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Limits on Party Autonomy in International Commercial Arbitration

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LIMITS ON PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

*Giuditta Cordero-Moss**

INTRODUCTION

International contracts are often drafted in a rather standardized manner, making use of so-called boilerplate clauses that aim at regulating the interpretation and operation of the contract. In addition, they often contain an arbitration clause that requires the parties to submit all disputes arising out of or relating to the contract to arbitration, thus excluding any involvement of national courts.

Standardised contract terms, including a boilerplate legal framework for the contract and arbitration clauses, are elements that seem to indicate an intention to render the contract self-sufficient. By including a detailed and extensive regulation of the legal relationship between the parties, the contract aims at making national law dispensable. If national law is not relevant, and the only basis for regulating the parties' legal relationship is the contract, it becomes possible and meaningful to standardise contract terms, even when contracts are intended to be implemented in a variety of legal systems, without the need to adapt them to the legal framework of the specific transaction. The impression of self-sufficiency is enhanced by the exclusion of national courts and the referral to arbitration instead. A

* Director of the Department of Private Law, Professor of Law at the University of Oslo. I presented the main lines of this article at the International Academy of Consumer and Commercial Law in Istanbul, July 2014. The article is originally published in the Oslo Law Journal 2014 No. 1, and is reproduced here with the consent of the publisher. The article was based on a paper that I presented at the Arbitration Forum of the Center for Transnational Litigation, Arbitration and Commercial Law, New York University, on February 3, 2014.

closed circuit is created, dominated by the will of the parties: the relationship is regulated by terms of contract agreed to by the parties, and disputes are solved by a private body bound by the contractual terms set forth by the parties. External sources, including national law, may seem redundant.

Self-sufficiency may seem a realistic goal as long as the legal relationship remains within the borders of the closed circuit. This assumes that the legal relationship is, at any time, subject to the terms and legal framework agreed between the parties.

There are, however, situations in which this assumption may turn out not to be true. For example, if a difference arises between the parties, and the parties disagree on what is the legal framework (notwithstanding that they may have agreed in the past, prior to the conflict); or if third parties' interests or public interests are affected, and mandatory rules or policies override the parties' agreement; or if the agreed terms or legal framework may be interpreted in more than one way or need specification by external sources. In these situations, the closed circuit is interrupted and recourse to external sources becomes necessary. To a certain extent, guidance may be sought in non-national, non-authoritative rules that may permit a uniform, transnational solution and thus reinstate the closed circuit. Where such a uniform guidance is not available, the closed circuit is interrupted again. When a full closed circuit cannot be assumed, party autonomy may be limited.

To assess the limits of party autonomy, it will be necessary to analyse the above mentioned situations where interference with the closed circuit may occur. Section II will briefly discuss to what extent the legal framework provided by the contract and possibly given effect to in arbitration may resist control and interference by national law; Section III will discuss to what extent the terms of the contract are capable of being interpreted in a uniform manner; Section IV will discuss to what extent transnational sources may provide a uniform legal framework capable of replacing national governing law; Section V will investigate to what extent the principle of faithful interpretation to the wording of the contract may be a guiding principle for arbitral tribunals.

I. EXTERNAL LIMITS TO PARTY AUTONOMY: COURT CONTROL

The closed circuit described above meets the expectations as long as the arbitral tribunal gives effect to the will of the parties as embodied in the contract and the award is complied with by the losing party or enforced by the courts. The closed circuit fails when an arbitral award becomes invalid or unenforceable as a consequence of having given effect to the contract terms.

International arbitration is an alternative method of solving contractual disputes that is based on the consent of the parties. If the parties agree to submit their disputes to arbitration, then the ordinary courts will have to decline jurisdiction on those disputes, and the only possible mechanism to solve the dispute will be the arbitration that has been chosen by the parties. If, on the contrary, the parties have not entered into an arbitration agreement, disputes between them will have to be solved by the national court that has jurisdiction. An arbitral tribunal, in other words, bases its existence upon the parties' agreement. Moreover, the parties determine the composition of the arbitral tribunal, the procedural rules that have to be followed by the arbitral tribunal, the scope of the tribunal's competence and its power. The arbitral tribunal is bound to follow the instructions of the parties; otherwise, it exceeds the power that the parties have conferred on it. If the arbitral tribunal exceeds its power, neither its jurisdiction nor its award are founded on the parties' agreement, and there is, consequently, no legal basis for either of the two. These basic elements of arbitration are based on the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, ratified by 155 countries¹ and are reflected in most national arbitration laws, as well as in the UNCITRAL Model Law on International Commercial Arbitration, adopted in sixty-nine countries.²

¹ For a list of ratifications, see UNCITRAL, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on June 19, 2015).

