention, which reflect the compromise between different State practices.

⁴⁶ Diplomatic immunity has a different regime due to the 1861 Vienna Convention on Diplomatic Relations, which accords special immunity.

⁴⁷ *FGH Case*, para. 179.

⁴⁸ Redfren, Alan, Hunter, Martin et al. (2004) *Law and Practice of International Commercial Arbitration*. 4th ed. Thompson, p. 467.

⁴⁹ *FGH Case*, para. 10.

damage its ability to function properly.”⁵⁰ From the materials available before the Court, it was concluded that US\$200-\$250 million would go to the budget of the DRC which would be used for public purposes. Therefore, that part of the entry fee will be immune from execution. The remaining US\$100-\$150 million which the DRC government would have passed on to Gecamine may become subject to execution, and no immunity will be given to that money.⁵¹ Whether the money given to Gecamine would qualify as money for public use or not is a different question. However, the court has concluded that money given to Gecamine, which is a government arm with its own commercial interests, may not use money that is intended for public use; therefore that money will be subject to execution of the award. Ultimately, if the entire entry fee is used for public purposes, even if Hong Kong follows restrictive immunity, the FGH cannot get the money to satisfy the award. This is a situation where enforcement of an award may come to a halt, which may cause hardship to the private party, but it will be in line with the practice accepted by the arbitration community, and such rare circumstances will not pose a threat to arbitration as a process of dispute resolution.

The 2004 Convention makes it clear that State properties are not subject to post judgment constraints such as attachment, arrest or execution unless a State has expressly consented to it through arbitration agreement.⁵² It does not say that merely signing an arbitration agreement in itself makes that State’s property subject to post-judgment constraints. That means a separate specific waiver of immunity is required. Therefore, if an arbitration agreement also includes an express waiver of immunity (as in the *Walker* case) on State property, that arbitration agreement may constitute a waiver of immunity from jurisdiction as well as from execution. If a State has earmarked a property for the satisfaction of a claim, during the execution of such claim that earmarked property will not enjoy sovereign immunity. Furthermore, in so far as a State property which is not intended to be used for non-commercial governmental purposes (i.e., it is intended for commercial purposes) is within the territory of the State of the forum and the said property is connected to the entity against which the execution is sought, that property is beyond the scope of immunity. The express waiver of immunity against State property may also be inferred from international agreements to which the State is a party: e.g., the New York Convention.

7. Conclusion

Sovereign immunity creates an insurmountable hurdle in arbitration mainly at the enforcement stage of the arbitral process. This is mainly because public international lawyers often apply the same yardstick when dealing with the issue of sovereign immunity in arbitration, including the enforcement of arbitral awards, as in court proceedings and the enforcement of a court’s judgments. The public international lawyers’ view, which does not differentiate between arbitration and court practice, argues that at the enforcement stage there is a need for another waiver, which goes totally against the understanding of the arbitration and business communities. It is important that court judgments and arbitral awards are treated differently. Therefore, once a State has agreed to arbitration, it should be assumed that the State has waived its immunity from jurisdiction and execution. If that State is a signatory to the NYC or has agreed to arbitrate in a State which is a signatory of the NYC, it should be treated as strong evidence of a waiver of immunity. If some arbitration rules, such as the ICC

⁵⁰ FGH Case, para. 234.

⁵¹ FGH Case, paras. 277-278.

⁵² 2004 Convention, Article 19.

rules, include an indication of a waiver of immunity that should also be taken into account in concluding that the State has given up the waiver of immunity.

The situation becomes even more difficult “because national courts (dealing with enforcement of awards) refuse to develop special rules for the enforcement of arbitral awards” and they are guided by the principles applicable in judicial proceedings.⁵³ Arbitration has not been allowed to develop its own substantive law as a freestanding system of dispute resolution, which, in itself, makes arbitration not an alternative but a dependent system of dispute resolution.⁵⁴ The court in *the FGH* case relied heavily on Hazel Fox’s book on sovereign immunity; however, Lady Fox herself, in her article “State Immunity and the New York Convention”, says: “I would challenge this subordination of enforcement of arbitral awards to the same regime as applies to foreign judgments of national courts, at least in respect of awards that are confined to commercial relationships and do not award compensation for regulatory failings of the State.”⁵⁵ As long as arbitration is treated like a court process, the problems of sovereign immunity and many other problems will create hurdles in the path of the smooth operation of arbitration. Unless arbitration exists as a standalone system of dispute resolution, the traditional legal processes as used in courts will keep on colliding with the commercial interest and parties’ autonomy in arbitration, thus undermining the integrity of international commercial arbitration as a true alternative to litigation.

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⁵³ Fox, Hazel, “State Immunity and the New York Convention” in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, pp. 829-864, p. 860 (emphasis added).

⁵⁴ Lord Wilberforce during the second reading of the English Arbitration Act, 1995 in the House of Lords. See Hansard, col 778, 18 January 1996.

⁵⁵ Fox, Hazel, *supra*, p. 861.

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