

**Arbitration Awards:
Generic Features and Textual Realisations**

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Edited by

Vijay K. Bhatia, Giuliana Garzone
and Chiara Degano

**CAMBRIDGE
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P U B L I S H I N G

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CHAPTER ONE

ARBITRATION AWARDS: GENERIC FEATURES AND TEXTUAL REALISATIONS. AN INTRODUCTION

VIJAY K. BHATIA, GIULIANA GARZONE
AND CHIARA DEGANO

1. Introduction

This volume is one of the end products of an international research project on international commercial arbitration, and focuses on the arbitration award as a genre that embodies the final outcome of a complex sequence of discursive and professional inquiry and negotiation practices, i.e. arbitration proceedings, in the same way as the judgment represents the end product of the lawsuit or the court trial. Similarly to the judgment, the arbitration award – today an increasingly conventionalised and codified genre – is a complex discursive artefact, which has the main purpose of announcing the arbitrator's or the arbitral tribunal's decision. In order to do so, it not only states their final decision, but also narrates the circumstances that have led to the arbitration itself, and above all provides justifications for such a decision, relying on hard facts and on reasoning. Thus, the arbitration award is a very interesting object of investigation for the discourse analyst as well as for the jurist and the rhetorician, being a still relatively unexplored genre. With the growing popularity of arbitration as a form of dispute resolution, research on the award can also contribute to shedding light on its evolution in recent times.

All the studies collected in this volume share the methodological assumption that texts and genres can be investigated only within the context of the institutional and professional practices in which they originate. Therefore, before going on to discuss the contents of the book

more in detail, a few contextual considerations regarding international commercial arbitration are in order.

1.1. International commercial arbitration and relevant practices

International commercial arbitration was established by the United Nations General Assembly in 1966 to favour the harmonization and unification of international trade practices, and was intended as 'alternative to litigation' to resolve cross-border commercial disputes. Some years later, the United Nations General Assembly introduced the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration (1985), which has greatly contributed to harmonization, being adopted integrally by a number of countries and incorporated, with more or less substantial modifications, into the legislation of many others.

Today, international arbitration is the most popular form of alternative dispute resolution (ADR) for the settlement of commercial disputes the world over (cf. among others Hunter, Marriot, and Veder 1995; Mattli 2001). As envisaged in the UNCITRAL Model Law, international commercial arbitration crucially depends on the parties' decision – usually expressed in an arbitration clause included in their agreement – to resolve disputes through private adjudication by a single arbitrator, or a tribunal of more than one. The practice of international arbitration has developed in a manner to allow parties from different legal and cultural backgrounds to resolve their disputes without any judicial interference. More importantly, arbitration is supposed to provide a mechanism for commercial dispute resolution that is not only economical, speedy and confidential, but also universally enforceable, just like any court decision.

In arbitration, parties often appoint legal counsels to present their arguments to an impartial arbitration tribunal to resolve the dispute. Unlike other forms of alternative dispute resolution, such as conciliation and mediation, which do not suggest or impose any specific decision to resolve the dispute, arbitration is meant to issue a decision, known as 'award', which is binding on the disputing parties, i.e. it is generally non-appealable in a court of law, except on procedural grounds under a very restricted set of conditions. In arbitration, the parties to the dispute have considerable input in the selection of arbitration tribunal, and also in the choice of processes and procedures they would like the tribunal to follow, including the choice of language, the seat of arbitration, as well as the arbitration

rules within which the resolution is negotiated, while in litigation they would have absolutely no control over the decision-making process.

Although the outcome of arbitration is final and enforceable, the parties to a dispute often look for opportunities to go to court when the outcome is not to their liking. They often choose arbitrators on the basis of their legal, rather than technical, expertise, as lawyers are likely to be more accomplished in exploiting opportunities to challenge a particular award (Miles 2003). As Bhatia *et al.* (2012: 303) point out, this brings in the crucial involvement and role of legal experts in what was supposed to be a non-judicial practice. Nariman rightly emphasizes that “there is just too much legal baggage [in International Commercial Arbitration]... it moves slowly and ponderously... [it] has become almost indistinguishable from litigation, which it was at one time intended to supplant” (Nariman 2000: 262). Similarly, Kerr (1997) points out that international arbitration seems to have acquired the pejorative sobriquet, *arbitigation*, which signals large scale ‘judicialization’ of arbitration. In practice, this overwhelming influence of litigation results in an increasing mixture of discourses as arbitration becomes, as it were, ‘colonized’ by litigation practices, and threatens to undermine the integrity of arbitration itself, thus compromising its spirit as a non-legal practice. However, there is relatively little research evidence for such impressions and observations, except the opinions and statements from experts in the field, like those quoted above.

