Kluwer Arbitration Blog

Pilot Empirical Project on Construction of Contracts in International Arbitration.

Giuditta Cordero-Moss (University of Oslo) · Tuesday, August 1st, 2023

On 27 June 2023, a pilot project on contract construction in international arbitration was presented and discussed at the Institute for Forensic Linguistics, Aston University. The project explores to what extent international arbitration ensures that contracts are construed in an autonomous, uniform way. The short answer is: only to a small extent.

Admittedly, contracts are detailed and exhaustive, and aim at solving any possible differences between the parties. Furthermore, arbitration is deemed to ensure a commercially oriented interpretation of the contract, not prone to formalities or overly strict application of the governing law. In short, arbitration, being based on a faithful reading of detailed and clear contracts, is held to deliver autonomous, uniform results.

This, however, is contradicted by our pilot project's outcome.

Notwithstanding the detailed and rather standardized contract language, comparative law research shows that the same contract language can have different legal effects depending on the governing law. Therefore, standardized terms do not necessarily lead to uniform results if disputes are decided by courts.

Does arbitration permit to avoid that contracts terms are influenced by the applicable law? And, if so, does arbitration have a uniform legal frame?

Arbitration enjoys a large (though not unlimited) autonomy from national procedural law and is said to be detached from domestic laws even as far as concerns the substance of the dispute. Even accepting that the substantive governing law only plays a marginal role (which our pilot project contradicts), would this permit contracts to have uniform effects in arbitration?

Linguists and psycholinguists developed empirical methods to assess the impact that a frame of reference may have on the way in which people express themselves. Inverting this method, the pilot project assesses whether arbitration permits an autonomous and uniform construction of the contract, and, if not, to what extent the arbitrators' legal framework has an impact on their way of understanding standardized contract language.

That empirical research would be useful in this setting was already hinted at in Giuditta Cordero-Moss, Non-national Sources in International Commercial Arbitration and the Hidden Influence by National Traditions, *Scandinavian Studies of Law,* 2017, vol 63, section 4.1. This idea is now

implemented as part of the preparation of the General Course that Cordero-Moss will hold in 2027 at the Hague Academy of International Law.

The project is carried out by a multidisciplinary team with lawyers, linguists, and psycholinguists. Based on the results and on feedback received by the participants to the pilot project, the main survey will be organized during 2024, involving about 100 international arbitrators with different backgrounds.

The team, led by Giuditta Cordero-Moss (Oslo University), consists of: (i) lawyers from various legal systems: Diego Fernandez Arroyo (Sciences Po, Paris), Gary Bell (National University Singapore), Franco Ferrari (New York University) and Cristiano Zanetti (Sao Paulo University); (ii) two linguists: Lucia Busso (Aston University) and Chiara Zanchi (Pavia University); and (iii) two psycholinguists: Bruno Laeng (Oslo University) and Michele Miozzo (Columbia University).

The pilot project consisted of a survey that was sent to 32 experienced international arbitrators, divided into three groups depending on their legal education (common law, civil law or dual). The list of participants and the presentation are available here.

Participants were asked to consider three cases (one involving a Termination clause, one an Entire Agreement clause, and one a mechanism for calculating a fee) and were asked to choose for each case a solution out of five alternatives. The alternatives reflected three different approaches and, within each of these approaches, two legal mentalities.

The three approaches are: (i) the answer is to be found in the contract language: the contract is self-sufficient, and, as long as the issue in dispute is regulated by the contract, there is no need to look further than the contract to solve the dispute; (ii) the answer is to be found in the governing law, in addition to the contract language; and (iii) the answer is to be found in usages, generally recognized principles, soft law and similar transnational law, in addition to the contract language.

The two legal mentalities are based, respectively, on the common law and on the civil law tradition. The former gives primacy to the parties' agreement and is inclined to accept what could look like unbalanced results, as long as they follow from clear contract language. The latter privileges the balance between the parties' interests and reads the contract terms in the light of principles such as good faith, thus coming to results that do not follow directly from the contract language.

Being all approaches compatible with both mentalities, each approach may lead to two different outcomes. Therefore, each case has six different reasons for arriving at two possible outcomes.

The majority of participants read the contract in the light of the applicable law (53%). A minority considered the contract to be self-sufficient or subject to the transnational law (respectively, 26% and 21%).

Each of the possible combinations of approach and mentality was chosen by at least a couple of respondents. And within each approach, the outcome is not consistent: considering the contract to be self-sufficient leads to both common law- and civil law-inspired results (respectively, 64% and 36%), and so does the transnational approach, although to a lesser extent (respectively, 9% and 91%).

The results do not suggest a strong correlation between the tradition in which participants received

their legal education and their choice of approach or their mentality. However, to a certain extent it can be observed that participants with a civil law education are more prone to adopt the transnational law approach than common law educated participants. Similarly, civil law educated participants more readily choose the common law mentality than vice versa. Also, participants with a dual education are clearly more inclined to consider the applicable law (67%) than to look at the contract as self-sufficient (9%) or as subject to a transnational law (24%).

The pilot study suggests that contract language, no matter how clear and detailed, is not free from framing effects and thus does not necessarily produce uniform legal effects; that arbitration does not provide uniform results; and that the governing law plays an important role.

In the main study, we will gather more data to cast light on the correlation between the arbitrators' background and their approach to contract construction.

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