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Non-national Sources in International Commercial Arbitration and the Hidden Influence by National Traditions

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1 Introduction 24
1.1 Outline 25
1.2 General Remarks 26

2 The Arbitral Tribunal's Power to Develop its own Legal Reasoning 28
2.1 Interpreting and Construing the Contract Under the Governing Law 31
2.2 Inferences From the Proven Facts 33

3 The Impact on the Contract of the Arbitral Tribunal's Independent Legal Reasoning 35

4 Conclusion: a Picture Worthy of Pirandello 38
4.1 Need for Multidisciplinary Research? 40

1 Introduction

One of the themes of Pirandello's literary work is the difficulty to identify an absolute truth: what seems to Vitangelo Moscarda[1] to be his real identity does not coincide with other people's understanding of who he is – and this does not only lead to a dichotomy, but to a multiplicity of identities, because each person has his or her own understanding of who Vitangelo Moscarda is. The result is that he is one, no one and one hundred thousand, as is already revealed in the title of Pirandello's novel.

The more I work with international arbitration, the more it becomes tempting to draw parallels with Pirandello's thoughts on multiplicity and the absence of an absolute identity.

One of arbitration's ambitions is to overcome the fragmentation due to the differences among the various national laws. Assuming that an international tribunal is subject not to a specific national law, but to transnational rules of law, and seeking to be faithful to the contract, arbitration promises to overcome the inconsistencies and surprises that may follow an accurate application of national laws. Furthermore, contracts are drafted in a detailed and extensive way with the purpose of rendering any other sources redundant. Therefore, the prospect that arbitration exclusively will be based on the will of the parties is looked upon as a sufficient condition to ensure that the contract will be applied faithfully and without surprises due to external elements. The will of the parties and the values of the international business community are looked upon as the North Star: by following the star, arbitration shall ensure a uniform solution responding to the parties' expectations.

But is it possible to assume that there is one absolute, authentic (in the sense of Pirandello) will of the parties and one absolute, authentic set of values of the international business community? What in theory may seem an ingenious way to overcome the plurality of national laws and the uncertainty that may follow from it, runs the risk of creating an even more Pirandellian scenario - where everyone is in search of a uniform authenticity (the meaning of the contract, the transnational rules of law), but everyone has his or her own understanding of what is authentic. The result threatens to be not a uniform solution, but one, no one and one hundred thousand solutions.

As I have been dwelling on elsewhere, it is not possible to identify an absolute legal effect for contracts, based simply on the contracts' own terms - not even when contracts are seemingly exhaustive[2] or when they, by referring to transnational rules of law, try to avoid being subject to a domestic law.[3] The applicable law will have an impact on the interpretation and application of the contract: to name some examples, the enforceability of the contract's provisions assumes that these do not violate mandatory rules of the applicable law; the

1 This is the name of the main character in Luigi Pirandello's novel *Uno, nessuno e centomila* (1926).

2 G. Cordero-Moss, *International Commercial Contracts*, Cambridge University Press 2014, p. 80-133.

3 G. Cordero-Moss, *International Commercial Contracts*, p. 27-79.

applicable law may add ancillary obligations to those spelled out in the contract's provisions; the applicable law will decide to what extent the wording of the contract may be interpreted literally. A contract (particularly if it contains a choice of law clause) will have to be interpreted and construed in light of the applicable law in all these respects. This may be difficult to reconcile with contract clauses that may reveal the parties' ambition to exclude any external influence on the contract (arguably, also to exclude the applicable law's influence), such as for example an Entire Agreement clause.[4] Also, this may be difficult to reconcile with other boilerplate clauses that may be inserted into the contract without having been adapted to the governing law.[5] How these difficult interactions are tackled, will depend on the legal values inspiring the decision-maker.[6]

1.1 Outline

International arbitration is often deemed to be immune from this kind of interference by the governing law, as arbitration is based on the arbitration agreement and on the parties' instructions. Moreover, arbitration enjoys a considerable autonomy from national laws, thanks to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In other works,[7] I have analysed the limits to arbitration's autonomy arising out of the restricted, but not insignificant judicial control on arbitral awards: the courts may set aside an award or refuse its recognition and enforcement due to invalidity of the arbitration agreement, lack of the parties' capacity, irregularity in the composition of the tribunal or in the procedure followed by the tribunal, excess of power by the arbitral tribunal, conflict with the public policy or the arbitrability rule in the court's system. Here, I will leave these institutionalised restrictions to arbitration autonomy aside and will concentrate on the areas where the courts do not have any competence to exercise control, and therefore arbitration actually enjoys autonomy.

As I have shown elsewhere[8] and will briefly show in section 3 below, arbitration does not provide a uniform approach to the interpretation and construction of contracts. This means that the same contract may potentially be

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4 A typical wording for an Entire Agreement clause is: "This Contract contains the entirecontract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract."

5 On boilerplate clauses *see* G. Cordero-Moss, *Boilerplate clauses, international commercial contracts and the applicable law*, Cambridge University Press 2011.

6 On the relationship between contract terms and the applicable law, *see* G. Cordero-Moss, *Detailed contract regulations and the UPICC: parallels with national law and potential for improvement - the example of Norwegian law*, in Essays in honour of Professor Bonell, forthcoming.

7 G. Cordero-Moss, *International Commercial Contracts*, p. 210-307.

8 G. Cordero-Moss, *International Commercial Contracts*, p. 123-132.

given different legal effects by different arbitral tribunals, even though all these tribunals are apparently only basing their decision on the contract or on the contracts and uniform transnational sources. Even in the areas where arbitration enjoys autonomy, therefore, there are potential restrictions to party autonomy, as the legal effects of the contract terms will be affected by the way in which the arbitral tribunal interprets and construes the contract or the transnational law. This leads to the necessity of ascertaining what influences the arbitral tribunals' interpretation and construction of contracts and application of the transnational law. My hypothesis is that an important role is played, mainly subconsciously, by the legal tradition to which the interpreter belongs. At the present stage, however, this is only a hypothesis that needs being verified by future research, as is explained in section 4.

