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The Use of the UPICC as Law Governing Commercial Contracts

An Empirical Study on the Principle of Good Faith in International Trade

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1. Introduction

There are many good reasons for celebrating the 30th anniversary of the UNIDROIT Principles of International Commercial Contracts – which, in the course of their existence, have received the effective, albeit not extremely harmonic, acronym "UPICC".

In addition to having received significant attention in academic circles,[1] the UPICC have proven to be a successful inspiration for contract law reforms in a variety of countries. Originally meant to be used as a basis for codification in countries in transition or developing countries, the UPICC have proven useful also in legal systems with

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1 Among the numerous books entirely devoted to the UPICC are M.J. BONELL, The Law Governing International Commercial Contracts: Hard Law versus Soft Law, *Recueil des cours, Académie de Droit International de la Haye*, Volume 388 (2018); J.-P. BÉRAUDO, *The UNIDROIT Principles for International Commercial Contracts - A New Lex Mercatoria?,* (Institute of International Business Law and Practice 1995); P. GALIZZI, G. ROJAS ELGUETA, A. VENEZIANO (eds.), *The Multiple Uses of the UNIDROIT Principles of International Commercial Contracts: Theory and Practice* (Giuffrè Francis Lefebvre 2020); A. GARRO, J.A. MORENO RODRÍGUEZ (eds.), *Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law* (Springer 2020); J. KLEINHEISTERKAMP, in S. VOGENAUER, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC),* 2nd ed. (Oxford University Press 2015); D. OSER, *The UNIDROIT Principles of International Commercial Contracts* (Brill 2008). The UNIDROIT bibliography lists nearly 300 articles and chapters devoted to the UPICC: see unilex.info/principles/bibliography/area/all .

developed contract laws. The UPICC have, to a larger or lesser extent, influenced reforms in countries such as Russia,[2] Japan,[3] and France.[4]

In addition, the UPICC are recognized as an authoritative collection of principles for commercial contracts and are therefore often used as a corroboration of the applicable law. Increasingly often State courts refer to the UPICC[5] to corroborate the relevance of their own national law or to choose from more than one possible interpretation of their law. In investment arbitration, the UPICC are sporadically used not only to corroborate the result flowing from a State law,[6] but even to corroborate the existence of principles of international law.[7]

The UPICC are, therefore, enjoying significant success with both legislators and adjudicators. With respect to contract parties, however, they seem to have less resonance,[8] at least as far as concerns what was originally expected to be a preferred area of use for the UPICC: as a governing law chosen by contract parties. The number of contracts choosing the UPICC as a governing law is quite low,[9]

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2 A.S. KOMAROV, Reference to the UNIDROIT Principles in International Commercial Arbitration Practice in the Russian Federation, 16 *Uniform Law Review*, 2011, 657–667.

3 T. UCHIDA, Contract law reform in Japan and the UNIDROIT Principles, 16 *Uniform Law Review*, 2011, 705–717.

4 S. ROWAN, The new French law of contract, 66 *International & Comparative Law Quarterly*, 2017, 805-831.

5 See, for example, *Kabab-Ji SAL v Kout Food Group* [2020] 1 Lloyd's Rep 269, paras 72 to 75; R*ock Advertising v MWB Business Exchange Centres Limited* [2018] UKSC 24. For further references, see https://www.unilex.info/principles/cases/article/102/issue/1263#issue_1263

6 G. CORDERO-MOSS and D. BEHN, The relevance of the UNIDROIT Principles in investment arbitration, 19 *Uniform Law* Review, 2014, 570-608, section V (1).

7 *Id*, at section IV (2).

8 See R. MICHAELS, The UNIDROIT Principles as Global Background Law, 19 *Uniform Law Review*, 2014, 643-668.

9 School of International Arbitration of Queen Mary University of London, *2010 International arbitration survey: Choices in international arbitration* (2010); MICHAELS, The UNIDROIT Principles (n°8 above). According to H. SIPPEL and K. DUGGAL (eds.), *Force Majeure and Hardship in the Asia-Pacific Region* (Juris, 2021), xix, "neither author has yet come across a contract that

although an increased use of the UPICC in contract practice may follow after the International Association of Lawyers (UIA) recommended lawyers and their clients to consider the UPICC.[10]

On the occasion of the 30th anniversary, it seems appropriate to inquire whether it is possible to enhance the contract parties' choice of the UPICC as governing law. How can contract parties' weak interest in the UPICC be explained, and can the UNIDROIT do anything to improve the situation?

