ESSAYS IN HONOUR OF MICHAEL BOGDAN

OFFPRINT

Juristförlaget i Lund
2013
International commercial arbitration is the preferred method for solving disputes arising out of international commercial contracts. There is a diffuse sentiment that international arbitration is more apt than national courts in understanding the interests of the parties. It is quite unclear, however, what this implies regarding the issue of contract interpretation. We know about the classic divide between the literal and purposive interpretation of contracts, traditionally believed to characterise courts belonging to the common-law and the civil-law traditions respectively. Are arbitrators more disposed than national courts to relying on the language of the contract and to disregarding possible interference from the principles of national law? Alternatively, do they rely more readily on considerations of good faith, the economic interests that are at stake, trade usages and the like than national courts do? I will argue here that there is no unified approach within arbitration. To substantiate this argument, it will first be necessary to consider the way in which contracts are written. There seems to be a gap between the practice of contract drafting and the way in which contracts are interpreted and enforced. Contracts are often written as if the only basis for their enforcement were their terms, and as if contract terms were capable of being interpreted solely on the basis of their own language. However, research shows that the enforcement of contract terms, as well as their interpretation, is the result of the interaction between the contract and the governing law.\(^1\) Considering contracts

\(^1\) See Giuditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press, 2011). This is also recognised in practice. Following a seminar on the interpretation of contracts that is mentioned in Section 3.1 below, I received the following wording that the international law firm Lalive regularly inserts in legal opinions concerning contracts written in English but providing for the application of Swiss law: “In this opinion letter, Swiss legal concepts are expressed in English terms and not in their original Swiss language; the concepts concerned may not be identical to the concepts described by the same English terms as they exist under the laws of other jurisdictions; this opinion may, therefore, only be relied upon on the condition that any issues of interpretation or liability arising hereunder will be governed by Swiss law and be brought before a Swiss court.”
to be self-sufficient and not influenced by any national law, as if they enjoyed a uniform interpretation thanks to their own language and some international principles, thus proves to be illusory. This contract practice may lead to undesired legal effects and is not optimal when viewed from a legal perspective — although, when viewed from a broader perspective, it may turn out to be more advantageous than the alternative, which would mean employing substantial resources in order to ensure legal certainty. The question is whether international arbitration has better means than national courts to tackle this divergence. Below, I will briefly discuss the international practice of contract drafting and its legal implications, before looking at how this works in the context of international arbitration.

1 Contract drafting and ambitions of self-sufficiency

International contracts are often written on the basis of rather standardised models; they are mainly drafted in English and therefore employ a common-law drafting style. This does not mean, however, that the parties intended the contract to be subject to English law. Often, contracts are governed by a law that does not belong to the common-law family, and this may create tensions between the contractual regulation and the governing law. To minimise the risk of the governing law interfering with the agreed terms, international contracts are drafted in a style that aims at creating an exhaustive, and as precise as possible, regulation of the underlying contractual relationship, thus attempting to render redundant any interference from external elements, such as the interpreter’s discretion, or the rules and principles of the governing law.

To a large extent, this degree of detail may achieve the goal of rendering the contract a self-sufficient system, thus enhancing the impression that if only they are sufficiently detailed and clear, contracts will be interpreted on the basis of their own terms and without them being influenced by any governing law. This impression, however, has proven deceptive, and not only because governing laws may contain mandatory rules from which the contract cannot derogate. As a matter of fact, not many mandatory rules affect international commercial contracts; there are important mandatory rules that are also relevant in the commercial context, however, for example in the field of limitation of liability. In the context of the interpretation of contracts, the focus should mainly be

---

2 To what extent these rules have an impact in the context of international commercial arbitration is analysed in Giuditta Cordero-Moss, "International Arbitration and the Quest for the Applicable Law", Global Jurist (Advances) 8, no. 3 (2008), part II, Section 2. See also the research project running at the University of Oslo, on Arbitration and Party Autonomy (APA): http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/
on the spirit underlying general contract law. This will vary from legal system to legal system, and consciously or not, will inspire the way in which the contract is interpreted and applied. Notwithstanding any efforts by the parties to include as many details as possible in the contract in order to minimise the need for interpretation, the governing law will necessarily project its own principles regarding the function of a contract, the advisability of ensuring a fair balance between the parties’ interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally towards each other, and the existence and extent of a general principle of good faith – in short, the balance between certainty and justice. To avoid such interference, contracts often contain a series of clauses in which the parties try to take into their own hands those aspects where the balance between certainty and justice may be challenged – the so-called boilerplate clauses. These clauses relate to the interpretation and general operation of contracts, and are to be found in most contracts irrespective of the subject matter of the contract. They are relatively standardised and their wording is seldom given attention during the negotiations.

The eagerness in drafting may reach excesses that have been defined as “nonsensical” by a prominent English expert. For example, the ubiquitous clause of Representations and Warranties may list, among the matters that the parties represent to each other, that their respective obligations under the contract are valid, binding and enforceable. This Representation and Warranty is itself an obligation under the contract, and is itself subject to any ground for invalidity or unenforceability that might affect the contract; therefore, what value does it add? It is particularly interesting that this observation is made by an English lawyer, because it shows that the attempt to detach the contract from the governing law may go too far, even for English law, and this is notwithstanding that the drafting style adopted for international contracts is no doubt based on the English and American drafting traditions.

1.1 The classic common law–civil law divide is not defunct and affects contract drafting

Extensive contracts do not reflect the tradition of civil law. A civilian judge reads the contract in the light of the numerous default rules provided in the governing law for that type of contract; therefore, extensive regulations are

---

not required in the contract. The common-law drafting tradition, in turn, requires extensive contracts that spell out all obligations between the parties and leave little to the judge’s discretion or interpretation, because the common-law judge sees it as his or her function to enforce the bargain agreed upon between the parties, and not to substitute the bargain actually made by the parties with one which the interpreter deems to be more reasonable or commercially sensible. Thus, English judges will be reluctant to read obligations into the contract that were not expressly agreed to by the parties. Since English judges often affirm that a sufficiently clear contract wording will be enforced, parties are encouraged to increase the level of detail, and to write around mechanisms that have proven to be problematic by formulating clauses that will not fall within the scope of the problem. In a recent decision, the English Supreme Court has gone far in affirming that contract interpretation that is more consistent with the commercial purpose of the contract is preferred, but the Court has been careful to underline that this assumes that that particular construction must be possible on the basis of the wording of the contract.