Before addressing the question of what influences and arbitral tribunal's interpretation of a contract and application of the law in a way that may restrict party autonomy, however, it may be useful to clarify to what extent arbitral tribunals have a leeway in interpreting the contract and applying the law independently from the parties' instructions. As a consequence of the assumption that arbitration is mainly based on the will of the parties, it is sometimes excluded that an arbitral award interprets the contract or makes a decision based on legal arguments of national law that are not reflected in the contract or in the parties' pleadings. Arbitration is deemed to be faithful to the will of the parties, and thus is expected to exclude interference from national laws. Also, this approach is often supported by making reference to non-national sources of law as an adequate source for international arbitration: sources such as the UNIDROIT Principles of International Commercial Contracts (UPICC), that are believed to be able to prevent that the arbitral award is tainted by the colour of a national law. This seems to assume that contracts and transnational sources have absolute, authentic (in the sense of Pirandello) legal effects, and that arbitration is the means to reveal them.

As I will argue in this article, these assumptions and the consequences that are drawn from them can be criticised in various respects. I will first shortly highlight which power the arbitral tribunal has in respect of the contract terms and the parties' pleadings, particularly from the point of view of the arbitral tribunal's possibility to develop its own, independent legal reasoning and to draw its own, independent inferences from the proven facts (section 2 below) – leaving aside the question of whether the arbitral tribunal may apply a law different from the law chosen by the parties.[9] After that, I will put into question the assumption that the alleged detachment of arbitration from national laws ensures a unitary interpretation of the contract (section 3).

1.2 General Remarks

To a large extent it is up to the arbitral tribunal's discretion to interpret and construe the contract and to apply the governing law. Any contract interpretation

9 For an analysis of this matter, *see* G. Cordero-Moss, *International commercial contracts*, p. 281-289.

or application of the law will be a matter of the dispute's merits and will have no bearing on the award's validity or enforceability, quite irrespective of whether the interpretation or application is correct or wrong – as it appears from the above mentioned short overview of the grounds upon which courts may set aside or refuse enforcement, courts do not have the power to review arbitral awards in the merits. Hence, it is largely correct that the arbitral tribunal enjoys a considerable autonomy regarding the merits of the dispute, and that an arbitral tribunal is (to a certain extent) free to give effect to the wording of the contract, even when this may lead to disregarding the governing law. This, however, is no guarantee that arbitral tribunals have a uniform approach to interpretation and construction of contracts. Arbitration's autonomy may permit to avoid the multiplicity of results that may follow an accurate application of national laws; but can it avoid the Pirandellian situation following the subjective understanding of how a contract should be interpreted or to what extent it should be supplemented by the interpreter? The subjectivity of interpretation and construction of contracts is not a phenomenon restricted to international arbitration: even courts within one single domestic system may have a multiplicity of approaches, as dispute resolution and application of the law are not exclusively a mechanical process.[10] However, in a domestic legal system the law that is applied is only one, and the legal education of the lawyers who apply it is based on the same system. Thus, the various interpreters will share similar understanding of the function of a contract, the interpreter's leeway in constructing the contract, the extent to which ancillary obligations may be read into the contract, the extent to which the interpreter's role is to ensure the accurate implementation of the contract at the expenses of the balance between the parties' interests, or vice versa, etc. As I have explained elsewhere,[11] these aspects are based on legal values that are intrinsic to a legal system, and may vary dramatically from system to system. A short simplification of these difference may be summarized as reflecting the system's balance between predictability and substantive justice. The systems that privilege predictability will see the role of the interpreter as ensuring that the contract terms are enforced accurately even when this may lead to undesirable results, whereas the systems that privilege substantive justice will see the role of the interpreter as ensuring that the parties' interests are balanced even when this assumes that contract terms are overridden. In international arbitration, a plurality of legal systems is involved, at least as background for the legal education of the interpreters; hence,

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10 For an overview of the theories on the cognitive process leading to legal decisions, *see* D. Teichman, E. Zamir, *Judicial decision-making. A behavioral prespective*, in E. Zamir, D. Teichman (eds.), Behavioral economics and the law, Oxford University Press 2014, p. 664-702. The opposite extremes, the legalistic theory (according to which the decision-maker mechanically applies the law to a given set of facts) and the realistic theory (according to which the decision is made on ground that are not necessarily based on legal sources, and the legal reasoning is a justification that is made *ex post*), seem to meet in more modern approach, emphasizing that decision-making is a dual cognitive process, where intuitive elements and deliberative reasoning interact. *See* C. Guthrie, J. Rachlinksy and A. J. Wistrich, *Blinking on the bench: how judges decide cases*, in 93 Cornell L. Rev. 1 2007-2008. It is this dual theory that is assumed in this article.

11 G. Cordero-Moss, *International commercial contracts*, p. 81-122.

each of the interpreters will have his or her own understanding of the interaction between the contract and the interpreter – in short, of the balance between predictability and substantive justice.

The reasoning is relevant also to the (rare) situations where the parties have chosen non-national sources to regulate their contract, such as the UPICC. As I have illustrated elsewhere,[12] the UPICC are written on such a high level of abstraction and rely so heavily on general clauses (notably, the principle of good faith), that often it is necessary to specify their scope and content when applying them, thus exposing their application to influences by legal traditions external to the UPICC – for example, by the law with which the interpreter feels most comfortable. All this may turn out to be a hidden influence on the contract and the transnational sources that the parties may have chosen to ensure a self-sufficient contract. In turn, this may lead to a plurality of understandings of the parties' rights and obligations under the contract. In summary, the relative autonomy from national law that arbitration formally enjoys is not a sufficient basis to avoid a plurality of approaches. Diversity in the approaches will not necessarily be due to the open application of a governing law, but may be due to diverging understanding by the arbitrators of what is the role of a contract interpreter.

2 The Arbitral Tribunal's Power to Develop its own Legal Reasoning

The grounds for unenforceability of an award are exhaustively listed in article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; error in the interpretation of the contract or error in the application of the law are not among these grounds. As regards the grounds for invalidity of an award, these are regulated by national law and there may be therefore discrepancies in the various regulations; however, the UNCITRAL Model Law, that has been adopted by over 60 countries, may be considered to be quite representative. In its article 34 on invalidity, the Model Law reproduces the same grounds contained in article 36 on enforceability, which in turn corresponds to article V of the New York Convention. This quick overview of the sources applicable to arbitration[13] shows that the arbitral tribunal's discretion in interpreting the contract and the proven facts, as well as applying the governing law, is not subject to any court control. The decision on the merits is final, and an award will be valid and enforceable even if it is based on a wrong interpretation of the contract or of the facts, or on a wrong application of the law. An award may be set aside as invalid or refused enforced only (for what is relevant here) if the tribunal exceeded its power, or if the principle of fair hearing was violated.