1.2. The research project

In the light of these developments, the idea emerged that it would be desirable to conduct an evidence-based investigation of the extent to which arbitration practices are influenced by litigation procedures and practices. This was the main focus of the international project funded by the Research Grants Council HKSAR under their Competitive Earmarked Research Grant, entitled *International Commercial Arbitration Practice: A Discourse Analytical Study*,¹ in collaboration with more than twenty international teams of researchers, drawn both from the legal and arbitration practice, and from discourse analysis. One of the key objectives of this project has been to investigate the ‘integrity’ of current international arbitration practices by analysing various sets of complementary textual, and discourse data, to assess the extent to which arbitration practices have

¹ For a more extensive description of the project and a discussion of the relevant issues, cf. Bhatia *et al.* 2012. Cf. also the project’s website at <<http://enweb.cityu.edu.hk/arbitrationpractice/>>.

been interdiscursively influenced by litigation, especially in terms of intention and purpose, processes and procedures adopted, and also in terms of the shared expertise expected on the part of the participants in specific cases. In order to achieve these objectives, the project used a multi-perspective and multidimensional genre analytical framework (Bhatia 2004) to integrate analyses of data. Three main perspectives were adopted:

- 1) Intertextual and interdiscursive relationships among discursive practices in arbitration.
- 2) Narratives of experience of key practitioners tested against other stakeholders.
- 3) Comparative analyses of arbitration and litigation documents, focusing on critical moments in the discourses of arbitration practice.

The studies collected in this book, mostly authored by members of the project, draw mainly on the third perspective, being text-based, but also occasionally consider aspects included in 1) and 2). They focus on different aspects of arbitration awards, which have been traditionally kept confidential, hence made not easily available in the public domain. In more recent years, however, some of the established international institutions, like the International Chamber of Commerce and the International Court of Arbitration, have taken the initiative to publish some of these awards, in sanitised or abridged form to preserve confidential information about the parties. This has made it possible to collect corpora of arbitration awards for research purposes.

Corpora of this kind, in various languages (English, French, Italian, Chinese), collected from some of the most important arbitration institutions in various countries, are the point of departure of most chapters of this book. Many of them focus on international arbitration awards, but in some cases (e.g. Antelmi and Santulli, and Tessuto), the analysis is based on awards resulting from national arbitration in order to outline a more comprehensive picture of the award as a genre.

In some cases, corpora of court judgments have also been relied on for comparison in order to identify various textual and discursive indicators – from syntactic traits to argumentative patterns – and describe contrastively the discursive mechanisms at work as well as the move structure and the rhetorical strategies enacted in each of these two genres. At the same time, the comparison of awards with court judgments has made it possible to assess the degree of interdiscursivity and hybridization between them, as an indicator of colonization.

The exploration of these themes has theoretical relevance too, as it provides interesting insights into the mechanisms that preside over the contamination and hybridization among genres in professional practice.

2. Contents of the volume

The volume is divided into two Parts. The studies presented in Part I introduce the distinctive features of the arbitration award as a discourse genre, examining its move structure, the recurrent rhetorical patterns and the use of linguistic resources, in some cases comparing it with judgments as a germane genre, thus also providing a fundamental background for the subsequent chapters. Part II takes up the issue of the possible contamination of arbitration discourse by discursive patterns typical of litigation, already marginally touched upon in Part I, and tackles it squarely in the various chapters, each of which examines one or more features of awards in different languages and contexts, looking for evidence that may confirm or disprove the main hypothesis of a blurring of boundaries between the discourse of arbitration and the discourse of litigation.

Part I opens with a chapter that deals with the general issue of the language of arbitration. Authored by MANLIO FRIGO, a practicing lawyer and arbitrator, it discusses the general problem of language use in arbitration proceedings and in the drafting of final awards, a problem that is crucial for the sake of the recognition, enforcement and free circulation of these pronouncements. Special attention is given to the possible interference, interaction or conflict between the language used and the applicable law chosen. Among the issues examined, prominent is that of the approach to be adopted in legal translation, given that in many cases in international arbitration the problem of the language is solved through certified translation. In light of his own experience as a practitioner, and examining the relevant provisions set forth in international conventions, Frigo recommends trans-conceptual translation, which focuses on the contents of the award, rather than on its linguistic formulation. He also recommends that, in order to avoid problems of non correspondence across legal systems, parties' and arbitrators' choice of the language of the arbitration be consistent with the applicable law chosen.

In the second chapter, which starts the discussion of the structure and discursive organization of the arbitration award, VIJAY BHATIA and JANE LUNG focus on the rhetorical and cognitive move-structure of this genre, which they explore in a corpus of arbitration awards collected from different countries, namely Iran, Russia, Austria, China, France, America

and Sweden, all drafted in English. On this basis they identify a discursive hierarchical pattern, in which moves are embedded in four main discursive patterns: background information, details of the dispute, review of contentions and claims, and closure, containing the decision. The chapter also makes an attempt to set these findings in relation with the nature and communicative functions of the arbitration award, and especially with its being a consensual private dispute resolution process. The authors conclude that, although arbitration does not take place in a court, it is still a legal process, so international commercial arbitration awards can be considered a distinctive genre in legal discourse in their own right.

