

Legal Discourse across Cultures and Systems

Edited by

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with the assistance of

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Hong Kong University Press is honoured that Xu Bing, whose art explores the complex themes of language across cultures, has written the Press's name in his Square Word Calligraphy. This signals our commitment to cross-cultural thinking and the distinctive nature of our English-language books published in China.

“At first glance, Square Word Calligraphy appears to be nothing more unusual than Chinese characters, but in fact it is a new way of rendering English words in the format of a square so they resemble Chinese characters. Chinese viewers expect to be able to read Square Word Calligraphy but cannot. Western viewers, however are surprised to find they can read it. Delight erupts when meaning is unexpectedly revealed.”

— Britta Erickson, *The Art of Xu Bing*

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1

Concepts, Contexts and Procedures in Arbitration Discourse

Vijay K. Bhatia, Christopher N. Candlin and Jan Engberg

HISTORY AND BACKGROUND

Although legal language has long been the focus of attention for legal philosophers and sociologists (Austin, 1962; Mellinkoff, 1963; Searle, 1965, Allen, 1957; Atkinson and Drew, 1979; to mention only a few), its attraction for linguists and discourse analysts has been of relatively recent origin. Legal language started attracting somewhat adverse publicity in the mid-seventies, when campaigns for reforms in legislative expression gained momentum, especially in the USA and the UK (see Renton Committee Report, 1975). Popularly known as the Plain English Campaign, it brought into focus the question of incomprehensibility of legal expression from the point of view of not only the ordinary people but also of legislators. In the last two decades legal writing has assumed unprecedented significance not only for linguists, language and legal educators, but also for sociologists, critical theorists, writing specialists, translators and social reformers. In particular, there have been a number of studies focusing on the construction, interpretation, use and simplification of legal documents from the perspective of a variety of legal systems and languages. The works of Bhatia (1982, 1983, 1987, 1993) on the analysis of legal documents; Candlin and Maley (1994), and Candlin and others (1987, 1995) on client consultation, arbitration and dispute resolution; Charrow and Charrow (1978) on the comprehensibility of legal documents; Fredrickson (1995) on the analysis of Swedish and American legal language; Gunnarsson (1984) on the comprehensibility of legal Swedish; Maley (1985, 1987, 1994) on judicial and legislative discourse; and Trosborg (1991, 1997) on pragmatic aspects

of legal discourse and legal translation, are only a few of the pioneering examples of recent work of interest in legal discourse.

Accompanying this is a valuable and interesting body of research related to the simplification of legal documents. There are two important approaches to reforms in legal writing. The first approach introduces simplification in legal writing as Plain English, where it is widely believed that legal documents can be expressed more or less in ordinary everyday English. Eagleson's work (1991) on the use of Plain English is insightful and encouraging. He has been able to convince a number of stakeholders in legal affairs, including government departments and legal firms, especially in Australia, about the possibility of achieving a reasonably high degree of legal specification without the excessive use of complex grammatical devices. Unfortunately, however, this view is not shared by a wide majority of legal professionals from the drafting community (Renton Committee Report, 1975, Thomas, 1985), who claim that it is impossible to achieve the required specification of scope in legal expression without the use of a complex array of qualifications and other grammatical resources. Bhatia (1982, 1993), in this context, proposed a different approach to rewriting legislation known as 'easification' of legal documents, where it is claimed that although it is possible to some extent to avoid unnecessary use of complex contingencies without sacrificing the essential integrity of the legal documents, it is not always possible to write legal documents in ordinary English without sacrificing a desirable and detailed specification of legal scope, especially if these documents are required to serve legislative purposes in the context of legal systems in western democracies. He suggests the use of a variety of 'easification devices' without compromising the essential integrity of the legislative genre to make them more readily accessible to its users, which may include lay readers as well as legislators.

There is also a vast body of literature on interpretation of statutes and other forms of legislation (Bennion, 1997, Cross, Bell and Engle, 1995, Dickerson, 1975, Eskridge, 1994, Evans, 1990, Gifford, 1990, and others). Some of them codify criteria for the interpretation of statutes, often incorporating linguistic aspects of statute construction and interpretation (Bennion, 1997), sometimes based on rules of logic, syntax, and punctuation. However, the principles of statutory interpretation discussed there do not materially differ from those applicable to the interpretation of documents generally. The most common treatment is based on the use of deductive reasoning, interpretation of individual words and phrases, or on the elaboration of meaning of words and phrases. There is very

little available on the lexico-grammar of legislative writing. The most interesting work on legal interpretation from the point of view of different legal systems comes from MacCormick and Summers (1991). They compare statutory interpretation based on a set of common questions applied to nine different countries. The questions addressed interpretative issues such as the general origins of interpretation within legal systems, statutory gaps and gap-filling, the role of constitutional law, the effect of statutory provisions prescribing interpretative method, and the nature of collisions between statutes and other norms, often discussing how they are resolved. However, it is interesting to note that in the context of such a diversity of systems, MacCormick and Summers put forward a universal thesis that amounts to claiming that all systems share a common core of major types of arguments which provide good reasons for interpretative decisions. They also point to major variations in types of arguments and patterns of justification in the different systems, including differences in structure, logic, and style of the opinions in the higher courts. The authors also explain these variations are rationally grounded in political, institutional, cultural, and other factors present in the systems.

All these studies are insightful and stimulating for those interested in the construction, interpretation, use, and rewriting of legal discourse. However, most of these studies focus on the use of English in various legal genres and, as a result, on contexts which are essentially those of common law countries. There are only a few studies which have focused on languages and legal systems other than English. Even then, most of these have so far invested their efforts in the analysis and use of legal language embedded in specific legal cultures and essentially monolingual settings.