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12 G. Cordero-Moss, *International commercial contracts*, p. 41-74.

13 For an analysis of this matter, *see* G. Cordero-Moss, *International commercial contracts*, p. 225-307.

Generally, arbitration agreements are quite broad and confer the arbitral tribunal the power to decide any disputes arising in connection with a certain legal relationship, and all aspects of these disputes. [14] Arbitration agreements that limit the arbitral tribunal's jurisdiction in respect of certain matters, for example, the interpretation of the contract, may turn out to create difficulties. In a decision by the Amsterdam District Court,[15] an award was set aside for having exceeded the power granted to the tribunal by the arbitration agreement. A contract between Tiffany and Swatch for the production and distribution of watches contained a provision that seems to be a procedural version of the Entire Agreement clause: "The arbitral tribunal may not change, modify or alter any express condition, term or provision of this Agreement and to that extent the scope of its authority is expressly limited. The arbitral tribunal shall make its award in accordance with the rules of law and not as amiable compositeur."[16] The arbitral tribunal, a very eminent tribunal consisting of Filip de Ly, Georg von Segesser and Bernard Hanotiau, considered the contractual provisions, among others provisions containing good faith obligations to develop and promote the products in order to accomplish the Business Plan. The Business Plan in itself did not contain binding obligations, but the arbitral tribunal interpreted the contract's good faith obligations in light of the governing law, and came to the conclusion that they gave sufficient basis to imply an obligation to take into consideration the Business Plan. The arbitral tribunal had carefully considered the wording of the arbitration agreement, and deemed that interpreting the contract and the governing law so as to read implied obligations into the contract, was not the same as changing, modifying or altering any express condition, term or provision of the agreement. The Amsterdam District Court disagreed, without, however, explaining its view in detail. Interpreting an implied obligation into the contract was considered as a question of merits by the arbitral tribunal, but as a question of scope of power by the court. The Amsterdam District Court decision was appealed, therefore the last word in the case may not have been said yet. The wording of the arbitration agreement may have been based on the desire to enhance predictability and avoid that the contract text is affected by purposive interpretations or by application of a governing law belonging to the civil law system and therefore prone to reading

14 As an illustration, no limitations to the arbitral tribunal's authority are mentioned in the Model Arbitration clauses recommended by, for example, the ICC, the LCIA, the SCC or the UNCITRAL. These standard clauses are sometimes accompanied by a recommendation to specifically regulate the number of arbitrators, the venue of the tribunal and the language of the proceeding; no mention is made of regulating the scope of authority of the tribunal. Often, these standard clauses are applied as a model to Arbitration clauses that are individually drafted; the number of clauses that contain specific limits to the tribunal's authority, therefore, is rather low. The ICC Rules assume that the parties shall, at the beginning of the dispute, agree on Terms of References, specifying the questions that are submitted to the tribunal. These are often drafted as a positive list of questions to be solved, rather than as a list of items that are excluded from the scope of the dispute.

15 Tiffany Company et al. v. The Swatch Group Ltd. et al., Amsterdam District Court, case No C/13/567933/HA ZA 14-653, decision rendered on 5. March 2015, ECLI:NL: RBAMS:2015:1181.

16 Quoted in Tiffany v. Swatch, Amsterdam District Court Decision at para 2.4.

ancillary obligations into contracts.[17] Leaving aside the observation that this desire of predictability seems difficult to reconcile with the expressed good faith obligations contained in the contract (as good faith obligations open to purposive interpretation of contract terms, implied obligations etc.), it is questionable how effective the restrictions contained in the arbitration agreement are. The first obstacle lies in the interpretation of the restrictions: changing, modifying or altering any express condition, term or provision of the agreement is not the same as interpreting the agreement, but where does the demarcation line go? The eminent arbitral tribunal and the Amsterdam District Court had different opinions on that. Moreover, these restrictions cast doubts on the relationship between the choice of law clause and the arbitration clause: if the chosen law contains rules and principles that create ancillary obligations or alter some provisions of the contract, which clause prevails? The clause that chose the law altering the contract, or the clause that restricts the possibility to alter the contract? In a similar context, it has been suggested that the latter must be considered as lex specialis, and that therefore it must prevail.[18] The parties may thus be deemed to have chosen the law less the rules that would alter the contract. But what if the rule altering the contract is mandatory? For example, an agency agreement may provide that the agent shall not be entitled to any compensation upon termination of the contract; the contract may have chosen the law of a EU member state; the arbitration clause may contain the mentioned restrictions. As known, EU law has mandatory rules on compensation upon termination, rules that have even been deemed by the CJEU to be essential for the achievement of the internal market[19] – a formulation that the CJEU uses in connection with public policy.[20] In this situation, it is not feasible to apply the chosen law less its mandatory rules on compensation.[21] It is, in conclusion, not necessarily helpful when the arbitration agreement contains restrictions to the arbitral tribunal's power to interpret the contract.

When the arbitration agreement does not contain restrictions to the arbitral tribunal's jurisdiction, which occurs in the vast majority of the cases, the arbitral tribunal is given the power to render a decision on the merits of the dispute. The scope of the dispute is set by the parties' agreement and by the factual situation proven by the parties in the proceeding. Any reasoning developed by the arbitral tribunal within this scope, is arguably made in the exercise of its discretion. The arbitral tribunal, therefore, does not exceed its power if it interprets the contract under the governing law in a way that contradicts the language of the contract or the parties' pleadings (section 2.1 below), or if it draws from the facts proven by

17 For a discussion of the impact that the legal tradition may have on interpretation and application of contracts *see* G. Cordero-Moss, *International Commercial Contracts*, p. 81-122.

18 W. Park, *The Predictability Paradox*, in F. Bortolotti, P. Mayer (eds.), *T*he Application of Substantive Law by International Arbitration, ICC Dossiers, 2014, p. 60-79, 62.