² For a list of Model Law countries, see UNCITRAL, Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,

Arbitration's dependence on the parties' will, which is so uniformly recognised, is an important factor strengthening the opinion that arbitration is a private matter between the parties, that the arbitral tribunal is bound to follow the parties' instructions, and that national courts or state laws have no possibility of interfering with the parties' will. This opinion is certainly confirmed by the observation that the vast majority of arbitral awards are complied with voluntarily by the losing party. The parties agree to submit the dispute to arbitration, then they instruct the arbitral tribunal as to the scope of the dispute, the rules to be applied, etc., then the losing party recognizes the arbitration's result and complies voluntarily with the award. In situations such as this one, the totality of the arbitration takes place in the private sphere of the parties. There is no point of contact between the national courts and the arbitration. Consequently, no national judge may decide to override the parties' contract or expectations by considering an agreement invalid due to violations of E.U. competition law³ or a contract not binding due to one of the parties not having legal capacity according to the law to which it is subject.⁴ The arbitrators may or may not decide to apply these rules, but, as long as the losing party accepts the result of the arbitration, there will be no possibility for any judge to verify the arbitrator's decision. In these cases, therefore, limits to party autonomy are relevant only to the extent that the parties request the arbitral tribunal apply state law or the tribunal elects to do so on its own motion. When the losing party does not voluntarily comply with the award, the courts will intervene. In these cases, the closed circuit is interrupted and limitations to party autonomy may become relevant.

The formal framework for arbitration grants it a relative autonomy, which actually gives the appearance of an autonomous

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited June 19, 2015).

³ Violation of E.U. competition law is, according to a controversial ECJ decision, to be deemed as a violation of *ordre public* and therefore prevents enforcement of the award under the New York Convention. Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-03055.

⁴ That each of the parties' own law governs their legal capacity, quite irrespective of which law the parties chose to govern the contract, is regulated by the New York Convention and the UNCITRAL Model Law and was confirmed by the Swedish Court of Appeal. Hovrätt (HOVR) (Court of Appeals) 2007-12-17 T3108-06 (Swed.); see KLUWER ARBITRATION, 6 ITA MONTHLY REPORT, MAY (2008).

system. The main instrument upon which arbitration is founded, as previously mentioned, is the New York Convention, that binds the courts of these countries to recognise arbitration agreements and thus dismiss claims that are covered by an arbitration agreement, as well as to recognise and enforce arbitral awards without any review of the merits or of the application of law – with only a restrictive and exhaustive list of grounds to refuse recognition and enforcement. UNCITRAL Model Law is also an important instrument, issued in 1985 and revised in 2006, which has contributed to a considerable harmonisation of the areas of arbitration law that are not covered by the New York Convention. The UNCITRAL Model Law is, in turn, based on the same principles as the New York Convention, which means that together these instruments create a harmonised legal framework for arbitration. Both instruments give a central role to the will of the parties. The power of the arbitral tribunal actually derives from the agreement of the parties; therefore, the arbitral tribunal is obliged to follow the parties' instructions in respect of the scope of the dispute, the law to be applied, and the remedies to be granted.

All this confirms, to a large extent, the understanding of arbitration as an autonomous system, based on the will of the parties and detached from national law. However, both the New York Convention and the UNCITRAL Model Law refer to national, non-harmonised legislation in a number of instances and thus reduce in few, but significant, respects the detachment of arbitration from national laws. Thus, national law defines what may be subject to arbitration, when an award is deemed to conflict with public policy, what the criteria are for an arbitration agreement to be binding on the parties, what mandatory rules of procedure apply, and when an award is valid.⁵ In these situations, the closed circuit is interrupted.

For example, a contract between a Norwegian and a Ukrainian party was submitted by the parties to Swedish law; after a dispute arose and arbitration was initiated, the Ukrainian party maintained that it was

⁵ For a more extensive analysis, see Luca Radicati di Brozolo, *International Arbitration and Domestic Law*, in INTERNATIONAL COMMERCIAL ARBITRATION, DIFFERENT FORMS AND THEIR FEATURES 40, 40-57 (Giuditta Cordero-Moss ed., 2013); see also Giuditta Cordero-Moss, *International Arbitration is Not Only International*, in INTERNATIONAL COMMERCIAL ARBITRATION, DIFFERENT FORMS AND THEIR FEATURES 7, 7-39 (2013).

not bound by the contract, because its representatives had signed the contract in a way that did not meet the formal requirements of Ukrainian law; the arbitral tribunal followed the choice of Swedish law contained in the contract, considered the contract validly signed according to Swedish law and disregarded Ukrainian law as irrelevant. The arbitral tribunal, therefore, fulfilled the closed circuit; however, the award was set aside by the courts of the country where it was rendered, Sweden, because the legal capacity of a party is subject not to the law chosen by the parties in the contract, but to the law of each of the parties.⁶ The closed circuit was interrupted, and party autonomy restricted.