In recent years, however, we have seen an unprecedented increase in the dismantling of socio-cultural, disciplinary and national barriers, especially in the context of co-operation and collaboration in international trade and business. Creation of massive international free trade zones, and the opening up of major political economies in the last few years have accelerated moves towards intense competition to capture international markets and the merger of corporations to form huge multinational conglomerates. With the increase in these and similar other trends towards a globalisation of socio-cultural, business and communication issues, law is fast assuming an international perspective rather than retaining a purely national concern. An excellent example of this trend became visible in the early nineteen eighties when most of the countries of Western Europe combined to create a common European

market. The need for a common European legal framework in order to introduce legislative instruments and the necessity to translate such legal instruments in all the languages has become a serious issue (Lang, 1989). The task was much more complex than simply creating a new legislative framework because this newly created instrument was meant to be interpreted within the contexts of a diversity of individual legal systems and languages of the member countries of western Europe, especially when one needed to interpret issues such as those of human rights, international agreements and contracts, freedom of speech, freedom of trade, protection of intellectual property, all of which have very strong socio-political and cultural constraints.

More recently, especially in context of the return of Hong Kong to the People's Republic of China and the creation of the SAR, the need to interpret one set of laws in the context of the other has become important. Whenever two languages and/or legal systems come in contact with each other, problems in the interpretation of statutes and regulations and in the translation of legal intentions from one language and/or one system to the other assume serious importance. As one example, in the periods immediately preceding and following the handover of the territory of Hong Kong, there were several cases where sections of the Basic Law were construed and interpreted rather differently by the parties concerned. The underlying issues in relation to statutory interpretation in many of these cases could either be traced back to differences between two drafting systems, which may include differences in languages, legal systems, or other socio-cultural factors. In the existing research on legal language, however, there has been very little attention paid to issues that arise as a result of differences in legal or socio-cultural systems. For example, we have some indication of how legal Danish is constructed, used and interpreted within the Danish legal system; we have some idea of how Swedes write their laws and use legal Swedish to negotiate justice in the courts of law in Sweden; we have considerable understanding of how legal English functions in the countries of the Commonwealth; but we know very little about how a particular legal language, be it English, Danish or Chinese, would handle a legal issue when it arises as a result of an interaction with another legal system, language or socio-cultural expectations. How, for example, should the issue of intellectual property protection law be construed, interpreted and used in Hong Kong SAR and the UK? To what extent and by what linguistic means should the two countries specify the scope of legislation? To what extent will the scope be constrained by the legal system in which it will be established?

To what extent will it be constrained by the linguistic resources available in the language in which it is written? Issues like these are crucial for the construction, interpretation and use of legal language across languages and legal systems. These issues are also extremely relevant when one translates legal expressions from one language or legal system into another. A number of these issues have been identified by several senior solicitors in Hong Kong (see Candlin and Bhatia, 1998).

A number of questions arise from the above review of legal discourse. One of the main questions is: what exactly is legal about legal language? More specifically, what happens to legal discourse when it is constructed, interpreted and used across linguistic, national, socio-political, cultural, and legal systems? In what way is generic integrity of legislative statements and other legal documents maintained in multi-lingual and multicultural legal contexts? What happens when the same rule of law is applied across legal systems?

This volume is an attempt to address some of these questions by contributing to the basic knowledge of legal language typically used in international commercial arbitration, and to suggest implications of this for legal practice, legal translation, and legal practitioner training. The discussions in this volume constitute one of the major outcomes of an international project, 'Generic Integrity in Legal Discourse in Multilingual and Multicultural Contexts'. The project investigated this challenge by focusing on international arbitration laws seen from the standpoint of a number of international contexts. As part of the project, academics and practitioners from, or focusing on, Brazil, the Czech Republic, the People's Republic of China, Denmark, Finland, France, Germany, Hong Kong, India, Italy, Japan, Malaysia, South Africa, and the United Kingdom have been involved in parallel investigations into such processes within their respective jurisdictions for several years. These international teams of researchers have also focused on analyses across their own jurisdictions in order to identify common elements in arbitration legislation as they are constructed and interpreted across multilingual and multicultural contexts. The research is based not only on the analysis of the texts of the legislation alone, but also on the factors shaping such constructions and interpretations. In the process, differences characteristic of, or resulting from the peculiarities of historical, socio-political, cultural, economic and legal developments in the sites concerned have also been taken into account.

The motivation for this research derived from the increasing international need for accurate and authoritative translation and use of

legal documents across languages, translations which would both preserve the integrity of the source documents and would provide a robust representation of the legislation in question. Such translations would also need to convey appropriately in both languages the pragmatic and functional intentions and implications of the original document in question, addressing such issues as of degree of qualification, specification of scope, issues of closed versus open-endedness and other matters concerned with complex contingency. Although all legal documents in all languages address these issues, they do so in distinctive and also in overlapping ways, partly as a consequence of the different languages in which they are constructed, partly because of the socio-political and cultural differences of the societies in question and of their legal systems, and partly as a consequence of the ways in which these systems construct and interpret issues such as legal authority, agency and responsibility. The discourse of law, in particular, relating to contract and arbitration, has considerable contemporary relevance in the context of international, inter-linguistic and inter-cultural social actions in an increasingly globalized economy. This comparative legal and commercial interest is matched by a parallel linguistic and discourse analytical interest in the relationship between language and globalisation. A number of diverse communities of practice, such as discourse analysts, commercial consultants, legal trainers, translators, and applied researchers in professional and institutional communication, especially in the field of legal writing and languages for specific purposes, undoubtedly exercise a keen interest in legal discourse across disciplines, languages, cultures, and legal systems.

This introductory chapter has three major objectives: firstly, to identify and bring into focus some of the main *concepts* and *constructs* in the field of comparative legal discourse; secondly, to identify and characterise the main *contexts*, socio-political, institutional, professional, in terms of which comparative legal discourse can be studied, and where such study is practically relevant; and finally, to identify and outline an integrated set of appropriate discourse analytical and other methodological *procedures* that enable the grounded study of legal writing so as to provide substantive, relevant, and usable accounts of value to practitioners in various fields.