This heightens the impression that a well-thought-out formulation may solve all the problems that may arise under the governing law. When adopting the common-law style, drafters may apparently be tempted to overdo things, and to write regulations that tend to elevate the contract to the level of law, such as the above-mentioned Representation and Warranty clause. This clause, as noted above, seems nonsensical even in an English law context, because a contract term does not have the power to determine whether it is valid or enforceable – it is for the law to decide what is valid and enforceable. However,

---


6 For example, in respect of the liquidated damages clause, see the comments below.


8 A similar attempt to elevate the contract to the level of law may be found in the assumption that the contract’s choice-of-law clause has the ability to move the whole legal relationship beyond the scope of the application of any law except that chosen by the parties. The choice of law made by the parties, however, has effect mainly within the sphere of contract law. For areas that are relevant to the contractual relationship, but which are outside the scope of contract law, the parties’ choice does not have any effect. Areas such as the parties’ own legal capacity, company law implications of the contract, or the contract’s effects on third parties within property law are governed by the law applicable to those areas according to the respective conflict rule, and the parties’ choice is not relevant. The APA project assesses such limitations to party autonomy, particularly in connection with international arbitration; see Section 2 below.
this clause is symptomatic of the intense desire to detach the contract from the applicable law so that it becomes its own law.9

The Representation clause on the validity and enforceability of the contract is not the only attempt to detach the contract from the governing law: other clauses, often recurring in contracts, regulate the interpretation of the contract and the application of remedies independently from the governing law.

Interestingly, some of these clauses do not seem to achieve the desired results, even under English law. As noted by Ed Peel,10 observers may tend to overestimate how literally English courts may interpret contracts.

Be that as it may, contract practice shows that it is based on the illusion that it is possible, through sufficiently clear and precise wording, to draft around problems and circumvent any criteria of fairness that may inspire the court. Ed Peel actually confirms that this is supported indirectly by English courts themselves, who often founded decisions on the interpretation of the wording rather than on substantial considerations, such as the balance between the parties’ interests. In respect of some of the more interesting contract clauses in this regard, which attempt to regulate precisely the interpretation of the contract, it seems that the drafting efforts are not likely to achieve results that might be considered unfair by the court, no matter how clear and precise the wording, and in spite of the courts’ insistence on making this a question of interpretation. For these clauses, therefore, English courts will not decide in the overly formalistic way that often is assumed to be typical of English courts, as the example of the Entire Agreement clause made in Section 2 below will show.

---

9 A representation clause on the validity and enforceability of the contract is a typical part of boilerplate clauses. See, for example, Section 5.2, Article V, Form 8.4.01 (Form Asset Purchase Agreement), M. D. Fern, Warren’s forms of agreements, Vol. 2, (LexisNexis, 2004). This is also the first representation recommended in Contract Standards, a site which analyses both public and private document collections with the purpose of creating standard forms and providing contract benchmarking (http://www.contractstandards.com/contract-structure/representations-and-warranties, last visited on February 14, 2013). On the basis of its survey, the site comments on this clause as follows: “States that the execution of the agreement will not violate any law or conflict with any contractual obligation agreement. The language is typically consistent across a range of transaction types.” (http://www.contractstandards.com/contract-structure/representations-and-warranties/no-conflicts, last visited on February 14, 2013). See also Sample Representations and Warranties, Section 3.2, Documents for Small Businesses and Professionals, http://www.docstoc.com/docs/9515308/Sample-Representations-and-Warranties (last visited on February 14, 2013). Numerous examples of actual use of this representation clause may be found in the contracts filed with the United States Securities and Exchange Commission; for example, Section 25.1.3 of the contract dated November 21, 2004, between Rainbow DBS and Lockheed Martin Commercial Space Systems for the construction of up to five television satellites (http://www.wikinvest.com/stock/Cablevision_Systems_(CVC)/Filing/8-K/2005/F2355074, last visited on February 14, 2013) and Section 5.02 of the merger agreement dated May 14, 2007, between eCollege.com and Pearson Education, Inc. and Epsilon Acquisition Corp. (http://www.wikinvest.com/stock/ECollege.com_(ECLG)/Filing/DEFA14A/2007/F4972482, last visited on February 14, 2013).

In respect of other clauses, however, the criteria of certainty and consistency seem to be given primacy by the English courts. This ensures a literal application of the contract regardless of the result, as long as the clause is written in a sufficiently clear and precise manner. The clause of Liquidated Damages, for example, is designed to escape the common-law prohibition of penalty clauses. In addition, both this clause and the possibility of converting it into a price-variation clause provide a significant example of how drafting may be used to achieve a result that otherwise would not be enforceable: this is defined as the possibility of the parties being able to manipulate the interpretation in order to avoid the intervention of the courts.\(^{11}\) This clause quantifies the amount of damages that will be compensated for, and has the purpose of creating certainty regarding what payments shall be due, in case of a breach of certain obligations. In many civilian systems, this may be achieved by agreeing on contractual penalties. The Liquidated Damages clause has its origin in the common law, where contractual penalties are not permitted. The main remedy available for breach of contract in common law is compensation of damages. In order to achieve certainty in this respect, contracts contain clauses that quantify the damages in advance. As long as the clause makes a genuine estimate of the possible damages, and it is not used as a punitive mechanism, it will be enforceable. The agreed amount will thus be paid irrespective of the level of the actual damage. Although the courts have the power to exert control on whether the quantification may be deemed to be a genuine evaluation of the potential damage, they are very cautious using this power, under the assumption that the parties know best how to assess any possible damages.\(^{12}\) Moreover, the penalty rule applies to sums payable upon breach of contract; an appropriate drafting will permit circumvention of these limitations by regulating payments as a consequence of events other than breach, thus excluding the applicability of the penalty rule.\(^{13}\) This is a good example of how far the appropriate drafting may go under English law.

The common-law terminology is also adopted in contracts governed by other laws, even when the applicable law permits contractual penalties, and where it would not be necessary to structure the penalty as a pre-estimation of damages. Regarding the intention of the parties to these contracts, these clauses are often assumed to work as penalty clauses. This means that they are not necessarily meant to be the only possible compensation for breach of

---

\(^{11}\) Ibid., Section 2.7.