Narrowing the focus on some distinctive pragmatic features of legal discourse, the expression of performativity and deontic modality is the main object of investigation in the following chapter, authored by CHIARA PREITE. Through the analysis of a corpus of awards in French issued by the International Chamber of Commerce (ICC) of Paris, it is shown that normativity is conveyed by means of *thetic* and *athetic* performativity, highly relevant in decisions, and by deontic modals, which can be found all across the texts examined in the form of Obligation, Permission, Prohibition and, to a lesser extent, Facultivity. For this purpose a wide range of more or less explicit markers are utilized – modal verbs, para-synonymical forms, periphrastic expressions, simple present and future tense. This variety of realizations is not peculiar to French arbitration awards only, but characterizes other forms of deliberative texts, e.g. judgments passed by the Court of Justice of the European Union.

In her chapter GIULIANA GARZONE, working on a corpus of ICC awards in English, and occasionally on a corpus of Lords' Judgments for reference, draws on the notion of polyphony to examine arbitration awards as argumentative texts in which arbitrators construct their arguments giving account of the parties' views and making reference to relevant texts. In so doing, they also respond to all possible objections and anticipate counterarguments by incorporating them in their decisions. In particular, Garzone looks at concessive constructions, including modals and disjuncts with a concessive/dialogic value, as a form of dialogism which enables the arbitrator to meet his/her interlocutors on their own ground, acknowledging their possible objections, and discusses the pragmatic inferences, or implicatures, that such constructions license. Garzone concludes that recourse to this type of discursive resources is all the more crucial in arbitration awards as arbitrators do not have the same absolute authoritativeness and authority as judges; rather, they are delegated their authority by the parties themselves, so they have to justify their decisions extensively, demonstrating that all the arguments put forth

by both parties – also those put forth by the party to which the award is unfavourable – have been taken into due account.

The discussion of dialogism in arbitration awards is developed further in the next chapter, authored by DONELLA ANTELMi and FRANCESCA SANTULLI, who examine a corpus of arbitration awards issued in Italy, in order to single out some of the distinctive features of the realization of this text genre in an Italian context, thus identifying the aspects in which they differ from court judgments. After showing that various forms of dialogism are deployed in these texts in order to introduce different ‘voices’ – mainly the parties’ and legislation – whose claims are then examined, on the basis of their analysis the authors conclude that the arbitration award as a text genre is similar to the judgment, but displays a larger number of elements and structures that express the different enunciative stance of arbitrators. Their linguistic texture, with its more or less explicit argumentative structures, is a clear consequence of the juridical debate on the nature and validity of arbitration, which has been a constant in the Italian academic and forensic tradition. The writer of an award must reduce the risk of challenge, but at the same time he/she must discursively create his/her own credibility, objectivity and impartiality.

The theme of the strategies used by arbitrators in order to discursively construct their own credibility and authoritativeness continues in GIROLAMO TESSUTO’s chapter, which is based on a small-size corpus of Canadian awards. Drawing on (meta)discourse and genre analytical literature, this study examines the generic-move structure and the linguistic resources used by arbitrators to encode their identity and authoritativeness in the organization and rhetorical patterns of the genre, shedding light on the intergeneric relationship between arbitration awards and legal judgments. Although the analysis of the move-structure points to similarity between awards and court judgments in a certain limited number of rhetorical and discursive devices, essential distinctions between the two genres remain. These concern in particular the construction of the sender’s and receiver’s identities, with the judges’ voices fitting with their status and hierarchy in the court procedure, while the arbitrators’ voices are the result of their being appointed by the parties. As for the receivers, arbitrators seem to interact more effectively with the intended readers by adapting and anticipating their values, interests and expectations, thus involving them in the institutional, professional and organizational practices of discourse.

The elements that have emerged in Part I, outlining the distinctive generic features of arbitration awards, and the occasional observations concerning the similarity or difference between arbitration awards and

court judgments and associated practices, represent a point of departure for the more systematic and focalized discussion of the hypothesis of a gradual colonisation of arbitration practices by litigation put forth in the chapters collected in Part II of the book. Here evidence for or against the colonization of arbitration awards by litigation is looked for by focusing on different aspects of award drafting, which broadly speaking cluster around two main lines of research: the logical structure of awards, on the one hand, with a focus either on cognitive structure or on argumentative features, and, on the other hand, discursive strategies related to the (Hallidayan) interpersonal function, with special regard for the construction of authorial stance in relation to other voices.

Along the first line of research, VIJAY BHATIA and HAN ZHENGRUI's chapter compares arbitration awards and litigation judgments issued in the People's Republic of China, revealing that the two genres tend to display the same moves, arranged in the same sequential order, with both arbitrators and judges committed to reporting conclusions rather than negotiating their decisions. The sole difference, according to the authors, lies in the degree of standardization, as judgments are more structured and standardized than arbitration awards. On this ground, the authors conclude that, although in arbitration practices considerable freedom is left for the parties to negotiate while in judgments the State's power exerts greater influence, not much material difference exists between arbitration awards and legal judgments. And such similarity is interpreted as an effect of interdiscursivity, which in turn is dependant on the context of production, given that arbitrators listed by various Chinese arbitration commissions are mostly law professors and lawyers.