LEGAL DISCOURSE

Legal language plays an important role in the construction, interpretation, negotiation and implementation of legal justice. Through a limited set of legal genres an attempt is made to create and maintain a model world of rights and obligations, permissions and prohibitions. Although, in principle, this model world is required to be consistent with the vision that individual states or nations have of the society, in practice, it is often constrained by the changing socio-political realities of the specific nations, legal systems, and cultures. Therefore, to regulate the real world of human behaviour as and when it is found to be inconsistent with the model world, these rules and regulations are judiciously interpreted and applied through a system of courts to negotiate and invariably enforce desired behaviour (Bhatia, 1982). The so-called model world is thus created by imposing rights and obligations, permissions and prohibitions through legislation, and this, in most western democratic systems, is seen as the will of the elected representatives of the people in the parliament.

This view of law and legal justice requires most genres, especially legislation, to be written “with mathematical precision ... to provide a complete answer to virtually every question that can arise” (Sir Charles Davis in Renton Committee Report 1975). This requirement gives legal genres their unique integrity, often characterized in terms of their use of lexico-grammatical and discoursal resources that are rarely found in other disciplinary or professional genres. As pointed out in Bhatia (1982, 1993), legal genres are characterized by their use of a complex range of qualifications often strategically positioned at syntactic points where they are unlikely to attract any ambiguous or unintended interpretation, thus making them clear, precise, unambiguous and all-inclusive at the same time (see Bhatia, 1982, 1993, for a detailed discussion). However, there are several other factors that make this claim somewhat problematic: the legal system, the language, the socio-political and the cultural context within which a specific instance of legal discourse is embedded. One of the main issues arising from this variation is the extent to which the integrity of a specific legal genre is likely to be maintained when it crosses linguistic, socio-political, cultural or legal boundaries in the present-day global business, trade or other professional environment. These issues of diversity in construction and interpretation of legal discourse acquire a more serious importance when we see law losing its jurisdictional character in this rapidly changing corporate world of international trade and commerce.

LEGAL DISCOURSE IN INTERNATIONAL ARBITRATION: THE PROJECT

In order to investigate what happens to the same legislative genre when it is written, interpreted, and used across linguistic, socio-political, cultural and legal jurisdictional boundaries, a group of researchers from more than ten countries representing various jurisdictions, languages, cultures and socio-political backgrounds collaborated on an international project¹ to study international arbitration laws written, interpreted and used in various jurisdictions, including Brazil, China, Hong Kong, India, Japan, Malaysia, and a number of European countries, such as Denmark, England, Finland, France, Germany, and the Czech Republic (for details see the website <http://gild.mmc.cityu.edu.hk/>) The investigation involved thirteen distinct languages, such as English, Chinese, Czech, Danish, Finnish, German, Hindi, Italian, Japanese, Hong Kong, Bahasa Malaysia, Portuguese and Czech, which drew upon several distinct legal systems, such as the common law, the civil code, Islamic law, and a number of others in use in countries such as Brazil, Japan, Denmark, Finland, and the Czech Republic.

There appeared to be considerable overlap in all the international arbitration laws in different countries as they were invariably adopted from the UNCITRAL Model Law (1985) provided by the United Nations Organization or from the Geneva Convention of 1962. The main objective of the international project was to develop a basic understanding of legal discourse across languages, socio-political and cultural boundaries, and legal systems. However, its primary focus was on the investigation of generic integrity of legislative documents used in multinational and multilingual contexts so as to enhance our understanding of the construction, interpretation and use of legislative discourse in international contexts, and to assist legal writers, translators, and practitioners of law in functioning more effectively internationally. In order to investigate the generic integrity of legislative documents, the investigation drew on a multidimensional and multi-perspective approach to research, one which required the following tasks.

1. Documentation of background reports on individual countries, in particular about their legal systems, focusing especially on the way

1 RGC (HKSAR) funded Cerg Project (No. 9040474) on 'Generic Integrity of Legal Discourse in Multilingual and Multicultural Contexts'.

laws are written, interpreted, and used, choice of language(s), historical traditions in arbitration and conciliation, etc, in each of these countries. These documentations were meant to be used as a broad and rich context within which one could explain some of the findings of the analyses of not only the construction and interpretation of arbitration laws, but also the processes and procedures used in specific arbitration cases (See Bhatia, Candlin, Engberg, and Trosborg, 2003).

2. Analyses of the linguistic and discursual properties of various subsets of international arbitration laws from different languages, language varieties, cultures and legal systems, focusing, in particular, on the nature and use of qualifications, specification of scope, all-inclusiveness, expressions of contingency, intertextuality and interdiscursivity, and degrees of control and transparency. The analyses offer a grounded account of the drafting and interpretative practices within specific contexts by focusing on a set of critical and relevant sites of engagement, incorporating specific moments of application of the laws under investigation, especially where certain aspects of these laws are invoked during the negotiation of justice (see Bhatia, Candlin and Gotti, 2003 for the analyses of arbitration laws from European countries, and Bhatia and Engberg, 2004 for the analyses of other international laws from outside Europe).
3. Comparing country specific laws with one another taking as a basis the UNCITRAL Arbitration Model Law provided by the United Nations, focusing in particular on areas which have been constructed differently in an attempt to offer explanations and implications of such divergences, often taking evidence from some of critical agreements, contracts, cases, and judgments in international arbitration. The present volume includes much of the comparative analysis of international arbitration laws.