\(^{12}\) Ibid.

\(^{13}\) Ibid.
contract, and paid irrespective of the extent of the actual damage. Questions may arise, however, as to the effects of the clause: will they have the same effects as in English law, and make the agreed sum payable in spite of the fact that there was no damage at all, or that the damage had a much larger value, or that the clause was meant to be cumulated with reimbursement of damages calculated according to the general criteria?

In civil law, no matter how clear and detailed the drafting is, there are some principles that may not be excluded by the contract. Thus, the agreed amount of liquidated damages will be disregarded if it can be proven that the loss actually suffered by the innocent party is much lower or much higher. Contractual penalties may be cumulated with other remedies under certain circumstances, also including reimbursement of damages. The English terminology that refers to “damages” may create a presumption that the parties did not intend to cumulate that payment with other compensation. This may come as a surprise to the parties who used the terminology on the assumption that it is the proper terminology for a contractual penalty; however, if it is possible to prove that the parties intended to regulate a penalty and did not intend to exclude compensation for damages in spite of the terminology they used, the presumption may be rebutted.

Relying simply on the language of the contract, and particularly if the contract also contains a Sole Remedy clause, a party could be deemed to be entitled to walk out of the contract if it pays the agreed amount of liquidated damages. The Liquidated Damages clause could thus be considered as the price that a party has to pay for its default, and as an incentive to commit a default if the

---


agreed amount is lower than the benefit that would have been derived from terminating the contract. In many countries, however, the principle of good faith prevents the defaulting party from invoking the Liquidated Damages clause in case the default was due to that party’s gross negligence or wilful misconduct.18

The Liquidated Damages clause is one example of the different approaches taken to drafting and interpretation in the common-law and civil-law traditions. Whereas the former permits circumventing the law’s rules by appropriate drafting, the latter integrates the language of the contract with the law’s rules and principles.

The possibility of writing around problems is thus quite rooted in the common-law tradition; international contracts adopt models developed under common law, and they are often written as if they were assuming that any issues would be solved by properly drafted clauses, quite irrespective of the governing law.

1.2 Contract drafting and the governing law

The idea that international contracts are drafted without consideration for the requirements and assumptions of any particular contract law seems difficult to reconcile with the necessity of interpreting and applying international contracts in accordance with a particular governing law. Taking contract practice as a starting point, the observer could be tempted to question the requirement that an international contract shall be subject to a law that was not considered during the drafting. When seeking solutions that adequately cater to the peculiarities of international contract drafting, however, it is necessary to consider their feasibility and effectiveness. Are harmonised sources available on a transnational level, capable of fully regulating the interpretation and application of contracts, thus making national contract laws redundant? Moreover, do the drafting style and practice constitute a sufficiently clear basis for selecting the governing law, thus justifying an approach that does not require the application of choice-of-law rules?

Research has shown19 that there are no real alternatives to a state governing law when it comes to principles of general contract law upon which interpre-

---


19 Giuditta Cordero-Moss, “Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?”, ibid.
tation and application of the agreed wording is based. Restatements of soft law, compilations of trade usages, digests of transnational principles and other international instruments, sometimes invoked as appropriate sources for international contracts, may be invaluable in determining the content of specific contract regulations, such as the INCOTERMS used for the definition of the place of delivery in international sales. However, for the moment, these sources do not provide a sufficiently precise basis for addressing questions such as the function of a contract, the advisability of ensuring a fair balance between the parties’ interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally towards each other and the existence and extent of a general principle of good faith. As research shows, some of the mentioned transnational sources—in particular, the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL), as well as the various products of the on-going work to develop European contract law (which are based on the PECL), such as the Draft Common Frame of Reference (DCFR) and the proposal for a regulation on a common European sales law (CESL) — solve these problems by making extensive references to good faith; however, good faith is a legal standard that needs specification and there does not seem to be any generally acknowledged legal standard of good faith that is sufficiently precise to be applied uniformly, irrespective of the governing law. Elsewhere, I have carried out an analysis of the material available on the Entire Agreement clause, which proves this point.

Moreover, these instruments grant the interpreter much room for interference regarding the wording of the contract – based on the central role given to the principle of good faith. This seems to contradict the very intention of the parties as it is embodied in contract practice: as was seen above, contract practice has ambitions of being exhaustive and self-sufficient.

Nor is much help afforded by the observation that legal systems converge on an abstract level and that very similar results may be achieved in the various systems, albeit by applying different legal techniques.

Firstly, convergence can rarely be said to be complete. Even within one single legal family there are significant differences, for example, between US

---

20 See, for example, Magnus, “The Germanic Tradition: Application of Boilerplate Clauses under German Law”, cit., Section 2.

21 The INCOTERMS, however, do not cover all legal effects relating to the delivery; for example, they do not determine the moment when the title passes from the buyer to the seller, as pointed out by Maria Celeste Vettese, “Multinational Companies and National Contracts”, ibid., Section 2.

22 Cordero-Moss, “Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?”, cit., Section 2.4
and English law regarding exculpatory clauses. Even within the same system, there may be divergences, as the same clause may have different legal effects in the different states within the USA.\textsuperscript{23}

Furthermore, reducing the divergence to a mere question of technicalities, misses the point: it is precisely the different legal techniques that matter when a specific wording has to be applied. It would not be of much comfort for a party to know that it could have achieved the desired result if only the contract had had the correct wording as required by the relevant legal technique. The party is interested in the legal effects of the particular clause that was written in the contract, not in the abstract possibility of obtaining the same result by a different clause. Therefore, there do not seem to be any generally acknowledged transnational principles which are sufficiently specific to give uniform guidance on the interpretation of contracts. The question must thus be addressed under the governing law.

The governing law is identified through private international law (conflict of laws). The simple use of a drafting style that is loosely inspired by common law is not a sufficient connecting factor that may determine the governing law, nor is the use of the English language.\textsuperscript{24} International contracts drafted according to the common-law tradition and written in English, therefore, will not automatically be subject to English law. They will be subject to the law chosen on the basis of the applicable conflict rule, just like any other international contract. The main conflict rule for contracts is party autonomy; that is, the power the parties have to determine the governing law. If the parties have not chosen the governing law, as a general rule the contract will be subject to the law of the place where the party that makes the characteristic performance has its habitual residence. Therefore, even a contract written in a common-law style may end up being subject to a law that does not belong to the common-law legal family.