2. Contract practice's need for predictability

As I have explained in previous publications of mine,[11] in my opinion one of the reasons why the UPICC are looked upon with suspicion by commercial parties is that some of the UPICC provisions may be interpreted as if the express contract terms did not have the main role in determining the parties' rights and obligations and their exercise thereof. The principle of good faith plays a central role in the UPICC – the 37 articles in which it is expressly mentioned interact with the contract terms in all phases of the contractual relationship, from negotiations to interpretation, performance and the exercise of remedies. Furthermore, the general principle of good faith laid down in Article 1.7 affirms that the parties may not exclude or limit it – thus

contained such agreement [choosing the UPICC to govern the contract] except for a few reported cases."

[10] International Association of Lawyers (UIA) Resolution Recommending Consideration of UNIDROIT Principles of International Commercial Contracts 2016 as an Important Option for International Lawyers and Clients signed on 15 July 2020, https://www.unidroit.org/uia-signs-resolution-recommending-consideration-of-unidroit-principles-of-international-commercial-contracts-2016/

[11] See my The UNIDROIT Principles: Long-Term Contracts, in P. GALIZZI, G. ROJAS ELGUETA, A. VENEZIANO (eds.), *The Multiple Uses of the UNIDROIT Principles* (n° 1 above), 75-96; Detailed Contract Regulations and the UPICC: Parallels with National Law and Potential for Improvements - the Example of Norwegian Law, in UNIDROIT (ed.), ***Eppur si muove****: The Age of Uniform Law - Essays in honour of Michael Joachim Bonell*, (UNIDROIT 2016), 1302-1317; *International Commercial Contracts*, 2nd ed. (Cambridge University Press 2024), section 2.2.5.

giving the principle of good faith primacy over contract terms. Depending on how the principle of good faith is applied, it can be used as a correction of the agreed contract terms whenever their literal application would lead to a result that seems inappropriate, or it can play a more modest role.

An expansive use of the principle of good faith runs in the face of the established commercial practice to carefully negotiate contract terms and write contracts as if they were an exhaustive regulation of the parties' relationship. Contract practice's high degree of detail is meant to create predictability as to the scope of the parties' rights and obligations and the modalities of their performance. Predictability is in turn crucial[12] for an effective contract management, and in addition it permits third parties to ascertain the scope of the contract – for example to ascertain the risk when a contract party wishes to ensure its rights under the contract, or to ascertain the value of the contract when the contract is used as security for financing one of the parties.

Thus, the parties employ considerable time and resources in carefully negotiating the scope of their respective performance, the remedies that are available in case of breach, and the conditions under which these remedies may be exercised. Predictability of these aspects is important not only to the parties, but also to third parties such as the insurance company and the financing institution. How can then the parties be expected to choose, as a governing law, an instrument that may defy this detailed regulation in the eventuality that its application is deemed to give inappropriate results?

This rhetoric argument may be refuted by pointing out that the principle of good faith should be interpreted in a way that is appropriate under the circumstances, and that it therefore will not unreasonably interfere with a detailed regulation agreed between commercial parties. This is comforting.

However, as the following sections will show, uncertainty remains about the principle's scope. This can explain why commercial

[12] For a more extensive reasoning see G. CORDERO-MOSS, *International Commercial Contracts* (n°11 above), section 1.4.

parties are less than enthusiastic about embracing the UPICC as the law governing their contract.

3. An autonomous principle of good faith?

Article 1.7 of the UPICC refers to the principle of good faith "in international trade". The UPICC, therefore, posit that the principle of good faith shall be interpreted autonomously and without reference to any specific legal tradition.