In the next chapter, CHIARA DEGANO relies on a corpus-based analysis of the arguments used in arbitration awards to seek evidence of a colonization of international commercial arbitration – in theory independent of any specific legal system – by the common law litigation tradition. Resting on the assumption that the widespread use of English in international arbitration ends up bringing with it an influence of the Anglo-Saxon legal culture as well, and considering that arguments based on analogy are the foundation of precedent-bound case law, Degano asks whether recourse to case-based logic in international arbitration awards has increased over time, as a possible effect of the influence of common law. The results of the computer-assisted analysis, carried out using linguistic indicators to retrieve occurrences of arguments by analogy, suggest an increase in the recourse to such forms of reasoning parallel to a reduction in the frequency of references to statutory sources of law, two

data which taken together can be seen as a step towards confirming the initial hypothesis.

Tackling both reasoning structure and rhetorical strategies, MICHELE SALA focuses on the use of argumentation in arbitration awards, taken as a yardstick to assess to what extent and through which discursive resources experts of the legal profession interpret and transform the conciliatory nature of arbitration. Based on a corpus of Italian commercial arbitration awards, the analysis examines the argumentative strategies which are used by arbitrators to support their claims, substantiate their final decision, and confer authority and definitiveness on their judgment, focusing primarily on the use of standardized and formulaic language, the frequency and distribution of syntactic indicators of argumentation such as consequential or contrastive markers and, finally, the rhetorical strategies used by the drafters to express evidentiality, epistemic and interactive meanings. The findings confirm the hypothesis of an influence of litigation, which according to the author might be due to the presence of lawyers on the Board of Arbitrators, but may also be purposefully intended to attach a specific deontic connotation to the award, so as to make it recognizable and acceptable as a normative text.

Along the second line of research, focusing on discursive strategies related to the interpersonal function, IGNACIO VÁSQUEZ and DIANA GINER explore intertextuality in arbitration awards and court judgments, considering it both in the prototypical form of quotations embedded in a text, and in the more indirect form of hedges and boosters as markers of interactional metadiscourse whereby the authors modulate their distance from, or commitment to, the words of the parties to the dispute that they decide to report in their final pronouncements. Results show that hedges and boosters are commonly used both in awards and judgments, with a twofold move-specific function: when appearing within the reasoning sections, they seem to be strongly related to the justifying function of the language, while in the conclusions and finding sections, there is a tendency to use boosters to make the tone more authoritative, with a clear declarative function. On this basis, the authors conclude that the two functions that Maley (1985) identified in the language of judgments are also present in the language of arbitral awards, thus reducing the gap that one might expect to exist between awards and judgments, as a consequence of their profoundly different rationales and procedures.

The last two chapters of the book deal with the same issues, but the object of investigation is a special form of international arbitration, i.e. sports arbitration.

PAOLA EVANGELISTI ALLORI's chapter looks in particular at the construction of the parties' identity in the text. She compares the authorial stance of arbitrators and judges in sport arbitration awards and judgments respectively, looking in particular at the reporting verbs these professionals use to represent actions undertaken by the parties to the procedure, and in so doing they implicitly convey their own view of the parties themselves and of their position within the case. The analysis, carried out on two specialised corpora of legal discourse, i.e. final pronouncements given by court judges and by sport arbitrators in international appeal cases, highlights remarkable differences in the use of reporting verbs, which is interpreted by the author as a clue to the existence of different drafting conventions for the practices of court litigation and (sport) arbitration. The findings reveal that in both genres reporting verbs play a significant role in the section dedicated to the exposition of the facts and the subsequent pronouncement of the judging body. However, a difference emerges in narrative styles, with a reverberation, in particular, on the image of the party who sets the legal appeal procedure in motion. While arbitrators tend to project an image of the Appellant as a dynamic and alert participant in the procedure who strives eagerly to have his/her point of view accepted by the judging body, the court judges project an image of the Applicant as a more static, almost detached participant in the background.

The issues involved in sports arbitration are explored also by MICHELA MENGHINI in the final chapter of the book. She focuses on the use of intertextual devices and their functions in awards issued by the Court of Arbitration for Sport between 1991 and 2010, with the purpose of establishing whether significant differences can be found between older and more recent awards, and whether such differences can be ascribed to the influence of litigation, as recently hypothesized for commercial arbitration. The analysis suggests that colonization by litigation practices has not (yet) conspicuously affected sport arbitration. However, few but interesting differences in terms of intertextual features might indicate that a recent trend in this sense is under way. Particularly noteworthy is the use of integral citations, which in recent awards are almost invariably present and distributed through the various sections, unlike in older awards. Since integral citations as markers of intertextuality in awards perform the function of signaling textual authority, their increase might indicate an incipient concern for sport arbitrators to assert authority and make their decisions as explicit and conclusive as possible, and this could be seen as an effect of the influence of litigation.