\section{Contracts and arbitration}

An observer might be tempted to dismiss the importance of the governing law when contracts contain an arbitration clause and, consequently, disputes


\textsuperscript{24} For a more extensive analysis see Cordero-Moss, “Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?,” in cit., Section 1. This is confirmed also by Gerhard Dannemann, “Common Law Based Contracts under German Law,” Ibid. Section 1 and Magnus, “The Germanic Tradition: Application of Boilerplate Clauses under German Law,” cit., Section 3.1.2.
arising in connection with them will be solved by arbitration and not by the courts. International arbitration is a system based on the will of the parties, and arbitrators are expected to abide by the will of the parties and not apply undesired sources that bring unexpected results. Moreover, arbitral awards enjoy broad enforceability and the possibility of courts interfering with them is extremely limited, so that the court’s opinion on the legal effects of the contracts becomes irrelevant. While all these observations are correct, they do not necessarily affect the question of how contracts are interpreted in arbitration.

It is true that an arbitral award will be valid and enforceable even when it does not correctly apply the governing law. Not even the incorrect application of mandatory rules of law is a sufficient ground to consider an award invalid or unenforceable. Therefore, arbitral tribunals are quite free to interpret contracts and to decide how, if at all, these contracts shall interact with the governing law.

This, however, will not supply the arbitral tribunal with a sufficient answer to the question of how to interpret the contract. This is not a mere question of verifying whether mandatory rules have been complied with. It is a deeper and subtler question, and it involves the values upon which interpretation should be based.

Whether a contract is interpreted strictly on the basis of its wording, or whether the wording is integrated with considerations of good faith, economic interest and the like depends on the interpreter’s understanding of the relationship between certainty and justice. This was described above as relating to the function of a contract, the advisability of ensuring a fair balance between the parties’ interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally towards each other and the existence and extent of a general principle of good faith. The interpreter’s position in these respects may lead to an interpretation of the contract that is more literal or more purposive. Some interpreters may be unaware of the influence that their legal system exercises on them: they may have internalised the legal system’s principles in such a way that interpretation based on these principles feels like the only possible interpretation. Others, and particularly experienced international arbitrators, may have been exposed to a variety of legal systems, and thus may have acquired

25 On the enforceability of international awards and the scope within which national courts may exercise a certain control, see the references made in Note 2 above.

26 The grounds for refusing enforcement of an award are listed exhaustively in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by about 145 countries.
a higher degree of awareness about the fact that the terms of a contract do not have one single natural meaning, and that the terms’ legal effects depend on the interaction with the governing law. These aware interpreters face a dilemma when confronted with a contract drafted with a style extraneous to the governing law: on the one hand, they do not want to superimpose on the contract the principles of a law that the parties may not have considered during the negotiations. On the other hand, they have no uniform set of principles permitting them to interpret a contract independently from the governing law. In particular, if one of the parties invokes the governing law to prevent a literal application of the contract (notwithstanding that this party might not have been aware of it during the negotiations), the dilemma is not easy to solve, not even for an arbitrator.

As an illustration of the dilemma faced by the arbitrators, we can look at the challenges that arise in interpreting a clause that often recurs in international contracts: the so-called Entire Agreement, also known as the “Integration clause” or the “Merger clause”.27 This is one of the previously mentioned boilerplate clauses.

The purpose of the Entire Agreement clause is to isolate the contract from any source or element that may be external to the document. This is also often emphasised by referring to the four corners of the document as the borderline for the interpretation or construction of the contract. The parties’ aim is thus to exclude the possibility for the contract to be integrated by terms or obligations that do not appear in the document.

The parties are obviously entitled to regulate their interests and to specify the sources of their regulation. However, many legal systems provide for ancillary obligations deriving from the contract type,28 from a general principle of good faith29 or from a principle preventing an abuse of rights.30 This means that a contract would always have to be understood not only on the basis of the

27 A typical wording is: “This Agreement constitutes the entire agreement between the parties and supersedes any and all prior oral or written agreements or discussions”.
28 See, for France, Lagarde, Méheut and Reversac, “The Romanistic Tradition: Application of Boilerplate Clauses under French Law”, in cit., Section 2, for Italy, see Article 1347 of the Civil Code and De Nova, “The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law”, cit., Section 1, as well as the general considerations on Article 1135 of the Civil Code in Section 1; for Denmark, see Mogelvang-Hansen, “The Nordic Tradition: Application of Boilerplate Clauses under Danish Law”, cit., Section 1.
29 See the general principle on good faith in the performance of contracts in §242 of the German BGB. See Dannemann, “Common Law Based Contracts under German Law”, cit., Sections 3.2 and 3.3 for examples of its application by the Courts.
30 See, for Russia, Zykin, “The East European Tradition: Application of Boilerplate Clauses under Russian Law”, in cit., Section 1.
obligations that are spelled out in it, but also in combination with the elements that, according to the applicable law, integrate it. A standard contract, therefore, runs the risk of having different content depending on the governing law. The Entire Agreement clause is meant to avoid this uncertainty by barring the possibility of invoking extrinsic elements. The Entire Agreement clause creates an illusion of exhaustiveness of the written obligations.