19 Case C-381/98 (Ingmar).

20 Case C-126/97 (Eco-Swiss).

21 Along the same line of reasoning W. Park, *The Predictability Paradox*.

the parties inferences different from those pleaded by the parties (section 2.2 below).[22]

Even though the arbitral tribunal does not exceed its power when it develops its own legal reasoning independently of the parties' agreement and pleadings, it must ensure that all parties have had the possibility to express their view on the basis upon which the award will be rendered. Otherwise, the adversarial principle may be violated and the award may be set aside or refused enforcement.

2.1 Interpreting and Construing the Contract Under the Governing Law

It is within the scope of the tribunal's power to investigate the applicable law and apply it as it deems appropriate, even if the parties have failed to make the relevant argument.

This may sometimes lead to an award that disregards contractual terms because these are deemed to violate the applicable law. [23] In a recent decision the Swiss Supreme Court considered an award that had *motu proprio* applied Swiss law on sham transactions.[24] On this basis, the arbitral tribunal disregarded a contract between the parties that allegedly had replaced an older contract between the same parties, and awarded payment according to the original contract. That particular Swiss rule had not been pleaded by the parties, and the losing party challenged the validity of the award. The Swiss Supreme Court came to the conclusion that the arbitral tribunal had not exceeded its power: as the principle of *jura novit curia* applies, the tribunal is entitled to develop its own legal reasoning. In this case, the applicable law was Swiss, and the legal counsel to the losing party was Swiss; therefore, the application of the Swiss rule could not have come as a surprise. On this basis, the Supreme Court found that the adversarial principle had not been violated. In contrast, the Swiss Supreme Court had short time earlier[25] set aside an award in which the arbitral tribunal had *motu proprio* applied a mandatory rule of Swiss law prohibiting exclusive intermediation in labour issues, and thus had rejected the agent's request for payment of the fee under an agency agreement for a football player. The agency agreement had been entered into between a Brazilian football player resident in Portugal and an agent resident in Spain. When the football player accepted an offer from a Portuguese football club, the agent claimed its fee in accordance with the contract. The arbitrator applied Swiss law, which was the applicable

22 More uncertain is the situation where the arbitral tribunal orders remedies different from those requested by the parties, *see* G. Cordero-Moss, *International commercial contracts*, p. 293f.

23 F. Perret, *Resolving Conflicts between Contractual Clauses and Specific Rules of the Governing Law*, in F. Bortolotti, P. Mayer (eds.), The Application of Substantive Law by International Arbitration, ICC Dossiers, 2014, p. 109-115, 110 f., affirms that the governing law must be applied and this includes any constraints the law may create to the contract, but encourages to apply the law in a way that is compatible with the parties' expectations.

24 *X. SA v. Y.SA*, Federal Supreme Court of Switzerland, case 4A_254/2010.

25 *Urquijo Goitia v. Liedson Da Silva Muniz*, Federal Supreme Court of Switzerland, case 4A_400/2008.

law according to FIFA statutes, and considered the exclusivity clause in the agency agreement as unenforceable. The award was set aside not because the arbitral tribunal had developed a legal reasoning that had not been pleaded by the parties – as a matter of fact, the Swiss Supreme Court confirmed that the principle of *jura novit curia* applies; the award was set aside because the parties could not have been expected to anticipate that Swiss law would have been applied. According to the Swiss Supreme Court, therefore, the arbitral tribunal is entitled to develop its own legal theory and apply the sources it deems applicable even though they have not been pleaded by the parties – when the specific circumstances suggest that those sources may come as a surprise to the parties, the arbitral tribunal has to draw the parties' attention to them. The obstacle that the arbitral tribunal has to overcome when it desires to introduce new sources, thus, is not the scope of its power – it is the adversarial principle.[26]

Another example of arbitral tribunal developing its own legal theory is an investment award based on the BIT between Moldova and Russia,[27] where I acted as the sole arbitrator. The claim regarded a privatization contract that provided for the investor to transfer some assets to the host country in exchange of not better specified shares owned by the host country. When the host country issued a regulation containing the list of shares eligible for exchange in the context of privatization, the investor claimed that the regulation could not be applied to pre-existing privatization agreements and pleaded that the host country had breached its own legislation on retroactivity. The arbitral tribunal found that the regulation was a necessary specification of the general obligation contained in the privatization contract, and that the rule on retroactivity was therefore not applicable. However, the content of the regulation was such as to deprive the exchange of any value, and this would be in breach of the provision on fair and equitable treatment of the applicable BIT. The BIT had not been pleaded by the investor, but it was part of the proceeding, as it had been used by the claimant as basis for the arbitral jurisdiction. The arbitral tribunal observed that it was within its power to develop the legal reasoning it deemed appropriate; however, to ensure respect of the adversarial principle, it invited the parties to present their arguments on the applicability of the BIT. The award ended up applying a provision of the BIT different from that pleaded by the claimant in response to the tribunal's request; this was within the power of the tribunal to develop its own legal reasoning. The losing party challenged the award before the Swedish Courts, claiming, i.a., that the arbitral tribunal had exceeded its power, and resisted enforcement of the award before the Moldovan courts, but the award was confirmed by the Svea Court of Appeal Stockholm[28] and enforced

26 For a similar line of reasonining *see* G. Knuts, '*Jura novit curia' and the right to be heard–an analysis of recent case law*, Arbitration International 2012, vol. 28, No 4, p. 669-688.

27 Iurii Bogdanov, Agurdino-Invest Ltd et al. V. Republic of Moldova, SCC Award dated 22 September 2005, "www.italaw.com/sites/default/files/case-documents/ita0094_0.pdf" last accessed 26 January 2016.

28 Svea Court of Appeal, case No T 745-06 dated 28 November 2008.

by the Supreme Court of Moldova.[29] The Svea Court of Appeal, in particular, found that the arbitral tribunal had applied the principle of *jura novit curia* correctly: even though the claimant had not pleaded the legal theory that the award was based on, the decision was based on the facts proved in the proceeding and the ordered remedy was within the scope of the relief sought by the claimant, therefore the arbitral tribunal was not deemed to have exceeded its power.