An autonomous interpretation ensures that national law is not directly invoked to determine the scope of the principle. If every interpreter understood good faith under their own legal tradition, it would be impossible to achieve harmonisation. Notwithstanding the sometimes-perceived convergence among various legal systems, the differences in approaches are still significant. In a comparison of English and Norwegian court practice, I summarized the divergence as follows:[13] "for the sake of preserving the balance of interests between the parties, and based on the overarching duty of loyalty between the parties, a Norwegian court will exercise objective interpretation of contracts by reading into the contract terms that are not written, or by restricting the application of terms that are written. In contrast, the English court will give effect to the unambiguous terms of the contract even when this leads to unsatisfactory results that were not intended by the parties. The significant divergence in this respect reflects the understanding that each tradition has of the balance between predictability and justice. As these are all elements of an extensive understanding of the principle of good faith, for the sake of simplicity I will refer to them as the principle of good faith."

Excluding that good faith is understood as under a specific legal tradition is thus a necessary condition of harmonisation. However, it is not a sufficient condition: it also necessary to be able to determine a uniform concept of good faith in international trade. So far, however, no evidence of such a uniform understanding of good faith is

[13] G. CORDERO-MOSS, *International Commercial Contracts* (n° 11 above), section 3.3.

available.[14] Therefore, each interpreter is left to apply what they believe corresponds to an autonomous standard.

This may be perceived to ensure uniformity when the evaluation is made in the frame of international arbitration. As I will argue below, however, what international arbitration may create is only an illusion of uniformity.

It is true that international arbitration enjoys, to a large extent, procedural autonomy; and international arbitrators are often deemed to embody a transnational, uniform approach to commercial disputes. However, and notwithstanding the abundant literature on international contracts and international arbitration which postulates precisely the existence of a transnational, uniform approach to the contract parties' interests, the reality may be less uniform than expected.

Starting with seminal works written in the 1960s,[15] legal literature developed a theory that is still influential today, and that often is called "delocalisation theory". Briefly, the delocalisation theory posits that international contracts and arbitration (which is the preferred method for settling disputes arising out of international contracts) are not subject to any specific country's legal system. They are subject to delocalised rules, stemming out of international business practice on the basis of which lies party agreement. Not all legal literature subscribes to the delocalization theory,[16] and each of the opposing sides of the

[14] On the lack of a uniform understanding of good faith in international trade see G. CORDERO-MOSS, *International Commercial Contracts* (n°11 above), section 2.2.5(g).

[15] B. GOLDMAN, LEX MERCATORIA dans les contrats et l'arbitrage internationaux : réalité et perspectives, *Travaux du comité français du droit international privé*, 2e année 1977 (1980), 221-270; B. GOLDMAN, Frontières du droit et *lex mercatoria*, 9 *Archives de philosophie du droit* (1964), 177; C. M. SCHMITTHOFF, The Unification of the Law of International Trade, *J. BUS. L.*, Annual Issue (1968), 105.

[16] See, among others, F.A. MANN, *Lex facit arbitrum*, in P. SANDERS (ed), *Liber Amicorum for Martin Domke* (1967), 157; R. GOODE, H. KRONKE, E. MCKENDRICK, *Transnational Commercial Law-Texts, Cases and Materials*, 2nd ed. (Oxford University Press 2015); F. FERRARI, *Plures leges faciunt arbitrum*, *Arbitration International* (2021), 579-597; G. CORDERO-MOSS, *International Commercial Contracts* (n° 11 above), section 2.3.

debate on this topic strongly believes in the soundness of their own position.[17] Not only the respective legal theories, but also each side's perception of reality, conform to the beliefs of each camp and seem therefore irreconcilable with the other side's perception. Debates on the issue often resemble parallel monologues, rather than a dialogue.

To move the debate forward, I engaged in a project which is meant to verify, empirically, to what extent contract and arbitration practice achieve the harmonisation that legal literature on delocalisation posits.