In another example, the European Court of Justice found that an award would be invalid and unenforceable for violation of public policy if it gave effect to a contract that does not comply with competition law.⁷ Had the arbitral tribunal been willing to follow the terms of the contract in full, the award would not be valid or enforceable; this is, therefore, another limitation to party autonomy.

Another example is a decision by a Russian court, refusing to enforce an award that had given effect to a shareholders agreement among the shareholders of a Russian company.⁸ The shareholders agreement regulated the parties' rights and obligations in a manner that did not comply with Russian company law, and the court found that enforcing the award would have violated Russian public policy. The harmonised framework for arbitration is, therefore, subject to national law in several significant respects, and this may have an impact on the

⁶ Hovrätt (HOVR) (Court of Appeals) 2007-12-17 T3108-06 (Swed.); *see* Kluwer Arbitration, *supra* note 4. For a more extensive analysis, *see* Giuditta Cordero-Moss, *Legal Capacity, Arbitration and Private International Law*, in CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW – LIBER AMICORUM KURT SIEHR (Katharina Boele-Woelki et al. eds., 2010).

⁷ Eco Swiss China Time Ltd., 1999 E.C.R. I-03055.

⁸ [Ruling of the Western-Siberian District Commercial Court on March 31, 2006], No.F04- 2109/2005(14105-A75-11) (Rus.) (regarding an arbitral award on a shareholder agreement between, among others, OAO Telecominvest, Sonera Holding BV, Telia International AB, Avenue Ltd, Santel Ltd, Janao Properties Ltd and IPOC International Growth Fund Ltd.).

enforceability of arbitration agreements and of arbitral awards, which in turn restricts the effects of party autonomy.⁹

II. TERMS OF CONTRACT: ABSOLUTE AND UNIFORM INTERPRETATION?

With the exceptions seen in Section 1, the liberal framework for arbitration permits to recognise and enforce awards even if the award were based on a wrong interpretation of the contract or of the evidence, it applied the applicable law wrongly, or it applied the wrong law. If the award gives effect to the regulation contained in the contract, therefore, it will mostly be recognised and enforced even though the contract may have disregarded and violated the applicable law. Arbitration, therefore, to a large extent seems to permit relying on the assumption of the closed circuit. This, however, does not imply that party autonomy is absolute. An absolute party autonomy, not at all affected by external elements, assumes that the terms of the contract have a uniform meaning flowing from the words, and that they therefore may be interpreted equally in all legal systems.

It is, however, not uncommon that contract terms need to be understood in light of assumptions and effects founded on the applicable legal framework. Even plain words may acquire different meanings, depending on the culture and tradition of the interpreter. Take an apparently self-explanatory expression such as “summer nights.” If read by an Italian, it will create associations with a dark and warm night, possibly with crickets singing and a sky full of stars. If read by a Norwegian, it will evoke a bright and chilly night, with the sun as the only visible star. If the meaning of plain words is affected by the context, even more so it is for terms of a contract, as they refer not to a natural phenomenon, but to legal effects that are created and supported by legal systems, which in turn use words as the most

⁹ For a more extensive analysis of the matter, see GIUDITTA CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS ch. 5 (2014); *see also* Giuditta Cordero Moss, *International Arbitration and the Quest for the Applicable Law*, 8 GLOBAL JURIST 1 (2008). A research project at the University of Oslo analyses the limits that this may impose on party autonomy. *See* UiO Dep’t of Private Law, The Fac. Of Law, *Arbitration and Party Autonomy (APA)*, (Nov. 17, 2009), <http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/index.html>.

important means to create and define those legal effects. It then becomes even more difficult to separate the legal effects from the words used to express them. In this situation, it may be illusionary to expect that the terms of a contract have an absolute meaning, fully independent of any legal framework or legal tradition.