The comparative analyses in the present volume based on a range of arbitration laws also attempt to provide some discussion of the issue of generic integrity of legal discourse in multilingual and multicultural legal contexts, and perhaps offers some answers to the question: “What happens to legislative discourse when it is constructed, translated, interpreted, used, or exploited across national, legal, socio-political, economical, and cultural boundaries”? Explanation of some of the issues is offered by reference to socio-cultural, economic and political, linguistic and legal factors based on the background studies of the legal systems of these two countries,

and also on the expert reactions and commentaries by legal specialists, both from the academy and from legal practice.

In addition to the comparative and contrastive analyses of alternative textualizations, the chapters in this volume also provide useful insights for applications in translation of legal genres, especially with regard to the degree to which generic integrity is maintained in the practice of translation and legal drafting of legislative documents. In doing so it provides guidelines for the training of legal draftspersons and translators, with particular reference to inter-cultural sensitivity, with the aim of ensuring greater international acceptability of such translated and drafted texts. In brief, the volume is an attempt to test the validity of the generic integrity hypothesis, focusing in particular on the necessary interplay between genre, linguistic realisation and the underpinning legal systems and philosophies and practices of law in different societies. However, before taking up some of the main issues identified and discussed in this volume, we introduce some of the main findings in this area. These have been raised in earlier volumes published by the project and form the basis of some of the major issues emerging from the analyses of arbitration laws from a number of national and legal contexts (Bhatia, Candlin, Engberg and Trosborg, 2003; Bhatia, Candlin, and Gotti, 2003; Bhatia and Engberg, 2004; and Bhatia, Engberg, Gotti, and Heller, 2005)

As we indicated earlier, one of the main objectives of the project has been to investigate generic integrity, by which we mean stability in the characteristics of a genre across languages, socio-political contexts, and cultures. In short, to explore the differences and similarities to be found when arbitration laws from different countries are compared. How high, for example, is the proportion of overlap, thus indicating a high degree of generic integrity across cultures?

In the project, the cross-cultural investigation of genres connected to arbitration has been carried out in two different ways. One way has been to examine texts written in English, but which originate from cultures where English is not the national legal language, and to compare the results of this scrutiny with a text written originally in English, that is, the UNCITRAL Model Law, 1985. A second direction has been to look at arbitration texts written in official legal languages other than English and once again to compare these with the above-mentioned texts written originally in English. In both cases, the focus has been on cross-cultural differences and similarities. In the second group, differences and similarities between legal cultures may be observed in an unmediated way as texts are written directly in the language of the relevant legal cultures

but where results may be influenced by systematic differences between the languages. In the first group, on the other hand, differences and similarities must be observed through the filter of translation (as the texts are written in a language different from the national language of the culture). Here it is possible to compare the results more directly as the language used in all the investigated texts is the same. So, both approaches have their advantages and disadvantages. Put together, they give us a rather detailed picture of differences and similarities.

OVERVIEW OF INVESTIGATIONS

The work being presented here draws on the research of a number of independent researchers working around a common core. Most of the analyses on which this overview is based have a wider scope than merely that of contributing to addressing the central question. We begin, therefore, by summarising earlier work we have already published so as to identify the main issues which arise.

In the edited volume by Bhatia, Candlin, Engberg and Trosborg (2003), a number of national legal systems are presented in general and with a special focus on relationships between national language(s) of law in various countries and national systems of arbitration.² The contributions in the volume have served as contextual background for the individual contrastive analyses, but will not be treated further here.

The studies in the project focused on two major genres: *statutes and executive orders* that function as the national or international statutory authority for international commercial arbitration, and *arbitration rules* of individual chambers of commerce, which govern the arbitration procedures. The second genre may be seen as concrete instantiations of procedural rules within the framework set up by the first genre. Most of the investigation has been directed at statutes. Accordingly, we begin with some of the important insights which result from the analyses of arbitration rules as they give us a useful overview of possible aspects on which to focus when examining the larger collection of research works.

2 The following countries have been covered in the volume: Brazil, People's Republic of China, The Czech Republic, Denmark, Finland, Germany, Hong Kong, India, Italy, Japan, Malaysia, Spain, and the Republic of South Africa.

Arbitration rules

Here the relevant articles are those of Belotti (2003), Facchinetti (2003) and Garzone (2003), investigating Italian, English, French and Swedish arbitration rules written in or translated into English. Arbitration rules connected to the specific national cultures have been investigated together with the UNCITRAL Rules, which are a set of model rules issued internationally by the United Nations. In these texts, the most important element of generic integrity relates to the macrostructure of the texts. There are major overlaps in terms of topics covered, in their macrostructures as well as in their order of appearance. So on these grounds, it may be stated safely that what we have here are examples of a cross-cultural genre.

One important general difference among the texts under study lies in their different contextual situations, i.e. their different national contexts rather than some international setting. On the one hand, Belotti (2003, 32) finds a general tendency for both national arbitration rules and for the UNCITRAL rules to be more reader-friendly from the point of view of, for example, manageable sentence length and syntactic complexity. In his view, this general characteristic probably derives from the fact that arbitration rules are always meant for business people rather than for legal experts. However, Belotti (2003, 38) and Facchinetti (2003, 169–170) also find that Italian rules are more detailed, concrete and easy to process than those of the UNCITRAL model. In particular the national texts demonstrate a higher degree of textual simplicity on a number of different levels than does the international text. In principle, this characteristic could be due to the differences between the model law and the concrete rules of specific chambers of commerce in one national jurisdiction, which may be a consequence of two different types of context (national vs. international, abstract vs. concrete).

Table 1.1 Number of words in arbitration rules under scrutiny (Garzone 2003, 186)

| Arbitration rules by countries | Number of words |
|--------------------------------|-----------------|
| English rules | 8,266 words |
| French rules | 6,277 words |
| Swedish rules | 4,055 words |

However, the study by Garzone (2003, 214) shows that the UNCITRAL rules are much less complex than the national English rules,

whereas the Swedish rules are even less complex than the French ones, especially in terms of their average sentence length. This shows that despite the shared generic integrity of the genre in question across these contexts, especially in the field of macro- and move structure, there are major differences in the stylistic features of the realisations of rules in English. The legal writing is heavily influenced by the underlying national legal culture. This influence may be seen, as indicated earlier, in terms of the syntactic complexity as well as in the number of words contained in the texts.