3. Concluding remarks

The picture of the award that emerges from this volume is one of a cohesive genre which, with the due differences across cultures and traditions, is quite codified in terms of macro-textual organization and cognitive structure.

At the level of micro-discursive features, too, the analyses presented in the various chapters consistently reveal a cluster of distinctive traits, which seem to be the result of two main extra-linguistic factors: the necessity for arbitrators to be accountable to the parties who appointed them, and the layering of procedural steps through which the arbitration process unfolds with the relevant discursive formations.

The first factor, i.e. arbitrators' accountability to the parties, determines their recourse to a complex nexus of rhetorical strategies, aimed at the discursive construction of the participants' identities. From the viewpoint of the writer/sender, arbitrators tend to emphasize their authoritativeness and credibility, while at the same time endowing their decisions with an aura of reasonableness and conclusiveness. At the other end of the continuum, the drafting takes into account the positions of the parties, anticipating their expectations and trying to accommodate their points of view, even when the final decision runs counter them.

As for the second factor, i.e. the discursive complexity of arbitration and its impact on the final pronouncement, the fact that the award is issued at the end of a composite process determines a stratification of discourses produced at various stages of the arbitration itself, which are represented in different degrees in the final document.

This, also partly associated to the concern for the parties' points of view, gives rise to a polyphony of voices skillfully orchestrated by the arbitrators, playing the double role of deliberators and of narrators (but also selectors) with regard to previous facts and discourses.

With regard to the initial hypothesis of the impingement of litigation on arbitration, the results of the researches presented in the volume suggest that even if the two genres retain some distinguishing features in their own respect, differences are a matter of gradualness, with court judgments displaying a higher degree of standardization, possibly as a consequence of their being more deeply institutionalized than arbitration. However, also arbitration, with its transformation from the original "town elder model" (Rivkin 2008) to its contemporary legalized form, has become increasingly institutionalized —hence a consolidation of the award as a genre—, drawing on the conventions of the court judgment. While in commercial arbitration such a process is well into its consolidation stage, in sports

arbitration the signs of an influence of litigation are at a more seminal phase, but are nonetheless present, suggesting that even this type of arbitration is not immune from litigation contagion.

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PART ONE.

ARBITRATION AWARDS: GENERIC STRUCTURE AND DISCURSIVE FEATURES

CHAPTER TWO

FREE CIRCULATION OF ARBITRAL AWARDS AND INTERACTION BETWEEN STRUCTURE OF THE LAW AND STRUCTURE OF THE LANGUAGE

MANLIO FRIGO

1. Introduction: language related problems in international arbitration

When we try to outline the advantages of arbitration we usually take into consideration some factors, typically:

- binding nature of the arbitral awards: they are not subject to appeal and the grounds of challenge available against arbitral awards are very limited;
- better enforcement: arbitral awards have easier and greater international recognition than judgments of national courts, thanks to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (130 States) and several bilateral agreements;
- expertise: the parties can appoint their arbitrators;
- rapidity;
- confidentiality: arbitration hearings are not public, awards are not published;
- equal footing: parties are on an equal footing with reference to the place of the arbitration, the procedures, the nationality of the arbitrators, the language of the arbitration.

However, with respect to international commercial arbitration the ‘equal footing guarantee’ might conceal some traps. This is particularly the case with problems pertaining to language and translation. Some

scholars have stressed the fact that international commercial arbitration is a “*trans-cultural venture*” and that the need to bridge language differences is part of the process, and this is also true when considering that post-award court proceedings must also meet language-related challenges (Varady 2006).

1.1. Impact of the linguistic factor

The linguistic factor is of great importance in fostering the spread of arbitration mainly in what concerns:

- a. the possibility of appointing arbitrators of different nationalities (and in particular coming from States different from the State where the proceedings will take place);
- b. the choice of a language different from the language of either party as the language of the arbitration and, accordingly, of the arbitral award.

Does the structure of the language used in arbitral proceedings affect the structure of the applicable law? Does the applicable law have any impact on the language used in the proceedings and *vice-versa*?

1.2. Language-related issues and award recognition

It is a common feature of both international and domestic law rules that they face “language-related problems” by means of specific provisions concerning the recognition of arbitral awards. Just to quote an example, the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* provides that, in order to obtain the enforcement by the relevant court, the applicant shall submit i) an application for enforcement, ii) the arbitral award, iii) the arbitration agreement. Furthermore it provides that “Application for enforcement made in the Mainland shall be in the Chinese language. If the arbitral award or arbitration agreement is not in the Chinese language, the applicant shall submit a duly certified Chinese translation of it”.¹

¹ Article 3.4. of the *Arrangement Concerning Mutual Enforcement of arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* of July 14, 2006.