The delocalisation theory stems from the observation that, when drafting international contracts, lawyers try to regulate everything in the contract terms. They assume that the words they have written in the contract will be understood simply on the basis of their semantic meaning, without considering any specific national law. This impression of autonomy of the contract language is enhanced by the widespread use of arbitration to solve contract disputes. When disputes are submitted to arbitration, national courts will not be involved. Arbitral tribunals are often composed of commercial lawyers from disparate countries and with international experience. This enhances the impression that contracts are not subject to any specific system of law.

The standardised contract language coupled with recourse to arbitration is often expected to create a uniform legal framework, completely independent of national law and not influenced by the pluralism of legal traditions represented by the members of the arbitral tribunal. This prompts a series of questions:

- Can a common contract language create its own autonomous frame, uniformly understood all over the world?
- Can this autonomous frame give a uniform meaning to the principle of good faith?
- Can arbitrators free themselves from the frame of their own legal background?
- Does the arbitrator's legal background act as a legal unconscious bias, even when arbitrators purport that they are interpreting the contract

[17] The debate was effectively described as a "war of religions" by B. LEURENT, Reflections on the international effectiveness of arbitration awards, 12(3) *Arbitration International* 269 (1996), 279.

simply on the basis the semantic meaning of its terms or on the basis of an autonomous principle of good faith?

A positive answer to the first three questions would imply that there is a uniform understanding of good faith in international trade. This in turn would permit the autonomous interpretation provided for in Article 1.7 of the UPICC.

A positive answer to the fourth question would suggest the opposite conclusion, thus undermining the prospects of a uniform understanding of the range of Article 1.7 of the UPICC.

4. The influence of the governing law on the interaction between good faith and contract terms

Before addressing the issue of good faith in international trade, it may be useful to spend some words on the role of the governing law for contract terms.

Research on the interpretation of English language contract terms under different governing laws shows that terms have different legal effects depending on the applicable law. [18] This is due to the circumstance that contract terms do not have legal effects simply on the basis of the semantic meaning of the words. In order to create legal effects, they depend on the legal system to which they are subject.

This is true not only with respect to mandatory rules that restrict the parties' contract freedom (for example, regulatory requirements in financial law prohibiting certain terms). In fact, mandatory rules are quite rare in the field of commercial contracts, and mostly the parties are free to regulate their interests as they deem fit. What mainly interests here, is the influence of the governing law in areas where the parties enjoy freedom of contract: that is, the influence that the governing law exercises as a frame to understand contract language – as opposed to

[18] G. CORDERO-MOSS (ed.) *Boilerplate Clauses, international commercial contracts and the applicable law* (Cambridge University Press, 2011); V. TRIEBER, and S. VOGENAUER, *Englisch als Vertragssprache* (C.H. Beck 2018), 69ff.

the influence it exercises when it regulates a specific issue with binding effect for the parties.

Legal systems have a series of assumptions for a contract to produce specific legal effects; they may have ancillary obligations that are implied into the contract and integrate the express terms; they have underlying principles that inform the performance of the contract, the expectations of the parties, the exercise of contractual remedies, etc.

The interaction between the contract terms and the applicable law's assumptions, ancillary obligations, underlying principles and rules of interpretation leads to the legal effects of a contract term. Therefore, even assuming that the contract terms are clear and need no interpretation (in the sense of disentangling ambiguities in the language), they must be read in the light of the applicable law. This process is sometimes referred to as interpretation, sometimes as construction.[19] The result is that the (possibly very clear) contract terms are coupled with the legal framework of the system they are subject to, and will therefore assume a meaning that is not apparent at a plain reading of the words written in the contract.

The most notable underlying principle is that of good faith, which (to varying degrees) underlies the legal systems belonging to the civil law family, whereas it is not deemed to be a general principle in the legal systems belonging to the common law family. The divide between the civil law and the common law of contracts, [20] particularly as concerns the role of the principle of good faith, has a considerable impact on the interpretation of contract terms.

To illustrate the influence that the governing law may have on the interpretation of contracts, imagine a clause according to which one party may terminate the contract with immediate effect if the other party fails to perform certain of its obligations. The clause may be written in

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[19] L.B. SOLUM, The Interpretation-Construction Distinction (2010), *Georgetown Law Faculty Publications and Other Works*, 676, https://scholarship.law.georgetown.edu/facpub/676.