In summary, the arbitral tribunal may develop its own legal reasoning on the basis of the applicable sources. If the tribunal's legal reasoning leads to new facts or evidence becoming relevant, the tribunal is well advised to invite the parties to comment. If one or both of the parties may develop their cases by presenting new evidence that was not relevant in the context of the original pleadings, but becomes relevant in the context of the tribunal's reasoning, it is reasonable to expect the tribunal to give the parties the opportunity to do so, even in the systems that do not, as a general rule, require an invitation to comment.[30]

2.2 Inferences from the Proven Facts

The tribunal is free to qualify the proven facts in accordance with the applicable legal sources. The qualification and subsumption of a fact belong to the evaluation of the legal consequences of that fact, and are part of the legal reasoning that the tribunal has the power and the duty to carry out independently. Therefore, the arbitral tribunal is not bound by the qualification of the fact pleaded by the parties. Moreover, the tribunal is allowed to consider the consequences of a fact that was proved before it, even if that fact was not invoked, as long as this does not modify the scope of the dispute.

A recent decision by the Svea Stockholm Court of Appeal[31] confirmed the validity of an award that had interpreted the contract in light of facts that were known to the parties, but had not been invoked. The disputed contract regarded the acquisition of an entity and contained several "Warranties" on the activity and financials of the acquired entity. The dispute regarded, i.a., to what extent the respondent was entitled to reimbursement of damages as a consequence of breach of these warranties. The arbitral tribunal interpreted the invoked warranties not as in the technical legal sense of the term, i.e. as guarantees that create a strict liability for the promisor, but as terms of contract that require negligence by the promisor, if a breach shall create liability. To come to this interpretation, which contradicted the effects proper of the terminology used in the contract, the arbitral tribunal relied on circumstances such as that the contract

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29 Supreme Court of Moldova, decision No 2re-46.2006 of 16 February 2006, Buletinul Curtii Supreme de Justitie a Republicii Moldova, 2006, No 3, p. 18.

30 In this sense, *see* also Wiegand, *'Jura novit curia v. Ne ultra petita' – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der Jüngsten Rechtsprechung des Bundesgerichts*, in Greiner, Monique Jametti, Berger, Bernhard and Güngerich, Andreas (eds.), Rechtsetzung und Rechtsdurchsetzung. Festschrift für Franz Kellerhals (Stämpfli Verlag, 2005), p. 127-144, p. 140ff.

31 MHH AS v. Axel's Konsult och Förvaltning AB, Svea Court of Appeal, case No T 2610-13, decision rendered on 4 December 2014.

had been drafted by the respondent, and that the claimant was not a sophisticated party capable of understanding the legal implication of the words used.[32] The award was sought set aside on the grounds that, i.a., these circumstances had not been pleaded by any of the parties. The Svea Court of Appeal observed that the parties could not be deemed to have given the arbitral tribunal joint instructions regarding the interpretation of the agreement. If the parties had instructed the tribunal to interpret the term "warranty" as creating a strict liability, the award would have been outside the scope of the tribunal's powers. Since the parties did not give any express instructions on this issue, the arbitral tribunal was not precluded from interpreting the contract in light of the circumstances that it deemed appropriate, as long as these were introduced into the proceeding in such a way that it could be expected that they would have been taken into consideration. Interpreting the words of the agreement in light of surrounding circumstances, such as who drafted the contract and the other party's degree of legal insight, even though these circumstances had not been invoked, was considered by the court not as a matter of scope of power, but as a question of merits.

A similar approach was taken by the Swiss Supreme Court[33] when it confirmed the validity of an award rendered in a dispute regarding an agency agreement. The losing party (who had been the respondent in the arbitration) alleged, i.a., that the persons who appeared in the arbitral proceeding did not have the power to represent it, and that therefore the award was invalid. The arbitral tribunal had concluded that the respondent was duly represented and had based its finding, among other things, on some documents that had been produced by the respondent. These documents had been introduced to prove a completely different matter. The respondent challenged the award's validity, claiming that it had been taken by surprise by the inferences that the tribunal drew from these documents. The Supreme Court recalled the tribunal's duty to inform the parties when it considers a source or a legal theory that was not pleaded by the parties and that could come as a surprise to the parties, and specified that this duty has to be applied restrictively. The Court found, moreover, that this principle does not concern questions of facts. The adversarial principle provides that each party expresses its views and submits evidence on the relevant facts, but it does not require the arbitrators to ask for the parties' view on the bearing of each piece of evidence, nor does it empower the parties to limit the autonomy of the arbitral tribunal in assessing the evidence.

In summary, the necessity of an invitation to comment is not evident if the tribunal's reasoning, based on facts or sources that are part of the proceeding, remains on a purely legal level: As long as the parties' comments are limited to the legal qualification of some factual circumstances or the subsumption under a certain rule, they are a contribution to the tribunal's reasoning, but they are not binding on the tribunal and do not add anything to the sphere of authority of the tribunal.

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32 Quoted in MHH AS v. Axel's Konsult, at p. 4.

33 *X. v Y.*, Federal Supreme Court of Switzerland, case 4A_538/2012.

3 The Impact on the Contract of the Arbitral Tribunal's Independent Legal Reasoning

There are many, less evident ways than those described above, in which the arbitral tribunal's interpretation and construction of the contract may be tainted by the applicable law or by the arbitral tribunal's own understanding of the applicable law – which again may be tainted by a variety of factors, including the arbitrators' legal background, inclination and commercial expertise.

Legal standards such as good faith in contract law, or rules such as exemption from liability for impediments beyond the party's control, require specification through the interpreter, as I will briefly discuss below.

The principle of good faith has a paramount importance in various legal traditions (although to varying degree), as well as in some transnational sources such as the UPICC. There is no unitary understanding of how far the principle of good faith goes in supplementing or even overriding the contract terms, or in creating ancillary obligations not spelled out in the contracts.[34] Will, for example, and Entire Agreement clause (providing that the contract contains the whole agreement between the parties and supersedes any prior agreements) be interpreted literally, thus excluding the applicability of product specifications that the parties may have negotiated but not formalised in the contract? Or will it be overridden by the underlying principle of good faith, preventing a party from taking advantage of it if it has created expectations in the other party? Different legal systems may have different approaches,[35] and even the UPICC are not interpreted uniformly.[36]The arbitral tribunal's understanding of how far the principle of good faith permits interfering with the clear language of the contract, depends on how the arbitral tribunal specifies the legal standard, i.e. it depends on the arbitral tribunal's set of values regarding the function of contract terms, the role of the interpreter and the degree to which he may interfere with the terms of the contract. The arbitral tribunal's own specification of these standards may or may not be faithful to the assumptions and principles underlying the applicable law. This specification may have a considerable impact on the effects of the contract and consequently the outcome of the dispute.