The main multilateral agreements on the subject matter provide for similar solutions, namely article 4 of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, and Article IV of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards contain the same rule and require a translation certified by an official or sworn translator or by a diplomatic or consular agent.² Incidentally, also the Italian civil procedure code, consistently with the above international agreements, provides for the same requirements.³ From this point of view, the solution of any linguistic problems relies therefore upon the “certified translation” of the original document.

2. Translation in international arbitration

The translation and its certification do not ensure a proper solution when a “non-merely-linguistic problem” is at stake. In other words, what happens when differences between legal systems or even specific legal institutions occur? According to a famous definition, legal translation is not merely a conversion from a juridical system to another, but rather “translation consists in superimposing, through the intermediation of two concordant terms which refer to two different juridical concepts, two correspondent or equivalent notions, linked to two different orders”.⁴

As has been observed by some legal scholars, the translator can make a choice between two or three alternatives: translating the text, reconstructing the thought of the author, or rendering what – in his view – is the “objectively” correct sense of a legal text written by somebody else in the original language.

The situation may even be more complicated, for instance because the text has more different juridical meanings and therefore a strictly juridical interpretation appears to be necessary. Furthermore, any language aims at describing the legal institutions or the legal phenomena of the country where that language is spoken. If we take the example of English expressions such as *equitable interests* or *consideration*, it is quite clear that other languages lack equivalent expressions as they are spoken in

² See article IV of the New York convention. With a slightly different wording article 4 of the Geneva Convention requires a translation “... certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the awards belongs or by a sworn translator of the country where the award is sought to be relied upon”.

³ See article 839 of the Italian *Codice di procedura civile*.

⁴ See Ricoeur 2006: 1ff.

countries where *equitable interest* and *consideration* simply do not exist (cf. Sacco 1999: 129ff.).

2.1. Issues involved in legal translation

Legal translation has to face some difficulties barely known to other kinds of translation. Broadly speaking, the translation of a notion into another notion is possible and legitimate when the two notions express the same concept, but this is not always the case in the juridical world. The concepts elaborated in the law making process or in any case defined by the jurists in a given legal system do not necessarily correspond to those elaborated or defined in another legal system. If this is the case, one should envisage the need for what may be defined as a *trans-conceptual translation*.

This problem may arise in cases where the same language is used in different legal systems: the *Besitz* of the Germans and the Swiss does not coincide with the *Besitz* of the Austrians, as the latter not only implies the control of the person on the object, but also his intention of being the owner of the object.

In other cases, there are notions that are at first sight identical in two different languages *and* in two different legal systems, but in actual fact they are different in certain respects. For instance, the *contract* of the British common law does not have a precise equivalent in the *contrat* of the French, where basically there is no trace of the notion of “consideration”.

Should then one conclude that the translation of legal texts is impossible or illegitimate, or simply unreliable? Of course not, as there are various solutions available. According to some proposals aimed at overcoming these difficulties, in order to translate a term involving problematic juridical notions it could be advisable to dismantle them by means of componential analysis, highlight the elements that have no reciprocal correspondence in the relevant legal systems, elaborate a language in diagrams in which the semantic unit contains all the characteristics to be considered in order to distinguish one notion from the other (cf. Vanderlinden 1995; Sacco 1996: 659).

Even without going so far, when problematic cases arise are there any legal criteria or principles applied in the international practice?

2.2. Rules for the interpretation of juridical norms

International law has its own rules concerning the interpretation of juridical norms, including at least partially the translation issue. As far as international treaties are concerned, Article 31 of the Vienna Convention of 1969 sets out a general rule of interpretation which provides that

A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This statement, far from being conclusive, raises a few issues:

- a) First: what is the ‘ordinary meaning’ of a word used in a treaty, considering that the expressions used in a treaty are technical?
- b) Second: what is the exact meaning of ‘good faith’? Is there a universally accepted notion of good faith, or is it, again, a technical notion the meaning of which may be slightly different according to the legal system it is referred to? The paradox, here, is that the good faith criterion is aimed at preventing that one of the parties to a treaty may take advantage from an ambiguous term, but the use of this term can turn out to be ambiguous in itself (Bariatti 1986: 175).

The issue of interpretation is expressly connected to the linguistic topic in another provision of the Vienna convention. Pursuant to its article 33, the interpretation of treaties authenticated in two or more languages is subject to two main rules:

1. “the terms of the treaty are presumed to have the same meaning in each authentic texts” (article 33.3), and
2. “Except when a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted” (article 33.4).

The first rule provided for under article 33.3 can be of some help in this discussion, as the principle set forth in it should be followed by the interpreter when the difference between the original text of the award and its translation may affect the post-award proceedings.