[20] Comparative research has questioned the appropriateness of this division. For an analysis and a refutation, see G. CORDERO-MOSS, *International Commercial Contracts* (n°11 above), section 3.3.

a very clear language; however, depending on the governing law, that party may or may not be entitled to terminate – notwithstanding that the language does not limit the possibility to terminate.

A civil law judge will consider how material the other party's failure to perform was; how serious its consequences were for the terminating party; whether termination was motivated by speculative reasons (for example, the terminating party hoping to take advantage of a change in the market conditions); whether termination would have consequences for the defaulting party that are disproportionate to the default. Depending on the circumstances, the judge may conclude that termination is not allowed – notwithstanding that the agreed conditions to exercise it were met.

A common law judge, in contrast, will not be concerned with the importance of the default, the terminating party's motives, the effect of the termination on the defaulting party, etc. As long as the circumstances meet the requirements spelled out in the contract clause, termination is allowed.

The clause has the same words, but its legal effects are different, depending on the governing law. In summary: contract terms do not have an absolute effect directly deriving from their language; their effects must be inferred based on the applicable legal system. Furthermore, legal systems do not have a uniform regulation of contracts. The use of a common language, therefore, is not sufficient to create a uniform regime for contract terms, as long as the contract is subject to a national governing law.

It is in this context that the UPICC might play a role as a uniform governing law, if there were an autonomous understanding of the principle of good faith in international trade.

5. The role of the UPICC, other soft law, arbitration and delocalisation

The issue which is at the core of this article is whether an influence by the legal framework may be assumed not only when the contract is governed by a national law, but also for the good faith principle which

plays such a central role in the UPICC – particularly, when the contract or the UPICC are interpreted by an international arbitral tribunal.

According to the delocalisation theory, international commercial contracts are not read in the light of any specific legal system or legal tradition - particularly when they are considered by an international tribunal. Instead, they are interpreted on the basis of their own words and in the light of principles shared in the international business community – which, in our context, correspond to the reference to "international trade" made in Article 1.7 of the UPICC.

Both contracts and arbitrators are, hence, described as delocalised and detached from any legal framework, apart from a uniform, transnational legal framework not deriving from authoritative sources such as specific national laws. Contract practice and arbitration decisions are important sources of this transnational law. The circumstance that they are uniformly expressed in English contributes to the perception of a unitary legal framework.

Were the existence of a uniform understanding of good faith in international trade confirmed, Article 1.7 of the UPICC could be interpreted autonomously. To the extent that the UPICC (or other sources of soft law) are exhaustive[21] and capable of being applied uniformly and autonomously, they would in fact give a legal framework that would permit international arbitral tribunals to uniformly interpret international contracts.

Were, however, a uniform principle of good faith in international trade not proven, then the UPICC would be exposed to multiple interpretations. In such cases, the interpreter's legal tradition or other elements would interfere with how uniformly the UPICC are applied.[22]

In these situations, the application of the UPICC or of other sources of soft law would do little more than push forward the

[21] Research shows that sources of soft law are fragmented and do not cover important areas that have relevance to the effects of the contract (see G. CORDERO-MOSS, *International Commercial Contracts* (n°11 above), section 2.2.6), and that, even when they cover an area, they may have gaps that are not capable of being filled autonomously (see *id*., section 2.3.4).

[22] See *id*., section 2.3.5.

dependence on a legal framework. Instead of seeing that contract terms are understood in the light of the applicable law's legal framework, it would be the soft law which risks being understood in the light of a legal framework. Therefore, also in arbitration there is the need to verify whether the arbitrator's legal framework has an impact on the interpretation of international contracts and the UPICC.