This is, however, only an illusion: first of all, ancillary obligations created by the operation of law may not be excluded by the contract.\footnote{See, for France and Italy, footnote 28 above. For Finnish law, see Möller, “The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law”, cit., Section 2.1.}

Moreover, some legal systems permit bringing evidence that the parties’ agreement creates obligations different from those contained in the contract.\footnote{See, for Germany, § 309 No 12, of the BGB, prohibiting clauses which change the burden of proof to the disadvantage of the other party; see Magnus, “The Germanic Tradition: Application of Boilerplate Clauses under German Law”, cit., Section 5.1.1.a. Italy, on the contrary, does not allow oral evidence that contradicts a written agreement; see De Nova, “The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law”, cit., Section 1.}

Furthermore, many civilian legal systems openly permit the use of pre-contractual material to interpret the terms written in the contract.\footnote{In addition to Germany (see previous footnote), see for France, Lagarde, Meheut and Reversac, “The Romanistic Tradition: Application of Boilerplate Clauses under French Law”, cit., Section 2; for Italy, De Nova, “The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law”, cit., Section 4; for Denmark, Mogelvang-Hansen, “The Nordic Tradition: Application of Boilerplate Clauses under Danish Law”, cit., Section 2.1; for Norway, Hagstrom, “The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law”, cit., Section 3.1; for Russia, Zykin, “The East European Tradition: Application of Boilerplate Clauses under Russian Law”, cit., Section 2.1. The situation seems to be more uncertain in Sweden; see Gorton, “The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law”, cit., Section 5.4.2.d, and more restrictive in Finland, see Möller, “The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law”, cit., Section 2.1.}

Lastly, under some circumstances, a strict adherence to the clause’s wording may be looked upon as unsatisfactory, even under English law. Although English courts insist that a properly drafted Entire Agreement clause may actually succeed in preventing any extrinsic evidence from being taken into consideration when faced with such a clause, these courts interpret it so as to avoid unreasonable results. The motivation given by the courts in the decisions may create the impression that a proper drafting may achieve the clause’s purpose, but the ingenuity of the court’s interpretation gives rise to the suspicion that a drafting would never be found to be proper if the result were deemed to be unfair.\footnote{See Peel, “The Common Law Tradition: Application of Boilerplate Clauses under English Law”, cit., Section 2.1.}

The Entire Agreement clause is an illustration of a clause by which the parties...
attempt to isolate the contract from its legal context; the use of such a clause is not completely successful and cannot be fully relied on.

Incidentally, a literal application of this clause would not be allowed under the transnational UPICC or the PECL; both are based on a strong general principle of good faith, which furthermore, is specified by an express rule limiting the application of the Entire Agreement clause.\(^{35}\) However, there does not seem to be a unitary interpretation of this principle under the UPICC.\(^{36}\)

The question, therefore, remains open: should the wording of the clause prevail over the mandatory principles underlying the governing law? Should the clause be interpreted in light of the governing law? Should the terms of the contract be integrated with transnational principles?

Pointing out that an arbitral tribunal wishes to be more faithful to the will of the parties than a court does gives only an ostensible answer to these questions. Is the arbitrator more faithful to the parties’ intentions when he interprets the clause literally, or when he integrates the clause with considerations of good faith, loyalty or of commercial sense – which may be based on the governing law, on transnational principles or on a more equity-inspired understanding of the dispute?

2.1 Understanding the dynamics of contract drafting

There seems to be no absolute answer to the question of what interpretation better meets the expectations of the parties: a strictly literal interpretation of the terms of the contract, or an integration of the contract with principles of good faith and commercial sense based on law, trade usages, transnational principles or other sources. The former would better reflect the parties’ expectations if it is assumed that the parties have consciously intended to achieve specific legal effects with each and every word they have written in the contract. This, however, does not reflect the reality of how contracts are drafted and negotiated.

Often, some of the clauses in a contract are inserted without the parties having given any particular consideration to their content. This applies particularly to the already mentioned boilerplate clauses, which are inserted more out of habit than out of a specific need or intention to regulate those matters in that particular way. In addition, parties may often negotiate details of their deal and draft the corresponding regulation before even considering the question of which law will govern the contract. This practice may be surprising, con-

\(^{35}\) See Cordero-Moss, “Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?”, cit., Section 2.4.

\(^{36}\) See Cordero-Moss, ibid.
considering the importance that the governing law has for the application and even the effectiveness of contract terms, as was seen above. However, the practice of negotiating detailed wording without regard to the governing law is not necessarily always unreasonable. From a merely legal point of view, it makes little sense, but from the overall economic perspective, it is more understandable. The gap between the parties’ reliance on the self-sufficiency of the contract and the actual legal effects of the contract under the governing law does not necessarily derive from the parties’ lack of awareness regarding the legal framework surrounding the contract. More precisely, the parties may often be aware of the fact that they are unaware of the legal framework for the contract. The possibility that the wording of the contract is interpreted and applied differently from what a literal application would seem to suggest may be accepted by some parties as a calculated risk.

A contract is the result of a process, in which both parties participate from opposite starting points. This means that the final result is necessarily a compromise. In addition, time and resources are often limited during negotiations. This means that the process of negotiating a contract does not necessarily meet all of the requirements that would ideally characterise an optimal process under favourable conditions. What could be considered as an indispensable minimum in the abstract description of how a legal document should be drafted does not necessarily match the commercial understanding of the resources that should be spent on such a process. This may lead to contracts being signed without the parties having negotiated all the clauses, or without the parties having complete information regarding each clause’s legal effects under the governing law. What may appear as unreasonable conduct from a purely legal point of view is actually often a deliberate assumption of contractual risk.37

Considerations regarding the internal organisation of the parties are also a part of the assessment of risk. In large multinational companies, risk management may require a certain standardisation, which in turn prevents a high degree of flexibility in drafting individual contracts. In balancing the conflicting interests of ensuring internal standardisation and permitting local adjustment, large organisations may prefer to enhance the former.38

In other words, it is not necessarily the result of thoughtlessness if a contract is drafted without having regard for the governing law. Nor is it a symptom of

37 See more extensively, David Echenberg, “Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?”, ibid. See also the debate in the APA seminar mentioned in Section 3.1 below.

38 See more extensively, Vettese, “Multinational Companies and National Contracts”, cit.
a refusal of the applicability of national laws. It is the result of a cost-benefit evaluation, leading to the acceptance of a calculated legal risk.

Thus, it is true that clauses originally meant to create certainty, upon interaction with the governing law, may create uncertainty. The uncertainty about how exactly a clause will be interpreted by a judge is deleterious from a merely legal point of view. However, this uncertainty may turn out to be less harmful from a commercial perspective: faced with the prospect of employing time and resources to pursue a result that is unforeseeable from a legal point of view, the parties may be encouraged to find a commercial solution. Rather than maximising the legal conflict, they may be forced to find a mutually agreeable solution. This may turn out to be a better use of resources once the conflict has arisen.