Another indicator is the use of modal auxiliaries: French and Swedish rules show more variation in the choice of modals as well as a less consistent use of *shall* than English and UNCITRAL law. This characteristic may be attributed to the fact that civil law legal cultures (like Sweden and France) traditionally use fewer modal auxiliaries and a greater variety of different expressions of the modality than common law legal cultures (England) and the English of international contracts (Garzone 2003, 206–208).

The investigation of arbitration rules from different cultures thus shows that although a number of successful efforts have been made to harmonize the content of such rules there is still visible a substantial influence of national legislation and drafting practices, even when texts are written in English (Garzone 2003, 211–215; 216). Generic integrity seems to be strongest at macro level (although national legislations may also have a differentiating influence here), whereas differences are more visible at micro level due to variations in drafting practices.

Statutes on arbitration

The general picture arising from the investigation of arbitration rules encourages the finding that generic integrity is primarily the function of overlapping macro-structures, whereas cultural differences operate primarily at the micro level. This is also true of the arbitration statutes, which have been the focus of attention in several papers, some of which are the following:

Scotland (Dossena 2003)

England (Tessuto 2003)

Finland (Salmi-Tolonen 2003)

Denmark (Engberg / Rasmussen 2003)

Germany (Engberg 2004, Engberg/Heller 2002, Heller 2003)

Italy (Giannonni 2003)
Spain (Chierichetti 2003)
Czech Republic (Chroma 2003)
Malaysia (Hashim 2004)
India (Bhatia/Candlin 2004)
China (Bhatia/Candlin 2004, Trosborg 2004)
Brazil (Frade 2004)

The texts under study have been compared to either the UNCITRAL Model Law 1986 or to the Geneva Convention of 1962, on which international model law is based.

Concerning similarities among the investigated texts, we note a high degree of cross-cultural overlap in the area of macro- and move structure of these texts. The general principle of text structuring in statutes is that of conditional argumentation (Heller 2003, 295). This implies that a number of topics are treated in the texts and that the structuring principle is a combination of conditions and consequences (qualifications, Bhatia 1993, 115) which serve as a basis for argumentation by courts or arbitrators. The topic is divided into a number of articles, each containing some kind of legislative provision or definition, although the number of articles, and especially their internal subdivision, may differ considerably. Finally, the analyses in the project show that all-inclusiveness and precision are guiding principles in the structuring of statutory texts, with the proviso that the characteristic of generality, fuzziness and vagueness acquires major importance in most cases (Frade 2004, 67–71).³ The relative importance of these three kinds of characteristics may differ across cultures.

Many of the analyses explicitly state that the underlying national legal system and the drafting traditions of the specific legal culture studied play a substantial role in shaping concrete texts, even in the case of internationally oriented texts such as the statutes on international commercial arbitration. We illustrate some of these different traditions in what follows.

Generally, there is a basic difference between the contexts of the concrete national statutes on the one hand, and those of general international conventions (UNCITRAL Model Law, Geneva Convention),

3 For more discussions of the balance between these two aspects, see Bhatia/Engberg/Gotti/Heller (2005) and Engberg/Heller in this volume.

on the other. This difference derives from the fact that the international texts establish a framework with the specification of a number of alternatives to choose among, whereas a national statute relies more on the generality of the text. As a consequence, national statutes display fewer instances of bi- and multinomials than the international texts. The following example from the UNCITRAL Model Law illustrates the point.

Fig. 1.1 Bi- and multinomials in UNCITRAL Model Law article 26 (Frade 2004, 61)

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

- { (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
- { (b) may require
 - { to give the expert any relevant information }
or to produce
 - { or to provide access to
 - { any relevant documents }
goods
 - { or property }

for his inspection.

However, it is interesting to see that the texts investigated from other countries also display this characteristic:

Table 1.2 Number of bi- and multinomials in Danish, Chinese and Italian texts

| | International text | National statutory text | Difference |
|--|--------------------|-------------------------|------------|
| Denmark (Engberg/Rasmussen, 2003, 120) | 63 | 24 | -62 % |
| China (Bhatia/Candlin 2004, 20) | 10 | 3 | -70 % |
| Italy (Giannonni 2003, 231) | 231 | 125 | -46 % |

Furthermore, Frade (2004, 62) states that bi- and multinomials are used very sparsely in the Brazilian statute on Arbitration. Consequently, the

national statutes are shorter than the international texts (Italy: 5,291 vs. 4,067; Denmark: 1,483 vs. 848; China: 669 vs. 341).⁴

In the Indian text, however, we see exactly the opposite situation:

Table 1.3 Number of bi- and multinomials in Indian text

| | International text | National statutory text | Difference |
|---------------------------------|--------------------|-------------------------|------------|
| India (Bhatia/Candlin 2004, 20) | 10 | 16 | + 60 % |

In the same way, in the analysis of the Malaysian text (Hashim 2004) and of the English text (Tessuto 2003) a number of examples of complex bi- and multinomials are reported, although without exact quantitative data. However, it is clear from the studies that complex bi- and multinomials are not rare in the Malaysian and English texts. This indicates that we can hardly identify the use of bi- and multinomials as an aspect of generic integrity across legal cultures. Rather, the use of bi- and multinomials is dependent on the type of legal system of the underlying legal culture. Denmark, China, Italy are civil-law countries and have a significantly lower incidence of bi- and multinomials, whereas India, England, and Malaysia are common-law countries, and they show a much higher incidence of these lexico-grammatical features.