The delocalisation theory points out that arbitration enjoys a large procedural autonomy. This is correct. However, it does not necessarily contribute to a uniform interpretation of contract terms or of the UPICC. Even disregarding the (few, but not insignificant)[23] areas in which arbitration is subject to national laws, procedural autonomy does not supply a uniform standard according to which contract terms are to be interpreted. Procedural autonomy only gives the arbitral tribunal the discretion to decide how the contract terms or the UPICC are to be interpreted; moreover, it prevents courts from scrutinising the exercise of this discretion. However, it does not give guidelines for the exercise of this discretion. Therefore, when the contract term or the soft law has gaps or may be interpreted in different ways, the autonomy of arbitration is not sufficient to ensure a uniform approach.

6. Pilot empirical project

That contract language has an intrinsic meaning detached from national legal systems and based on a uniform frame developing from the common English contract language, is difficult to reconcile not only with *comparative law* research,[24] but also with *linguistics and psychology* research on the understanding of language.

Linguistics investigates the relation among linguistic expressions, their extralinguistic context and language users' interpretative process. Specifically, Frame Semantics assumes that the meaning of linguistic expressions cannot be interpreted without the knowledge of the whole conceptual system to which said expressions belong, which is referred to as the "*frame*". For example, we cannot

[23] *Id.,* section 5.2.
[24] See above footnote 18.

understand the words "mother", "daughter", "father-in-law", etc. without the whole conceptual frame of "family relations". Thus, linguistic expressions do not have an absolute, univocal meaning, but the latter depends on the *frames evoked* by the text's lexical units.[25]

The question is whether knowledge about the influence of frames on the understanding of language may be useful in ascertaining to what extent contract terms and the UPICC may be deemed to be autonomous.

The relatively abundant literature on law and psychology and on law and linguistic has not yet addressed the particular issue of how legal frames may influence the understanding of contract terms. Literature on law and psychology considers particularly the judge's evaluation of evidence, or the judge's determination of damages.[26] Recently, studies have been devoted to the judges' unconscious bias in the decision-making process and in process management,[27] and to the dynamics of

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[25] C. J. FILLMORE, (2006). Frame semantics in Dirk Geeraerts (ed.), *Cognitive linguistics: Basic readings*, Cognitive linguistics research 34, Mouton de Gruyter Berlin New York, 373-400.

[26] See C. GURTHIE, J.J. RACHLINKSY and A.J. WISTRICH, Blinking on the bench: how judges decide cases, in 93 *Cornell L. Rev.* 2007-2008, 1; D. KLEIN and G. MITCHELL (eds.), *The psychology of judicial decision making* (Oxford University Press 2010); N. VIDMAR, The psychology of trial judging, in 20 *Current directions in psychological science*, 2011, 58-62; E. SUSSMAN, Arbitrator decision-making: unconscious psychological influences and what you can do about them, in 24 *The American Review of International Arbitration,* 2013, 487-514; S.D. FRANCK, A. VAN AAKEN, J. FREDA, C. GUTHRIE, and J.J. RACHLINSKI, Inside the Arbitrator's Mind (November 20, 2016), 66 *Emory Law Journal*, 2017; Cornell Legal Studies Research Paper No. 16-46; American University, WCL Research Paper No. 2017-08.

[27] See T. COLE (ed.), *The roles of psychology in arbitration* (Wolters Kluwer 2017); E. COHELO, A Tomada de Decisão dos Árbitros: a Ignorada e Relevante Influência dos Vieses Inconscientes, in L.O. BAPTISTA, D. VISCONTE, M. CATTEL GOMES ALVES (eds.), *Estudos de Direito: Uma Homenagem ao Prof. Dr. José Carlos de Magalhães* (Atelier Jurídico 2018), 801-832; J. KARTON, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press 2013); J. KARTON, The arbitral Role in Contractual Interpretation, 6 *Journal of International Dispute Settlement*, 2015, 4–41; F. SINGARAJAH, Unconscious Bias in International Arbitration, JUNE 14, 2021, http://arbitrationblog.practicallaw.com/unconscious-bias-in-international-

group decisions.[28] Law and language are investigated in forensic linguistics under many perspectives, one of which is the impact of a person's background on that person's language.[29] Law and language are examined also in the context of multilingualism, legal translation, and English as *lingua franca* - particularly in connection with the European Union. The aim of these studies is mainly to assess the conditions for accurate legal translations,[30] to assess the differences among the various legal cultures,[31] or to permit the legislators to develop a harmonised legal order.[32]

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arbitration/.