In addition, this kind of legal uncertainty is evaluated as a risk, just like other risks that relate to the transaction. Commercial parties know that not all risks will materialise, and this will also apply to the legal risk: not all clauses with uncertain legal effects will actually have to be invoked or enforced. In the majority of contracts, the parties comply with their respective obligations and there is no need to invoke the application of specific clauses. In the situations where a contract clause actually has to be invoked, the simple fact that the clause is invoked may induce the other party to comply with it, irrespective of the actual enforceability of the clause. An invoked clause is not necessarily always contested. Therefore, only a small percentage of clauses will actually be the basis of a conflict between the parties. Of these conflicts, we have seen that some may be resolved amicably, precisely because of the uncertainty of the clause’s legal effects. This leaves a quite small percentage of clauses upon which the parties may eventually litigate. Some of these litigations will be won; some will be lost. Commercial thinking requires a party to assess the value of this risk of losing a law suit on enforceability of a clause (also considering the likelihood that it materialises), and compare this value with the costs of the alternative conduct. The alternative conduct would be to assess every single clause of each contract that is entered into, verify its compatibility with the law that will govern each of these contracts and propose adjustments to each of these clauses to the various other contracting parties. This, in turn, requires the employment of internal resources to revise standard documentation, and external resources to adjust to the applicable law, and possibly negotiations to convince the other contracting parties to change a model of contract that

39 This observation is made by Hagstrøm, “The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law”, cit. Section 2.
they are well acquainted with. In many situations, the costs of adjusting each contract to its applicable law will exceed the value of the risk that is run by entering into a contract with uncertain legal effects.

The sophisticated party, aware of the implications of adopting contract models which are not adjusted to the governing law, and consciously assessing the connected risk, will identify the clauses that matter the most, and concentrate its negotiations on those, leaving the other clauses untouched and accepting the corresponding risk.

A faithful interpretation of the contract assumes an understanding of this uneven approach to contract drafting.

2.2 The implications for arbitration
As was seen above, the practice of drafting contracts without regard to the governing law does not mean that the parties have opted out of the governing law for the benefit of some transnational set of rules. Just because the parties decided to take the risk of legal uncertainty for some clauses does not mean that the interpreter has to refrain from applying the governing law or that the legal evaluation of these clauses should be made in a less stringent way than for any other clauses. In addition, knowing that some clauses (particularly boilerplate clauses) are not negotiated indicates that giving them excessive importance in the interpretation of the contract would not necessarily result in being faithful to the parties’ intentions.

The arbitral tribunal is therefore expected to understand the dynamics of negotiations in order to properly give effect to the intention of the parties. Blindly applying the wording of the contract without any regard to the principles of the governing law or (to the extent that they are determinable and applicable) of transnational law, would not necessarily reflect the true intention of the parties if the clause that is being applied literally is one of the boilerplate clauses which the parties did not consider. Integrating or correcting a clause with national or transnational principles, on the other hand, might not necessarily reflect the parties’ intention either, if the clause that is being interpreted is one of the clauses which the parties carefully negotiated.

3. Arbitration as a unitary system?
The question which arises, then, is this: does international arbitration ensure such a nuanced interpretation of contracts?

International commercial arbitration is not a unitary legal system. What characterises international commercial arbitration is probably the very lack of
a unitary system – contrary to the myth that sees arbitration as the expression of a not better identified “international business community”.

The formal framework for arbitration grants it a relative autonomy, which actually gives it the appearance of a unitary system. The main instrument upon which arbitration is founded is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by about 145 countries, and which forces the courts of these countries to recognise arbitration agreements, and thus dismiss claims covered by an arbitration agreement, as well as recognise and enforce arbitral awards without any review of the merits or of the application of law – with only a restrictive and exhaustive list of grounds to refuse recognition and enforcement. An important instrument is also the UNCITRAL Model Law on International Commercial Arbitration, issued in 1985 and revised in 2006, which is used as a basis for national arbitration law in about 70 countries and has thus contributed to a considerable harmonisation of the areas of arbitration law not covered by the New York Convention. The UNCITRAL Model Law is in turn based on the same principles as the New York Convention, which means that together, these instruments create a harmonised legal framework for arbitration. Both instruments give a central role to the will of the parties. The power of the arbitral tribunal actually derives from the agreement of the parties; therefore, the arbitral tribunal is obliged to follow the parties’ instructions in respect of the scope of the dispute, the law to be applied, remedies to be granted and so forth.

For the sake of completeness, it must be added that both instruments refer to national non-harmonised legislation in a number of instances, such as the definition of what may be subject to arbitration; when an award is deemed to conflict with public policy; and what the criteria are according to which an arbitration agreement is binding on the parties etc. Therefore, in several significant respects, the harmonised framework for arbitration is subject to national law, and this may have an impact on the enforceability of arbitration agreements and of arbitral awards.

The foregoing paints a picture of international arbitration as mainly based on a few international sources giving a central role to the parties’ will, and which meets only a few (albeit significant) limits in national law. It is therefore

---

40 For a more extensive analysis, see G. Cordero-Moss, “International arbitration is not only international”, in G. Cordero-Moss (ed.), International Commercial Arbitration. Different forms and their features, Cambridge University Press 2013.

41 A research project at the University of Oslo analyses the limits this may impose on party autonomy: www. http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/index.html
fully understandable that the general impression is that arbitration is a system
which reflects the parties’ will without being subject to the formalities of a strict
application of the law. When applied to the question of the interpretation of
contracts, this may lead to the impression that arbitral tribunals are particularly
faithful to the wording of the contract and are inclined to follow the parties’
will without integrating it with considerations of law.

This system, however, does not necessarily lead to a predictable and uniform
method for the interpretation of contracts. The concept that arbitral tribunals
shall follow the parties’ instructions means that they shall aim at being faithful
to the contract by understanding the business purpose of the contract, and
the dynamics of drafting and negotiating contracts. This implies that the de-
gree of literal interpretation may vary, depending on the importance that the
clauses have for the commercial meaning of the contract as well as the level
of awareness that the parties had in respect of the effects of the clauses. As
was seen above, an important assumption for a faithful interpretation of the
contract lies in understanding the process that leads to the text of the contract:
drafting, negotiations, acceptance of legal risk.