Interestingly, although a precise quantitative analysis of bi- and multinomials in the German statute is lacking, Heller (2003, 292; 294; 309) notes that the recent German statute she analysed is much more complex than the former version of the German statute. Moreover, this higher complexity is also due to the use of bi- and multinomials. The number of conditionals is more or less constant from one version of the German statute to the other, but bi- and multinomials have been used more frequently when formulating conditionals in the recent version in order to achieve a higher degree of precision than the traditional civil-law drafting style of German statutes is capable of. The result is interesting because it is one of the rare examples where a national statute has taken over a convention from a foreign tradition, probably due to translation, adoption or closer approximation.

⁴ Not all analyses look at the whole texts, but concentrate upon comparable parts. Both the Chinese and the Italian text has been compared to the UNML, but the analysis of the Chinese text only covers three articles in UNML and their corresponding sections in the Chinese statute.

The observed differences may be attributed to differences in the importance of all-inclusiveness and precision, respectively. According to the general function of statutes in legal systems, modern national statutes have to achieve all-inclusiveness and precision. However, depending upon the basic legal approach, different traditional strategies are adopted in the studied texts: Civil-law jurisdictions seem to opt for all-inclusiveness, using more abstract wording and therefore generally both fewer words and fewer bi- and multinomials than the international texts on which the national statutes are based; common-law countries, on the other hand, opt for precision, generally achieved via more words and more bi- and multinomials than the international texts. The German statute is a special case in that it follows many of the traditional conventions of German statutes, but in its structuring rather opts for a non-traditionally high degree of precision, as it contains a higher number of conditions, a trait which normally leads to a higher degree of explicitness (Heller 2003, 295).

Following the same line of argument, we see differences in the use of modal auxiliaries. Common-law texts have a relatively high proportion of explicitly expressed modality in the format of modal auxiliaries. Civil-law texts, on the other hand, often use simple present or future tense and thus express the modality in a more indirect way (see for example Chierichetti 2003, 54–55). This is further supported by Garzone (2003) in the investigation of the arbitration rules.

Summarizing the results

If we look at the issue of generic integrity in the case of the two genres under scrutiny (statutes and arbitration rules), macro- and move structure are very stable across cultures concerning both genres. All-inclusiveness and precision also seem to belong to the cross-cultural characterising traits of texts of the genre, but the focus may shift between them and, as a consequence, textual realisations like the use of bi- and multinomials are not part of the overall characteristics of the genre across cultures. Their relative importance is dependent on the degree of importance accorded to the characteristic of precision by the respective legal cultures. Here, a first-level division between common-law and civil-law cultures becomes important. We may thus postulate two general sub-types of the genre on this basis.

Finally, most analyses show that national drafting traditions at various textual levels, which include lexico-grammar as well as arrangements of qualifications within the structure of statutory clauses, are generally the

dominating factor: Statutes on international commercial arbitration are written so that they meet the traditional standards of the underlying legal culture, irrespective of the language used (English or the national language). As a matter of fact, the analyses undertaken as part of the project only found one example of a text where this description does not fit, viz. the recent German statute. Here, although many of the traditional characteristics of the genre in the German legal culture are to be found, Heller argues that the textual structuring differs considerably from the former version of the same statute — and thus from the traditional standards — in being more deeply structured and thus more explicit and precise. It would be interesting to investigate more thoroughly whether a new development is on its way here, breaking up the divisions between the two major blocks represented in the analyses of the project, viz. that of civil-law and common-law countries.

A preliminary answer thus to one of the central questions of the project, viz. the degree of generic integrity in the statutory genres under scrutiny, is that a number of similarities have been found, mainly at higher textual levels; that general contextual factors like the quest for all-inclusiveness and precision are stable across cultures, but that national traditions also play a considerable role. As already discussed, despite the fact that international commercial arbitration is a field more likely to move towards greater harmonization, legal genres are still deeply rooted in their national cultures.

MAIN ISSUES OF FOCUS IN THE PRESENT VOLUME

In contrast to already published work, which has also been briefly referred to above, the chapters in this volume address some of the major issues emerging from these studies and do so in a more comparative way, taking these concerns further, raising more theoretical issues and discussing their implications for legal drafting, translation and legal practice. In the following we identify some of these general issues and discuss the contributions made by authors of this volume.

Vagueness and indeterminacy

Vagueness and indeterminacy in statutory texts create a dilemma in law. The basic assumption is that society must be governed by the rule of law

and not on the basis of individual beliefs or actions. However, it is also obvious that indeterminacy and vagueness are typically inherent characteristics of law, thus making interpretation a necessary and important aspect of legal application.

In international commercial arbitration this aspect of interpretation assumes greater importance because of several factors. Firstly, arbitration is inherently characterised by a relatively lower degree of formalisation and a higher degree of negotiability than is the case in normal litigation, and secondly, it often involves procedural rules of one country, but where the parties may to a large extent (depending on the chosen forum and the relevant arbitration rules) decide the procedural rules for their dispute themselves. This means that at least hypothetically, rules for international commercial arbitration will encourage a high degree of vague expressions which may facilitate negotiation between the parties and the arbitrators.

Engberg and Heller investigate vague expressions in arbitration laws and claim that they are typically essential as discretion markers because the flexible nature of arbitration discourse makes relatively more room for interpretation. They further argue that qualifying expressions, although integral features of legislative provisions, do not necessarily eliminate vagueness. This is chiefly because of the presence of ‘internal’ qualifiers which contribute significantly to the negotiation of scope and application.

Globalization of legal practice

Economic globalization exercises a significant effect on relations among institutions, organizations and actors across societies, cultures and legal systems, through both law and language. It tends to influence all forms of legal relations through the creation and recreation of new forms of expression for the construction of professional practices and identities (Fairclough 2001).