The criterion of "beyond the control" of the prevented party is contained, i.a., in article 79 of the Vienna Convention on Contracts for the International Sale of Goods (CISG) as the assumption for exempting that party from liability for not having performed its contract obligations. There is no uniform understanding of this criterion,[37] and this may affect not only application of the CISG, but also the arbitral tribunal's interpretation of a Force Majeure clause in the contract, as

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34 For an analysis and references, *see* G. Cordero-Moss, *International Commercial Contracts*, p. 41-61.

35 An analysis of the different legal effects of this clause under a number of national laws is carried out in Cordero-Moss, *Boilerplate clauses*, throughout part 3.

36 Cordero-Moss, *International Commercial Contracts*, p. 47-50, referring to the case law collected in the database Unilex, administered by the UNIDROIT.

37 For an analysis and references, *see* G. Cordero-Moss, *International Commercial Contracts*, p. 109ff.

these clauses typically are based on exemption from liability if the non-performance is due to an event beyond the control of the defaulting party. If the seller's products are delivered too late, and the delay is due to the circumstance that the seller's supplier failed to deliver raw materials on time, is the delay due to an impediment beyond the control of the seller, or not? If "beyond the control" is considered to mean that the event must fall outside of the seller's sphere of risk in an objective allocation of risk between the two contract parties, the seller's supply of raw material cannot be deemed to be beyond the seller's control. If, on the contrary, "beyond the control" is understood as an event that could not factually be influenced by the seller, or that occurred without the fault of the seller and notwithstanding the seller's diligent conduct, the delay by the seller's supplier may be considered to be beyond the seller's control. Under the former understanding, the seller is liable; under the latter, it is not.

These illustrations[38] are meant to show that there is no unitary, absolute way of construing a contract or applying the transnational rules of law – notwithstanding that the contract is written in a very detailed and seemingly self-sufficient way, that it is subject to transnational sources such as the UPICC or to a convention such as the CISG. The circumstance that the arbitral tribunal's interpretation of contract and application of law are not subject to revision by any court, therefore, in itself is not sufficient to ensure a uniform and faithful interpretation of contract, neither is the exclusion of national laws in favour of transnational sources.

A panel in a seminar I organised at the University of Oslo some time ago,[39] discussed the arbitrators' approach to the interpretation of contracts and revealed that there is, in the framework of arbitration, a variety of approaches to interpretation of contracts. Some arbitrators affirmed that they apply the governing law accurately if that law was chosen by the parties in the contract,[40] 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, for example, competition rules.[41] 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.[42] In a similar vein, it was said that the

38 For further illustrations *see* Cordero-Moss, *International Commercial Contracts*, p. 80-122.

39 Arbitration and Party Autonomy (APA): "www.jus.uio.no/ifp/english/research/projects/choice-of-law/" The programme for the seminar, the list of panel participants and the transcript from the panel discussions are available at "www.jus.uio.no/ifp/english/research/projects/choice-of-law/events/2011/2011-arbitration-and-the-not-unlimited-party-autonomy.html".

40 *See* the interventions of CATHRINE KESSEDJIAN, "www.jus.uio.no/ifp/english/research/projects/choice-of-law/events/apa-transcript.pdf ", at p. 41 and GUSTAF MÖLLER, cit. at p. 13.

41 *See* the intervention of STEPHAN JERVELL, cit., at p. 43-44.

42 *See* the intervention of LUIGI FUMAGALLI, cit., at p. 49.

governing law should be applied, but not in an overly formalistic way.[43] A different approach was that international contracts should be interpreted in the light of transnational principles.[44] This latter approach would lead to an interpretation of the contract that is not merely based on the contract terms, since transnational principles such as the UPICC or the PECL, as was mentioned above, contain various expressions of the principle of good faith and fair dealing, which interfere quite heavily 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.[45] 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.[46] Taking this line of reasoning even further is another approach, which is more based 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,[47] based more on the gut reaction of the individual person than on the legal system to which he belongs.[48] 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 defined her approach as Freudian; that is, led by her (legal) subconscious.[49] This was echoed by others who spoke about the different "philosophical" starting point from which lawyers from different legal traditions depart.[50] An extensive international experience was considered to contribute to moderating the strong influence of a national legal background.[51]

If the debate in the mentioned seminar may be deemed to be somewhat representative of the approaches that may be met in international commercial arbitration, the picture that results is one of marked diversity in the approach to contracts in international commercial arbitration: contract terms 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 transantional soft law principles such as the UPICC and the

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43 *See* the intervention of IVAN ZYKIN, cit., at p. 17.

44 *See* the intervention of ALEXANDER KOMAROV, cit., at p. 45-46.

45 *See* the intervention of TAIKALKOSKI, cit., at p. 37

46 *See* the intervention of RYSSDAL, cit., at p. 29-31.

47 *See* the intervention of MICHAEL SCHNEIDER, cit., at p. 57.

48 *See* the intervention of JERNEJ SEKLOEC, cit., at p. 11-12.

49 *See* the intervention of KESSEDJIAN, cit., at p. 40.

50 *See* the interventions of ECHENBERG, cit., at p. 35; NORBURG, cit., at p. 27-28 and SCHNEIDER, cit., at p. 57.

51 *See* the intervention of BRAUTASET, cit., at p. 24.

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 a further approach to interpretation of the contract, which goes under the label of "splitting the baby". This Solomonic approach consists in 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.[52] 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.[53] 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 to give a more purposive interpretation; it is also possible that the decision will be influenced by equitable considerations that are not based on the contract or on other legal sources.