This understanding, however, has to fit with the requirement of predict-
ability and objectivity. Particularly when contracts are meant to circulate,
for example because they are assigned to third parties, used as security, or
used as a basis for calculating insurance premiums, it is essential that they
are interpreted strictly in accordance with their terms: third parties are not
aware of and should not be assumed to take into consideration the relationship
between the original parties to the contract, what the original parties may have
assumed or intended, or any circumstances that relate to the original parties
and that may have had an impact on these parties’ interests. Therefore, it is
expected that a contract is interpreted primarily, if not exclusively, in light of
its terms – without considering such things as what a fair balance between
the parties’ interests would be or what one party’s expectations might have
been. This means, among other things, that in a dispute decided under a
law giving great importance to considerations of loyalty between the parties,
or of good faith in the negotiations and in the performance of the contract,
the arbitral tribunal might be inclined to apply the law flexibly and to give
effect to contract arrangements according to their terms, whereas a court
might have been more readily disposed to consider the terms as unbalanced
or unreasonable, and to interpret them restrictively or extensively to avoid the
result that follows from them. There is not a clear line between the formalistic
and contextual interpretation of contracts: context may be used to cast light
on the parties’ intentions, particularly when the contract may be interpreted
in different ways. However, there is a difference between a contextual interpretation made necessary by a poorly drafted contract, and second-guessing what the parties should have written in the contract to comply with principles of fairness or good faith.

3.1 Various approaches
The observations made above result in the possibility that an arbitral tribunal will adopt a mixed approach to the interpretation of one and the same contract, which is both formalistic and purposive depending on the clause.

In addition, there is, in the framework of arbitration, a variety of approaches to interpretation of contracts.

A seminar organised at the University of Oslo in November 2011 in the framework of the research project on Arbitration and Party Autonomy was devoted to the question of interpretation of contracts in international arbitration. A panel discussed the parties’ expectations when drafting contracts, and confirmed that parties do not always expect that each and every one of the contract’s clauses will be enforced literally. Often, the parties do not even know whether these clauses are enforceable, and they consider their non-application as a legal risk which they are willing to take.

Sometimes the parties believe that a properly drafted contract, which describes the deal in detail, will make recourse to governing law or external principles redundant. Sometimes the parties do not bother describing the deal in excessive detail, and they rely on trade usages to integrate the contract. Sometimes a clause with a very technical legal meaning is inserted, without the drafters having given consideration to the legal definition and effects which that particular wording assumes.

Another panel in that seminar discussed the arbitrators’ approach to the in-

---

42 The programme for the seminar, the list of panel participants and the transcript from the panel discussions are available at http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/events/2011/2011-arbitration-and-the-not-unlimited-party-autonomy.html
44 See the intervention of Brautaset, cit., at p. 22.
45 See the intervention of Anders Rysdal, cit., at p. 29-30.
46 Taikalkoski, cit., at p. 32, refers to a dispute where the in-house counsel of a company was asked to explain what she intended when she introduced in the contract the distinction between direct and indirect damages. Without giving any consideration to the sophisticated distinctions in this respect contained in her own legal system or in the governing law, she answered: “Isn’t it pretty obvious, direct damage is when money goes out of your pocket, and indirect damages is when money does not come into your pocket”. It is, therefore, not always justified to assume that parties have a high degree of awareness about the legal effects of their contract terms.
interpretation of contracts and identified a variety of approaches. Some arbitrators affirmed that they apply the governing law accurately if that law was chosen by the parties to the contract, quite irrespective of how considered the choice of law was and how much it influenced the actual drafting of the contract terms. These arbitrators, therefore, will superimpose on the contract terms any principles or rules of the governing law. Another approach was to take into consideration not only the governing law, but also overriding mandatory rules of third countries, such as competition rules. According to a slightly less strict approach, arbitrators should take into account, though not necessarily strictly apply, the governing law as well as the rules of third countries. In a similar vein, it was said that the governing law should be applied, but not in an overly formalistic way. A different approach was that international contracts should be interpreted in the light of transnational principles. This latter approach would lead to an interpretation of the contract that is not merely based on the contract terms, because as mentioned above, transnational principles such as the UPICC or the PECL contain various expressions of the principle of good faith and fair dealing, which interfere quite significantly with the contract. Conversely, others found that contracts were increasingly being applied literally, without interference from outside principles, whether of law or of soft law. Yet other arbitrators stated that international contracts were not interpreted exclusively on the basis of their own terms, but in light of the parties’ interests and trade usages. Taking this line of reasoning even further is another approach, which is based more on a general understanding of the involved interests, rather than on specific sources of law. According to this approach, arbitrators are said to act according to a feeling of what is right, based more on the gut reaction of the individual person than on the legal system to which the person belongs. Yet the legal background of the arbitrator is recognised as playing an important role – a sort of imprinting – which will influence the approach taken to (among other things) the interpretation of contracts. Thus, an arbitrator who arbitrates in various languages affirmed that she even thinks differently depending on the language in which she works, and jokingly de-

47 See the interventions of Cathrine Kessedjian, cit., at p. 41 and Gustaf Möller, cit. at p. 13.
48 See the intervention of Stephan Jervell, cit., at p. 43-44.
49 See the intervention of Luigi Fumagalli, cit., at p. 49.
50 See the intervention of Ivan Zykin, cit., at p. 17.
51 See the intervention of Alexander Komarov, cit., at p. 45-46.
52 See the intervention of Taikalkoski, cit., at p. 37.
53 See the intervention of Ryssdal, cit., at p. 29-31.
54 See the intervention of Michael Schneider, cit., at p. 57.
55 See the intervention of Jernej Sekloec, cit., at p. 11-12.
fined her approach as Freudian; that is, led by her (legal) subconscious.56 This was echoed by others who spoke about the different “philosophical” starting point from which lawyers from different legal traditions depart.57 An extensive international experience was considered as a contribution to the moderation of the strong influence of a national legal background.58