2.2.1. An example

Very recently, in the *Continental Casualty Co. v. Argentina*⁵ ICSID case concerning the 1991 Argentina-US BIT (Bilateral Investment Treaty), the arbitral tribunal had to face a problem of interpretation of an escape clause. Pursuant to article XI of the BIT the obligations that either party had undertaken under the treaty as to the treatment of investments and investors of the other party “*shall not preclude*” the application of “*measures necessary*” for the pursuit of three types of national interests listed therein, among which namely: “a. the maintenance of public order”, and “c. the protection of its own essential security interests”.⁶

In its award of September 5, 2008, the Tribunal was confronted by a narrow interpretation by the claimant and a broader definition by the defendant of the terms ‘*public policy*’ and ‘*essential interests*’. It is noteworthy that, with reference to the former expression, the tribunal held that “the expression ‘maintenance of public order’ indicates...rather clearly that public order is intended as a broad synonym for public peace, which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace”. Moreover, “this is the ordinary and principal meaning of “*orden publico*” in the Spanish text of the BIT corresponding to the same meaning in the French legal concept of ‘*ordre public*’ in public and criminal law”.⁷ In this case, in rendering its decision the Tribunal brilliantly tried to provide an interpretation of the “ordinary meaning” of the wording by making recourse to a broad notion of public order, possibly slightly beyond its strictly legal meaning, but in all likelihood more in keeping with the spirit of the interpretation criteria set out in the Vienna Convention.

This example shows quite clearly how the above criteria can be properly applied in interpreting a normative text.

⁵ See *Continental Casualty Company v. Argentine Republic*, ICSID Award of September 5, 2008, at <www.worldbank.org/icsid>.

⁶ The other principle, not relevant to this discussion, is “the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security”.

⁷ As a consequence: “Thus in the Tribunal’s view, actions properly necessary by the central government to preserve and repress illegal actions and disturbances that may infringe such civil peace and potentially threaten the legal order, even when due to significant economic and social difficulties, and therefore to cope with and aim at removing these difficulties, do fall within the application under Art. XI”. (see, § 174)

2.3. Trans-conceptual translation

Going back to the recognition and enforcement of arbitral awards, it is quite unlikely that errors in translation may be relied on as a ground for challenging the validity of the award. If we look at the 1958 New York convention's provisions, it is clear that the refusal of recognition and enforcement can only be justified for reasons concerning either the contents of the award (see article V.1.c,⁸ and article V.2.b⁹ with respect to the public policy of the country where recognition and enforcement are requested), or the subject matter of the arbitration in case it is not capable of settlement by arbitration under the law of that country (see Article V.2.a).

It is to be added that the seriousness of this problem can be particularly appreciated in case the law applied by the arbitrators is not the law of the country where the recognition is requested. In this respect an error in translation might only lead the interpreter to a refusal based on a *prima facie* consideration of the conditions, as the norm clearly requires that the consideration be effected on the documents (award and/or "agreement in writing") and not on their translation. Should this be the case, the refusal could be easily overcome by making recourse to the ordinary legal tools provided for by the law of the country concerned.¹⁰

On the other hand things would be different in case of trans-conceptual translation. Should the award (and not its translation) refer to legal institutions and/or juridical notions having a different meaning or being

⁸ Pursuant to article V.1.c. of the 1958 New York convention recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that "... the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced".

⁹ Pursuant to article V.2.b of the 1958 New York convention recognition and enforcement of the award may be also refused if the competent authority in the country where recognition and enforcement is sought finds that "The recognition or enforcement of the award would be contrary to the public policy of that country".

¹⁰ In the Italian legal system, article 287 of the Civil Procedure Code admits the possibility of the correction of an error (*errore materiale*, 'material mistake') by the same judge who had rendered the decision.

absolutely unknown in the country where the award is supposed to be recognized or enforced, two different outcomes could be foreseeable:

- a) the interpreter recognizes the award, translating the problematic notion into a notion expressing more or less the same concept (i.e. a similar legal *régime*);
- b) the interpreter considers that the award cannot be recognized due to the impossibility of “translation”. This is an extreme and certainly not desirable solution, but in this respect it is to be pointed out that this option was recently confirmed by the Italian Supreme Court when stating that a foreign award of punitive damages – which are not contemplated under Italian positive law – cannot be recognized in Italy, being contrary to the country’s public policy. In such a case a *trans-conceptual translation* was considered simply impossible, not because of the absence of a theoretical equivalent, but rather due to inconsistency with the public policy – that incidentally only broadly speaking is an equivalent of the Italian *ordine pubblico* – meant as a general limit to the recognition of foreign legal and juridical values not consistent with the Italian legal system.¹¹

3. Conclusion

In conclusion, it is the main task and responsibility of the arbitrators to ensure that their award can circulate as provided for under the applicable norms. The relevant international law rules are, in this respect, sufficiently clear in highlighting the exclusive importance of the *contents of the award* (and not of its translation) as a ground for challenging the award and refusing its recognition.

In this regard one should read the relevant provisions contained in the most significant legal texts concerning the language of the arbitration as a call for responsibility of both the parties and the arbitrators in taking into consideration the effects of their choice. According to an ordinary rule in international commercial arbitration, arbitrators are empowered to determine the language (or languages) of the arbitration in the absence of an agreement by the parties.¹²

¹¹ See Cass. n° 1182 of January 19, 2007; the Supreme Court had confirmed the decision of the Venice Court of Appeal that had dismissed the claim for recognition of a judgment of the District Court of Jefferson, Alabama.