4 Conclusion: a Picture Worthy of Pirandello

The foregoing shows how fallacious it is to assume that arbitration is a unitary system, responding in a coordinated way to the needs of a unitary business community. First of all, as I think is obvious to anyone, it is illusionary to assume that the global business community operates on the basis of harmonised interests, values, business ethics and usages; moreover, as I have shown elsewhere,[54] even within the same contract there may have been an uneven approach to the drafting of the various contract terms, thus putting into question the assumption of a uniform and conscious contract drafting. Furthermore, even within areas where arbitration actually is a system autonomous from national law because it is not subject to court control, section 3 above showed that there is no uniform approach among arbitrators to the question of how contract terms are or should be influenced by the governing law.

The question that comes to mind, then is: what influences the arbitral tribunal when the tribunal construes the contract or applies transnational rules of law? In my research I have shown that often contract terms do not have an absolute

52 This appears in the 2012 Survey of the SCHOOL OF INTERNATIONAL ARBITRATION OF QUEEN MARY, University of London, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, section 7.

53 QUEEN MARY's survey, p. 38.

54 G. Cordero-Moss, *Interpretation of contracts in international commercial arbitration: diversity on more than one level*, in European Review of Private Law, 1-2014, p. 13-36.

meaning.[55] The effects of contract wording are influenced by legal standards and values 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. For want of empirical data on what actually influences the arbitral tribunal, I am operating under the hypothesis that the arbitral tribunal's concretisation of the applicable legal standards and its understanding of its role are influenced by the set of values in the legal tradition to which each arbitrator has been mostly exposed – which often may, but needs not necessarily, coincide with the national legal system in which the arbitrator has received her first legal education.

It can, of course, not be excluded that arbitrators are influenced by other factors,[56] such as their personal experience in the specific branch and thus their own understanding of what is customary to regulate in contracts and how parties expect those contracts to work; their personal experience in drafting contracts, and thus their own understanding of what are the parties' expectations when writing a certain contract term; their personal experience with a multiplicity of legal systems, and thus their own understanding of how different legal systems may offer different solutions to the same problem; their geo-economic background, and thus their own understanding of what is generally assumed as proper allocation of risk and benefits; and possibly many other variables.

In addition to the vast number of variables that may influence one arbitrator, it should be taken into consideration that arbitral tribunals often consist of three arbitrators.[57] Therefore, the interaction between the arbitrators will also play a significant role. Should the background of at least two arbitrators bring them to share some of the values that may affect the relationship between contract terms and governing law, these arbitrators will probably be reinforced in their assumption that their approach is the correct approach. Should each arbitrator have different values, the outcome of the dispute will probably be the result of persuasive capabilities under internal deliberations.

It is possible that, in this multifaceted picture, the national legal tradition of the arbitrators plays a lesser role than it could be expected. However, it seems plausible that it is legal reflexes, i.e. the result of a legal imprinting, that inspire the arbitrator's own understanding of, e.g., how the principle of good faith interacts with the contract terms, or what is the correct meaning of "event beyond the control of the prevented party".

Be that as it may, the above shows that selecting the individuals who will act as arbitrators is of extreme importance. Traditionally, parties may have

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55 G. Cordero-Moss, *Boilerplate clauses,* and G. Cordero-Moss, *International commercial contracts,* chapters 2 and 3.

56 For a thorough study of how a judge's thought is influenced by a plurality of factors, *see* Richard Posner, *How judges think*, Harvard University Press 2008.

57 On the dynamics of group decision *see* D. Simon, *More problems with criminal trials: limited effectiveness of legal mechanisms,* 74 L. & Contemp. Probs. 167-209 (2012).

attempted to limit Pirandellian situations by appointing arbitrators who share the same values. As far as the elite of arbitration is concerned, a *de facto* relatively closed number of arbitrators may have ensured a certain harmony in the set of values that underlie the application of the law.[58] The number of arbitration disputes, however, increases, and so do the venues of arbitration and the nationality of the involved parties. This leads to extending the originally exclusive group of like-minded arbitrators, and thus to a plurality in the background and the set of values of arbitrators.[59] The selection process has undergone a significant professionalization in the past decades, but there is certainly room for improvement.[60]

4.1 Need for Multidisciplinary Research?

The need for transparency around the composition of the arbitral tribunal is increasingly recognised, as numerous initiatives testify: arbitral institutions such as the Stockholm Chamber of Commerce started publishing their decisions on challenge to arbitrators appointed under the respective Rules of Arbitration;[61] the International Bar Association's Guidelines on Conflict of Interest in International Commercial Arbitration, recently published in a second edition,[62] enjoy a wide recognition; a net-based resource with the goals of increasing transparency, fairness, accountability, and diversity in arbitrator selection, Arbitration Intelligence, collects awards and information generated through Feedback Questionnaires completed at the end of arbitration cases;[63] the School of International Arbitration of the Queen Mary University carries out empirical studies aimed at unveiling various aspects of international arbitration that are not immediately accessible to purely legal research;[64] the International Chamber of Commerce publishes, as from 1 January 2016, the names and nationality of the members of ICC arbitral tribunals.[65]

The selection of arbitrators is, as the above shows, increasingly being the object of numerous initiatives aimed at rendering the process more professional

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58 For a thorough analysis of arbitration as a field, *see* Y. Dezalay and B. G. Garth, *Dealing in Virtue*, The University of Chicago Press 1996.

59 *See* J. Karton, *The culture of international arbitration and the evolution of contract law*, Oxford University Press 2013; T. Schultz, R. Kovacs, *The rise of a third generation of arbitrators? Fifteen years after Dezalay & Garth*, 28 Arbitration international 161 (2012).

60 *See*, for further references, G. Cordero-Moss, *Interpretation of contracts in international commercial arbitration*, pp.33f.

61 "www.sccinstitute.com/media/30001/felipe-mutis-tellez_article-on-scc-challenges-on-arbitrators.pdf".

62 "www.ibanet.org/Publications/publications_IBA_guides_and_free_ materials.aspx".

63 "www.arbitratorintelligence.org".

64 "www.arbitration.qmul.ac.uk/research/index.html".

65 "www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/".

and transparent. These initiatives are welcome. Given the importance that the arbitrator's background and inclination play for the application of the law, as was argued in this article, it seems that more research could be carried out on the processes that underlie the arbitrator's legal reasoning.