If the debate in the mentioned seminar may be deemed to be somewhat representative of the approaches that one might encounter in international commercial arbitration, the picture that results is one of marked diversity in the approach to the interpretation of contracts in international commercial arbitration: contracts are not necessarily always applied in strict accordance with their terms. There are different degrees of interference and the sources of the interference also vary quite considerably. There is a scale moving from a strict application of the governing law to integrate the contract, via interpretation of the contract terms in the context of transnational soft-law principles such as the UPICC and the PECL (which are heavily based on the principle of good faith and may give rise to a substantial possibility of interfering with the contract language), to interpretation of the contract on the basis of its own terms combined with the parties’ interests and trade usages, to interpretation of the contract solely on the basis of its own terms. There is also an additional approach to interpretation of the contract, which goes under the label of “splitting the baby”. This Solomonic approach consists of rendering an award in the middle range between the claims of each of the parties. This is not necessarily based on a literal consideration of the contract terms or on an integration of the contract with other sources, but simply on the desire to accommodate both parties.59 Interestingly, there does not seem to be a uniform perception of the frequency of this approach: a recent empirical study shows that the parties to arbitration perceive that they got a Solomonic award in 18–20% of the cases, whereas the arbitrators perceive that they take this kind of equitable decision in only 5% of the cases.60 This, therefore, adds a new variable to the equation of the interpretation of contracts. Not only is it uncertain whether the arbitrators will interpret the contract literally, whether they will use sources of law, or whether they will apply transnational principles

56 See the intervention of Kessedjian, cit., at p. 40.
57 See the interventions of Echenberg, cit., at p. 35; Norburg, cit., at p. 27-28 and Schneider, cit., at p. 57.
58 See the intervention of Brautaset, cit., at p. 24.
60 Queen Mary’s survey, p. 38.
to give a more purposive interpretation; it is also possible that the decision will be influenced by equitable considerations which are not based on the contract or on other legal sources.

This reveals an important lack of uniformity at two levels: parties’ contract drafting is not uniform and arbitrators’ contract interpretation is not uniform. In this context, it seems quite deceptive to assume that international commercial arbitration acts as the voice of a unitary international business community.

3.2 The importance of the selection of arbitrators

Given that at least six or seven different approaches to the interpretation of contracts were professed in a discussion involving about eighteen arbitrators, it seems obvious that the outcome of a dispute will depend heavily on who is acting as an arbitrator in the particular dispute. It was even affirmed, rather provocatively, that it is not so much the applicable law that matters for the outcome of the dispute, but rather the cultural background of the individuals who act as arbitrators.61

Selection of arbitrators has been defined as the ultimate form of forum shopping.62 The process of selecting arbitrators has undergone tremendous development in recent decades. I remember one of the first arbitrations in which I was involved, the mid-1980s as in-house counsel. I contacted with a law firm that specialised in arbitration and said that we were contemplating an arbitration, and after just five minutes, I received a telefax with the names of five people the law firm recommended as potential arbitrators. I had not been asked what type of contract the dispute was based on, who the counterpart was, or what kind of expertise the dispute required, let alone whether we were interested in a formalistic or a purposive interpretation of the contract. Today, when parties consider appointing a certain arbitrator, they undertake fully fledged research, analysing the arbitrator’s writings and assessing whether this arbitrator has expressed opinions that may be incompatible with the position that they will present in the proceeding, and they even invite the person to a pre-appointment interview to discuss issues such as availability and conflict of interest.63 The relevance of the selection process also appears clearly in the success that a soft-law instrument of the International Bar Association

61 See the intervention of Schneider, cit., at p. See also Brautaset, cit., at p. 24.
63 The Queen Mary’s survey, p. 6 and 7, reports that 86% of the respondents consider it appropriate to conduct pre-appointment interviews.
Giuditta Cordero-Moss

has achieved: the IBA Guidelines on Conflict of Interest in International Arbitration.64 This is an attempt to bring transparent and objective criteria to an area previously dominated by recognition of established positions on the basis of reputation and implied criteria. In addition, arbitral institutions are opening up to a more systematic approach to the criteria for appointment of arbitrators. The Arbitration Institute of the Stockholm Chamber of Commerce, for example, has recently published a study on the criteria it applies in challenges to arbitrators appointed under the SCC rules.65 The importance of having detailed knowledge of the appointed arbitrators and the environment in which they operate is indirectly confirmed in the revision that was made in 2010 to the UNCITRAL Arbitration Rules: in regulating who should act as an appointing authority in the eventuality that one of the parties does not appoint an arbitrator, it was evaluated whether the Permanent Court of Arbitration could carry out this function.66 It was concluded that a centralised body, even a body of the calibre of the PCA, would not be in a position to properly appreciate all the aspects of the appointment in each of the jurisdictions where appointment might be necessary. Therefore, Article 6.2 of the revised UNCITRAL Arbitration Rules ended up by giving the PCA the task of appointing the appointing authority, who would in turn appoint the arbitrator – on the basis of the assumption that a local authority would be in a better position to select the arbitrators.

The development from a list of potential arbitrators quickly scribbled on a fax to a full due-diligence process is remarkable, but selection is still made on the basis of what has been defined as a bizarrely outdated technique mainly based on personal knowledge and hearsay.67 This is due to the structure of arbitration as a largely private and non-transparent system.68 Seen from the outside, these features of arbitration may give the impression of a unitary system. As the overview above has shown, however, there is no basis for assuming that arbitration is a unitary system.

64 http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx #conflictofinterest
68 Rogers, ibid. See also the intervention of Kai-Uwe Karl in the APA project seminar of 2011, cit., at p. 53.
4. Conclusion

International arbitration does not have a uniform approach to contract interpretation: it may range from a formalistic application of the contract’s wording, to an interpretation of the wording in light of the governing law, to an interpretation of the wording in light of transnational principles of soft law or even principles of a more equitable character. Even the same arbitral tribunal may adopt more than one approach to the same contract, depending on the tribunal’s understanding of the dynamics of negotiations that led to that particular contract’s text. This picture certainly contradicts the usual assumption that international commercial arbitration is a harmonised system, uniformly giving expression to the interests of the “international business community”. Parties have the possibility of influencing the approach to interpretation by selecting arbitrators who represent a certain attitude towards contract interpretation. The process of selection has come a long way in recent decades, but is still unsatisfactorily based on personal experience and anecdotal evidence. This may lead to repeated appointments of the arbitrators who have shown that they represent a certain approach; always appointing the same few people as arbitrators indeed leads to a certain degree of predictability. Most of the arbitral tribunals, however, consist of three arbitrators — usually, one appointed by each of the parties, and the chairperson appointed by the two party-appointed arbitrators. If each of the parties has appointed an arbitrator known for a formalistic or, respectively, purposive approach, the approach that the award will depend on is the chairperson’s approach, as well as on the deliberations within the tribunal. This, in turn, does not enhance predictability.