¹² See article 5 of the Arbitration Rules of the Chamber of National and International Arbitration of Milan, Article 22 of the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), article 16 of the

Moreover, it is also commonly admitted that arbitrators can supplement the parties' agreement as to the choice of the law applicable to the merits, particularly when their choice is open, as in cases where the arbitral clause provides for a multiple choice, e.g. the choice of more than one national applicable law as well as international law.¹³

As the two things frequently go together in international practice, for the sake of the free circulation of arbitral awards – and to some extent this is a truly common target – it would be of some importance that the parties and the arbitrators make a choice of the language of the arbitration which proves to be consistent with the (choice of the language of) the applicable law.

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Rules of Arbitration of the International Chamber of Commerce of Paris (ICC), which also provide that the choice of the language or languages of the arbitration is to be made "... due regard being given to all relevant circumstances, including the language of the contract".

¹³ See as an example the decision of the Stockholm Court of Appeal 15 May, 2003, in case n° T 8735-01 *The Czech Republic v. CME Czech Republic B.V.*, in *Rivista dell'Arbitrato*, 2003, 815; cf. article 17 of ICC Arbitration Rules, and article 3 of Rules of the Milan Chamber of National and International Arbitration.

CHAPTER THREE

ANALYSING INTERNATIONAL COMMERCIAL ARBITRATION AWARDS AS GENRE

VIJAY K BHATIA AND JANE LUNG

1. Introduction

Although legal genres have been extensively researched both in their spoken and written forms with a focus on rhetorical and cognitive move structures (Bhatia 1982, 1993, 2004; Lung 2008), there has been relatively little research in the analysis of arbitration discourse. This chapter aims to fill this gap by analyzing the genre of arbitration awards. The term arbitration refers to a non-litigative method of resolving disputes between two parties. This is essentially carried out by an impartial tribunal consisting of one or more arbitrators, not necessarily legal experts, but often knowledgeable in the areas of dispute. At the end of what is generally known as arbitration trial, the tribunal delivers an award, somewhat similar to a court judgment. This chapter will examine a corpus of awards in order to discover the nature of its organisation in terms of rhetorical moves and the manner in which these moves are embedded in a discursive pattern and how typical such patterns are. The chapter will also make an attempt to show how this discursive hierarchical pattern can be explained by taking into consideration the nature and communicative functions of arbitration awards.

As to the nature of arbitration, it is interesting to note that arbitration falls into the category of a consensual private dispute resolution process. It is consensual in that parties agree to submit their disputes to be resolved by an arbitral tribunal, and the resulting award is viewed as final and binding. Turner defines the arbitration award as

the decision of the arbitrator based upon the submissions made to him in an arbitration. It can be made orally, but an oral award is not covered by the provisions of the Arbitration Act 1996 ("the 1996 Act") and oral awards

are rare, or an exceptional ad hoc measure in conditions of urgency – followed by the same in writing. An award must be the consequence of an arbitrator deciding as between opposing contentions, having weighed the evidence and submissions. (Turner 2005: 9)

2. Data and methodology

This study employs a genre analytical framework to examine the cognitive and rhetorical features of arbitration awards. The data used for this study draw on arbitration awards collected from different countries, namely Iran, Russia, Austria, China, France, America and Sweden. Although the arbitration trials were conducted in various countries, the awards were reported in English. Genre and discourse analyses take a number of factors into consideration in order to explain both institutional and social community goals. This study considers genre as a typical “staged, goal-oriented” (Martin 1985) “social action” (Miller 1984) serving a specific communicative purpose (Swales 1990; Bhatia 1993).

3. Discursive hierarchical patterning in arbitration awards

This section examines some of the typical rhetorical and cognitive patterns one may find in arbitration awards, illustrating how such patterns are presented, and discussing what kind of information is textualised through what can be viewed as a discursive hierarchical pattern (DHP). A discursive hierarchical pattern can be defined as individual discursive patterns organized hierarchically in terms of three aspects: textual, generic and social. The textual aspects include the use of linguistic resources such as lexico-grammar and discourse markers, whereas the generic aspects relate to the generic moves which realize communicative purposes. Social aspects, on the other hand, have a direct bearing on how language is used and interpreted socio-critically.

The analysis reveals that arbitration awards tend to favour the following typical discursive hierarchical pattern (see Figure 1 below), consisting of four individual patterns (DHP 1-4).

Figure 1 shows that Arbitration Awards tend to display a typical Discursive Hierarchical Move Pattern, which begins with the opening Move “Heading” (ArbDHP-Pre-1) meant to be a brief guide to the award. “Heading” is followed by the first Move “Recitals” (ArbDHP-1) offering the essential background information about the award. ArbDHP-1 includes four steps, “Introducing the parties” (ArbDHP-1-S1), “Competence of the tribunal” (ArbDHP-1-S2), “Pre-hearing proceedings and applicable law”