A multidisciplinary method has been applied to assess the psychological influences that may affect judges [66] or arbitrators [67] in the decision-making process. These studies focus mainly on processes regarding fact-finding, evaluation of evidence or determination of damages. They show that judges and arbitrators are not exempt from the influence of intuition in their decision-making, just like other human beings; also, they show that judges and arbitrators are subject to cognitive bias such as anchoring and framing. These studies have mainly the purpose of verifying to what extent legal decisions are taken only on the basis of legal reasoning, or also on the basis of extra-legal elements.

It could be useful to apply similar methods to the question of whether unconscious psychological influences affect also the application of law and construction of contracts, what I above defined as the "legal imprinting" of an arbitrator. The research theme would not be: "how fact-finding or determination of damages is influenced by extra-legal elements," but: "to what extent the construction of a contract or application of the transnational law is influenced by the interpreter's legal culture." To my knowledge, there has so far been little research specifically on this question.[68]

The studies made so far on the psychology of decision-making show the importance of intuition in legal decision-making. These results, if applied to the question of application of law, would seem to suggest that also application of the law is subject to unconscious influences, including the interpreter's legal culture. This, however, is a hypothesis that would need to be verified with dedicated experiments.

Psychological experiments could be coupled with theories in areas from which it seems possible to draw analogies – such as linguistics. The law is a system based on concepts bound to each other by a systematic structure and it has its own semantics and syntax. It seems therefore relevant to look at linguistics to find inspiration for the analysis of how the application of the law

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66 *See* C. Gurthie, J. Rachlinksy and A. J. Wistrich, *Blinking on the bench: how judges decide cases*, in 93 Cornell L. Rev. 1 2007-2008; 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 58-62 (2011).

67 E. Sussman, *Arbitrator decision-making: unconscious psychological influences and what you can do about them*, in The American Review of International Arbitration, (2013) vol 24 No 3, p. 487-514. In 2013, the Burnel Centre for the Study of International Arbitration and Cross-Border Investment organized an international conference the topic of arbitration and psychology, showing the multifaceted interaction between these two disciplines – but the issue of psychology and application of the law was not addressed: *The role of psychology in international arbitration*, available at "www.brunel.ac.uk/law/research/events/bcsiacbi-brunel-centre-for-the-study-of-international-arbitration-and-cross-border-investment/ne_283957" last visited on 31 January 2016.

68 In this direction *see* the work of R. Caterina, *I fondamenti cognitive del diritto*, Bruno Mondadori 2009, and R. Caterina, *La dimensione tacita del diritto*, Quaderni del Dipartimento di Scienze Giuridiche dell'Università di Torino, 2009.

works from a cognitive point of view.[69] The old theory of linguistic relativism, according to which language may affect a person's conceptual views and esthetic interpretations, is gaining renewed interest. [70] If applied to the law, relativism would seem to suggest that an arbitrator constructing a contract or applying the transnational law will understand it through the filter of her own legal system, what I above defined as legal imprinting. On the contrary, the theory of linguistic universalism, according to which language reflects universal structures innate in humanity, applied to the law would seem to suggest that the transnational law is a body of rules reflecting a global system, and not dependent on national legal traditions.

Also neuroscience can give relevant contributions to the research. Neuroscience seems to undermine the hypothesis of a legal imprinting: according to some experiments, [71] the intuitive, or rather ethical values of a subject play a lesser role when she operates in a foreign language. Applying the transnational may be compared to speaking a foreign language, as it is a system different from an arbitrator's system of origin (not to mention, that it is usually expressed in English, which often is not the mother tongue of the arbitrator); neurosciences seems therefore to suggest that the legal imprinting plays a lesser role in international arbitration.

An important contribution may be given also by anthropology.[72]

All these hypotheses are simple ideas of possible themes for future research, and need to be properly formulated, analysed and verified. Knowledge developed in the course of comparative legal research and research on the application of transnational law could give the material necessary to develop the basis for such research. In view of the results of this legal research as mentioned above in this article, i.e. that neither arbitration nor the transnational law ensures a uniform interpretation and construction of contracts, it seems that it would be useful to apply psychological and neurological methods to answer the question of what influences arbitration in the construction of a contract or application of the transnational law. Disciplines such as linguistics, behavioral sciences and political sciences could provide inspiration to explain the results.

Understanding the unconscious influences in the application of the law would contribute to more predictability. The need for predictability is one of the major reasons for theorizing the autonomy of arbitration and the delocalization and self-sufficiency of international contracts. When the transnational law fails to

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69 R. Sacco, *Lingua e diritto*, in Ars Intrepretandi, Annuario di ermeneutica giuridica, traduzione e diritto, Milano, 2000.

70 J. Gumperz, S.C. Levinson, *Rethinking linguistic relativity*, Cambridge University Press 1996.

71 A. Costa, A. Foucart, S. Hayakawa, M. Aparici, J. Apesteguia, J. Heafner et al. *Your morals dependo n language* (2014) PLoS ONE 9 (4): e94842 doi: 10.1371/journal.pone.0094842; B. Keysar, S. L. Hayakawa, S. G. An, *The Foreign-Language Effect: Thinking in a Foreign Tongue Reduces Decision Biases*, 23 Psych. Sci. 551 (2012); M. Favreau, N. S. Segalowitz, *Automatic and Controlled Processes in the First- and Second-language Reading of Fluent Bilinguals*, 22 Memory & Cognition 565 (1983); E. Picozza, L. Capraro, V. Cuzzocrea and D. Terracina, *Neurodiritto. Una introduzione*, Giappichelli Editore, 2011.

72 Fundamental the study of R. Sacco, *Antropologia giuridica, Il Mulino* 2007.

provide a unitary framework, the whole construct rests on uncertain ground. Unveiling the cognitive mechanisms underlying the application of the transnational law will contribute to formulating sources of transnational law in a way that takes into consideration these aspects. It will also contribute to a higher level of awareness in the selection of arbitrators. This, in turn, will contribute to more predictable awards and will be a benefit not only for the parties to the specific dispute, but will contribute to the development of a consistent transnational law. This, in turn, will enable the transnational to be, to a larger extent than it is today, a reference for the development of national commercial law and consequently to harmonization of national commercial laws.