28 B. BARRY, Judging Better Together: Understanding the Psychology of Group Decision-Making on Panel Courts and Tribunals (2023). Articles, 44, https://arrow.tudublin.ie/aaschlawart/44.

29 See B. BIX, *Law, Language and Legal Determinacy* (Oxford University Press 1996); M. COULTHARD, A. JOHNSON, and D. WRIGHT, *An introduction to Forensic Linguistics* (Routledge 2016); A. DURANT and J.H.C LEUNG, *Language and Law* (Routledge 2017); M. FREEMAN and F. SMITH (eds.), *Law and Language* (Oxford University Press 2013); J.P. GIBBONS (ed.), *Language and the Law*, T&F (2014).

30 A. BORJA ALBI and F. PRIETO RAMOS (eds.), *Legal Translation in Context: Professional Issues and Prospects* (Peter Lang 2013); C.J. W. BAAIJ (ed.), *The Role of Legal Translation in Legal Harmonization* (Kluwer Law International 2012); P.W.Y. EMILY, The Cultural Transfer In Legal Translation, 18 *Int J Semiot Law*, 2005, 307–323; V. MATTIOLI and K. MCAULIFFE, A corpus-based study of opinions of advocates general of the court of justice of the European Union: changes in language and style, *International Journal of Legal Discourse*, 2021, 87-111; K. MCAULIFFE, The Limitations of a Multilingual Legal System, *International Journal for the Semiotics of Law (*2013*),* 861-882; K. MCAULIFFE, Translating ambiguity, *Journal of Comparative Law*, 2015, 65-87.

31 V. JACOMETTI and B. POZZO, *Traduttologia e linguaggio giuridico* (Wolters Kluwer 2018); U. SCARPELLI, P. DI LUCIA, and M. JORIO (eds.), *Linguaggio del Diritto* (1994).

32 B. POZZO, Harmonization of European Contract Law and the Need of Creating a Common Terminology, *European Review of Private law*, 2003, 754-767. The most notable result is the compilation of the Draft Common Frame of Reference, which is meant to permit overcoming within the EU the differences between the legal frames that associate different legal effects to the same words and concepts: C. VON BAR, E. CLIVE and H. SCHULTE-NÖLKE (eds.), *Principles, Definitions and Model Rules of European Private Law* (Sellier 2009).

After having hinted for a while at how useful it would be to carry our empirical research on the issue,[33] in 2023 I finally put together a multidisciplinary team[34] with lawyers, linguists, and psycholinguists. A pilot project was carried out with linguists Lucia Busso and Chiara Zanchi, and was presented and discussed on 27 June 2023 at the Institute for Forensic Linguistics, Aston University.

The pilot project consisted of a survey that was sent to 32 experienced international arbitrators, divided into three groups depending on their legal education (common law, civil law or dual).[35]

Participants were asked to consider three cases. The three cases were designed to expose the extent to which the principle of good faith may interfere with the contract terms.

One case involved a termination clause that permitted a party to terminate the contract in case of breach by the other party of its obligations, and the question was whether the clause permitted termination even in case the other party's breach was immaterial.

The second case involved an Entire Agreement clause according to which the contract superseded any previous agreement between the parties, and the question was whether a previous agreement on product specifications was binding.

The third case involved payment of a fee that under the agreement was to be made only if a certain price had been obtained, and the question was whether some remuneration was due even if the stipulated price had not been achieved.

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33 G. CORDERO-MOSS, Non-national Sources in International Commercial Arbitration and the Hidden Influence by National Traditions, *Scandinavian Studies in Law* (2017), vol 63, section 4.1.

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

35 The list of participants and the presentation are available at https://zenodo.org/record/8089846

Participants were asked to choose for each case a solution out of five alternatives. The alternatives reflected three different approaches and, within each of these approaches, two legal mentalities.