Economic globalization not only creates conditions for universalization of trade and investment practices — often influenced by dominant American modes of thinking — but also creates conditions for the development of a parallel implementation of legal approaches based on the common law tradition. The globalization of law presupposes its operational autonomy *vis-à-vis* other national laws, serving to undermine the autonomy of nations in regard to their law practices.

Frade analyzes the implications of legal globalization in the context of Brazil, a Portuguese-speaking and civil law country, but one which is

fully integrated into global economy. She emphasises the adjustments that need to be made to comply with the latest requirements for becoming “legally global” through the enactment of the Brazilian Arbitration Law and the implications this has on national legal practice, culture, discourse and education. She points out how national legal discourse tends to display a new texturing of meanings to reflect the “generalized tensions between international practices and local traditions” (Fairclough 2001: 25–26), while at the same time legal education and professional training calls for a new perspective for training ‘international lawyers’ to achieve “core international legal competence” (Orban III 2001: 53).

Litigation v. arbitration

Commercial activities in the present-day world of intense corporate competition have become increasingly complex. Conflicts of various kinds arise and are resolved in various ways through litigation, arbitration, mediation, conciliation or negotiation. Litigation in the common law countries is adversarial and power-laden, and discourse processes are constrained by legal authority and absence of any choice, making discourse in the litigation process typically monologic (Bakhtin, 1984). Other mechanisms, in comparison, are essentially devoid of the imperatives of adversarial process, and hence can be viewed as dialogic in nature.

Arbitration, although like litigation in its adjudicatory process, allows dialogue with no legal mandates as long as this is acceptable to the parties to the conflict. In contrast, a judge in a litigation process is allowed to perform only within the boundaries of specific legal mandates, whether they be legislative authorities or legal precedents. In arbitration, the emphasis is on settling the dispute and winning the case.

Commercial Arbitration proceedings can be, and often are influenced by conventional legal practice in a typically adversarial framework. From the point of view of disputants arbitration should be viewed as negotiation and conciliation and must take place in a dialogic mode instead of the adversarial mode, (which is) clearly seen as monologic. The intensely dialogic and dynamic nature of commercial arbitration mechanism is more visible in the context of the multi-cultural and globalized nature of economic and business activities.

Based on arbitration proceedings in India, Dhanania argues that commercial arbitration proceedings are increasingly being influenced by judicial processes, and hence are less consistent with the principles of

negotiation and settlement, and their dialogic modes of interaction. These proceedings, she argues, are becoming mere replicas of the judicial process in private settings. Such adversarial resolution of disputes is contrary to the spirit of arbitration of commercial conflicts.

Based on arbitration practices in Japan, Sato proposes the concept of hybrid dispute processing, which combines some of the basic dispute processing elements such as conciliation, arbitration, and litigation. He identifies the need to recognize the evolution of Alternative Dispute Resolution (ADR) and to cope with the problems arising from an increasing 'colonization' of arbitration by litigation in international commercial contexts. He discusses several examples of hybrid dispute processing from various international contexts, especially Japan, and points out that such hybrid dispute resolution will contribute to harmonization of dispute processing from various dispute cultures scores the world.

Socio-cultural constraints on arbitration: Harmonization of legal discourse

Normative discourse (statutes and regulations) varies in countries with different constitutional, sociocultural and economic conditions in order to adapt to different cultural, linguistic and legal environments, depending on local customs and traditions, legal systems, nature of disputes, procedural aspects, linguistic issues, cultural contexts, and other socio-economic constraints. In the contexts of global trade and commerce, law is increasingly being interpreted in a more international than a purely jurisdictional perspective, which is more centrally relevant to international commercial arbitration than to any other legal domain. It would be interesting to investigate the extent to which cultural elements influence such differentiation in the construction, interpretation, and use of arbitration laws and procedures in various countries. Considering culture as a set of traditions and social practices typical of a specific professional community — in this case, legal practitioners involved in arbitration procedures — one may find interesting variations in arbitration laws and practices in different countries and legal systems, especially when one considers the conditions and constraints within which legal texts are framed and the actual situations in which such texts are used and interpreted.

Features such as the choice of technical lexis, the use of specific syntactic formations, for example binomial/multinomial expressions,

complex prepositions, and nominalizations, the transparency and spread of information, concerns for conceptual or terminological unambiguity and explicit textual schematization, are indicative of the emphasis normally placed by common law legislation on precision and detailed specification of legal action in specific circumstances. The civil law, on the other hand, shows a divergent behaviour, paying more attention to simpler syntactic formulations, lower level of information density, extensive use of simple and compound sentences, and the use of common lexical forms.

Gotti, based on his analysis of arbitration laws from different countries, points out textual, conceptual and stylistic discrepancies that arise in the process of establishing closer harmonization in legal normative discourse at a global level. He argues that harmonization becomes particularly difficult when 'model' texts have to be adopted in various contexts. Such contexts give rise to interesting differentiations in the resulting texts that can be attributed not only to the languages in which the final texts are expressed but also to the different cultural traits and legal traditions of the communities for which they are meant. In particular, he finds significant variations in the specification of information in the various texts, which he claims are due to the differences in socio-cultural expectations and practices that constrain social behaviour in local contexts.

His analysis confirms the influence of cultural constraints in texts that are the result of a translation or a re-writing process used in international arbitration. While the main objective of using UNCITRAL Model Law was to create greater harmonization in various country specifications, Gotti, on the contrary, finds that this kind of total harmonization is clearly lacking. A more realistic objective might be to strive for a common understanding of terms and practices rather than total adoption and blind acceptance of proposed models. This might be achieved through the exercise of flexibility and non-involvement in decreeing rules for domestic arbitration, and emphasizing the freedom of action of individual states and the discretion of the institutions involved.

Confidentiality in arbitration

Arbitration is generally seen to be a private matter unless the agreements provide otherwise. It is assumed that any sensitive evidence, documentation or matters raised in the proceedings will not be made

public. In other words, contrary to the situation in court proceedings, personal confidences, trade secrets, business processes and reputations are effectively safeguarded.