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

The two legal mentalities are based, respectively, on the common law and on the civil law traditions. The former gives primacy to the parties' agreement and is inclined to accept what could look like unbalanced results, as long as they follow from clear contract language. The latter privileges the balance between the parties' interests and reads the contract terms in the light of principles such as good faith, thus coming to results that do not follow directly from the contract language. All approaches being compatible with both mentalities, each approach may lead to two different outcomes. Therefore, each case had six different reasons for arriving at two possible outcomes (the alternatives offered for multiple choice were only five, because the approach described under (ii) above referred to the governing law, and the legal mentality would follow from this law).

Although the questionnaire was not specifically directed at ascertaining how the principle of good faith laid down in the UPICC is interpreted, it may shed light on this issue – as the approach to how far the adjudicator may interfere with contractual language demonstrates the extent to which the principle of good faith is uniform in international trade; and this will in turn necessarily reflect on the principle of good faith in the UPICC, which is based on good faith in international trade.

According to the answers, the majority of the participants read the contract in the light of the applicable law (53%). A minority of 26% considered the contract to be self-sufficient, and a minority of 21% considered the contract to be subject to transnational law. Both these

minorities may be deemed to be representative of how good faith in international trade may be perceived.

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

The pilot study suggests that contract language, no matter how clear and detailed, is not free from framing effects and thus does not necessarily produce uniform legal effects; that arbitration does not provide uniform results; and that the governing law plays an important role. The results do not suggest a strong correlation between the tradition in which participants received their legal education and their choice of approach or their mentality. However, to a certain extent it can be observed that participants with a civil law education are more prone to adopt the transnational law approach than common law educated participants – and the civil law mentality largely influences the transnational law approach. Similarly, civil law educated participants were more often inclined to apply the common law approach than common law educated participants were to embrace the civil law approach. Also, participants with a dual education are clearly more inclined to consider the applicable law (67%) than to look at the contract as self-sufficient (9%) or as subject to a transnational law (24%).

The pilot project will be followed by a main study. In the main study, we will submit 10 cases to about 150 arbitrators. This will permit us to gather more data to cast light on the correlation between the arbitrators' background and their approach to contract construction. To ensure that the cases in the questionnaire are representative of contemporary practice, we are organising workshops in Oslo, Rome, New York, Paris, London, Vienna, São Paulo and Singapore, gathering transactional lawyers (in-house or from law firms) who regularly draft and negotiate contracts. The purpose of the workshops is to contribute experience on contract clauses whose construction has proven to be

uncertain, clauses that are meant to be interpreted faithfully, clauses that will probably be read in the light of the governing law, etc. What are the circumstances under which these clauses are drafted, what expectations do the drafters have? On the basis of the material collected in the workshops, the 10 cases of the questionnaire and the 5 answers to choose from will be developed.

The results of the main study are expected to cast light on the understanding of good faith in arbitration – specifically, on the interaction between good faith and contract terms. This may or may not confirm the theory according to which international contracts are subject to an autonomous frame when they are interpreted in international arbitration. If this theory is confirmed, the reference to "international trade" that is made by the UPICC in Article 1.7 to determine the scope of the principle of good faith will achieve a uniform regime. If it is not confirmed, the scope of the principle will remain uncertain.

7. Conclusion: a possible way forward

If the existence of a uniform, autonomous understanding of good faith in international trade is not confirmed, as the results of the pilot project seem to suggest, the uncertainty about the effects of choosing the UPICC as a governing law will not be overcome.

This prompts questions of what can be done to render the UPICC more attractive to commercial parties.

A possible initiative is to give guidelines on the application of the principle of good faith.

This could be done in a separate publication, or as an addition to the comment on specific articles of the UPICC.

Offering illustrations, a technique already utilised in the comments to the UPICC, in the guidelines could contribute to a common understanding of where the line should go between certainty (the clear terms of the contract) and justice (the principle of good faith supplementing or overriding the terms of the contract). In turn, this would contribute to making the application of the UPICC more

predictable. This again might result in an increased interest by commercial parties in adopting the UPICC as governing law.