Confidentiality, cost-effectiveness and flexibility in settling commercial disputes are some of the key aspects in arbitration as against litigation. Parties often weigh some of these advantages when they decide whether to refer the dispute to arbitration rather than litigation. However, there are substantial international differences in the existence and scope of the duty of confidentiality. Privacy ranks relatively low as the most important attribute of arbitration, in spite of an expectation that the proceedings will be conducted in the absence of strangers to the arbitration and that their business and personal confidences will be kept in strict confidence. The International Court of Arbitration (ICA) Rules of Arbitration provide for the protection of trade secrets and confidentiality of the award and the privacy of the hearings.

The confidential and informal nature of arbitration not only protects parties from potentially inconsistent jury awards, settlements and punitive damages that carry large liability, but also from public scrutiny and embarrassing criticism. In the case of labour disputes, arbitration is much preferred, since this allows the preserving of a positive employer-employee relationship with a greater possibility of employee reinstatement during the pendency of the dispute.

To, in his study of confidentiality in arbitration, mediation and litigation considers these issues from an international perspective taking into account case laws on arbitration and mediation from a number of prominent legal systems, including those in Australia, Hong Kong, the People's Republic of China, Sweden, Singapore, the United Kingdom, and the United States of America.

Arbitral awards

Unlike arbitration laws and rules which rely heavily on the use of typical lexico-grammatical features for clarity, precision, unambiguity and all-inclusiveness (Bhatia, 1993), modern English arbitral awards rely more on content. Awards are presented and expressed in modern, plain and effective English, and as such are readily comprehensible to the lay as well as to specialist audiences.

Tessuto argues that although the main purpose of arbitral awards is to provide simple, cost effective ways of resolving disputes, the arbitrator's

attitude is equally important, especially his or her socio-culturally-institutionalised judgment in contexts where social behaviour needs to be controlled, and justified.

Multicultural tribunals

Malanczuk, on the basis of his first hand experience of the Iran-United States Claims Tribunal, argues for the multi-cultural composition of the arbitrators in tribunals. This tribunal was created under unique circumstances, considering the diverse ideological premises of the parties, their political and military confrontation, and the volume of the economic interests at issue, and this was often reflected in the difficulties of its operation in practice. In that particular instance, Iran and the United States each appointed three arbitrators from their own countries. Since their national legal systems were as different as their languages, cultures and religion, these differences were further complicated by the diversity of the backgrounds and legal traditions of the third-country arbitrators from Sweden, Germany, Switzerland, Argentina, Poland, Finland, Netherlands and Italy. This made tribunal proceedings and decision in terms both of the procedure and the substantive law truly multicultural, offering a broad field of study for the meaning of the clash of legal cultures in international arbitration.

Translation

In the context of the globalization of international trade, the number of international disputes submitted to arbitration has increased tremendously in recent decades with actors from all continents speaking and writing in a multitude of languages. As a result of the acceptance of international instruments such as the UNCITRAL Model Law on International Commercial Arbitration, a high degree of harmonization has been achieved in national arbitration laws. The Model Law has been accepted in whole or in part by a large number of states and jurisdictions, many of which have incorporated it into their national law largely by an indirect process of translation. Although mostly behind the scenes, translation plays a vital role in numerous aspects of international arbitration, including the translation of legal documents for the proceedings, the translation of national arbitration laws into world languages, the translation of

institutional procedural rules and standard arbitral clauses, the production of multilingual instruments of international arbitration law and others. However, multilingualism in the law can be effective only if those affected by the instrument are guaranteed equality before the law, regardless of the language of the text. Although the authentic texts of a legal instrument are presumed to be equal in meaning, effect and intent, there is always a risk of linguistic diversity and error when translation is involved. If the divergences and errors are harmless, it is a less serious problem; however, in cases where more serious ambiguities are noticed, they can be potentially misleading, posing a threat to uniform interpretation and application. This assigns a serious responsibility to translators of legal documents. Šarčević, in her chapter, rightly argues that despite the growing use of English, translation plays a significant role not only in the globalization but also in the harmonization of international arbitration. However, she concedes that the process of legal translation can be risky even for native speakers if they have not participated in the drafting process and have no contact with the drafters of the authentic text or texts. Since the ultimate purpose of arbitration legislation is to resolve disputes, not to create new ones, translators have the difficult task of anticipating how the target text will be interpreted and applied by users of different legal, linguistic and cultural backgrounds (cf. Šarčević 2000: 72). The cause for concern is greater, she adds, when a similar divergence exists in the authentic texts of multilateral instruments of international law, which are interpreted and applied by national courts and arbitrators from diverse legal systems and cultures.

One of the most difficult aspects of legal translation is the issue of terminology, and Chroma, in her chapter, outlines some of the key terminological issues relevant for the translation of arbitration laws and procedures. She argues for a conceptual approach to terminology in legal translation which relies on the choice of seemingly equivalent terms in two or more different legal systems using two or more different languages as the vehicles of legal information, always based on the comparison of the scope (intension), applicability (in various contexts and genres), the purpose and effect of legal concepts. She recommends extensive conceptual analyses of key terms to avoid the potential risk of choosing translational equivalents which would not be adequate in the target legal system and, hence misleading or incomprehensible for the ultimate recipients.

To sum up, research reported in this volume has reinforced the necessity to pay attention to issues of both the language and the law as a means of harmonizing procedures in the construction, interpretation and

use of legal language in international legislative contexts. This volume is intended to take the realisation of this necessity forward in close international cooperation with established researchers and practitioners in language and law. The descriptive, interpretive and explanatory approach to the analysis of legislative data has enabled the contributors to this volume to highlight the significance of language analysis to an understanding of international arbitration laws in multilingual and multicultural legal jurisdictions.

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