National legal systems may differ from each other in many respects that are relevant to a contract, even when the systems belong to the same legal tradition, so-called legal family. Even more so there will be differences across legal families, such as the common law and the civil law. Modern comparative law research is inclined to consider this divide as overrated and largely overcome by a common core of European contract law. The common core reveals a certain synchrony between the systems on an abstract level, but it does not necessarily lead to harmonised solutions on a specific level.¹⁰ Awareness about a common core may show that a certain principle may be recognised and a certain result may be achieved in a plurality of legal systems, albeit by employing different legal techniques. In a specific case, however, it is the particular legal technique employed in the contract that counts, and not the abstract possibility of achieving the desired result, if only the right legal technique had been adopted.

A. The Applicable Law's Impact on Force Majeure Clauses

An example of term of contract that may have different legal effects depending on the legal framework, is the so-called Force Majeure clause. This clause is meant to excuse a party's non-performance of its obligation if fulfilment was prevented by an event beyond that party's control that was unforeseeable and could not be reasonably overcome. One question is how the requirement of "beyond the control" shall be interpreted. Interpretation may be

¹⁰ BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW (Giuditta Cordero-Moss ed., 2011). This book is based on a research project that I ran at the University of Oslo from 2004 to 2009, and shows that the same contract wording may lead to diametrically different legal effects, depending on the governing law. See, particularly, part 3 in the book, as well as the Conclusion; see also INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 9, ch. 3.

influenced by the legal system's understanding of the assumptions for liability.

An illustration of this situation is when a producer cannot fulfil its obligations, because it did not receive raw materials from its supplier. The question is whether failure by a party's supplier may be deemed as an event falling outside of that party's sphere of control. To answer this question, it is necessary to understand the purpose of the Force Majeure clause.

There may be several different goals for regulations on exemptions from liability for non-performance. In some legal systems, the aim is to allocate between the parties the risk for supervening unexpected events according to which one of the two parties is closer to bear that particular risk. This approach assumes a strict liability, triggered irrespective of the conduct of the party that was prevented from performing its obligations.

According to an alternative approach, the risk for unexpected events should not be borne by a party, as long as that party has acted diligently and cannot be blamed for the occurrence of the impediment - even if in an objective allocation of risk that party would be closer to bear such risk.

The legal systems, that follow the criteria of the strict liability and the allocation of risk between the parties according to the respective spheres of control, would consider the choice of supplier to be an event falling within the sphere of control of the seller. Certainly this impediment would not fall within the sphere of the buyer and, since all risks have to be allocated between the parties, it follows that it must fall within the sphere of the seller. That the producer has been diligent in selecting its supplier and cannot be blamed for the supplier's failure to deliver is not relevant. This is the approach taken by English law.¹¹

German law has a different approach. According to § 276 BGB, if the prevented party is to be blamed for the impediment or its consequences, it cannot be excused from liability. If, however, the

¹¹ EDWIN PEEL, *TREITEL ON THE LAW OF CONTRACT*, ¶. 17064 (13th ed. Sweet & Maxwell, 2011).

prevented party can prove that it has not acted negligently, it will be excused from liability. If the seller has operated with diligence in the choice of supplier, it would not be considered liable for non-performance due to failure by the supplier.

The distinction between Common Law and Civil Law in the context of liability for non-performance can be explained with the inclination of the English system to privilege predictability, for the sake of ensuring that business is carried out smoothly, rather than ensuring that an equitable justice is made in the specific case.¹² Common Law allocates the risk of non-performance between the parties according to where it is most likely that the risk should be borne. This objective rule is not to be defeated by subjective criteria such as lack of negligence, because it would render the system less predictable. Civil Law systems privilege (in different degrees) the subjective elements of the specific case, in order to ensure that an equitable solution is reached.

Applied to the example made above, this means that the Force Majeure clause may be understood differently under the different governing laws. As a result, in a contract containing the same wording, a producer who cannot fulfil its supply obligations due to failure by the raw materials supplier, is not excused under English law,¹³ whereas he is excluded under, for example, Norwegian law.¹⁴

B. The Applicable Law's Impact on Entire Agreement Clauses

Another example of term of contract that may be interpreted differently depending on the legal framework is the so-called Entire Agreement clause. This is a recurring clause in contract practice and states that the document signed by the parties contains the whole agreement and may not be supplemented by evidence of prior statements or agreements.

The purpose of the Entire Agreement clause is to isolate the contract from any source or element that may be external to the document. This is also often emphasised by referring to the four

¹² For a more extensive discussion and references, see INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 9, ch. 3.

¹³ PEEL, *supra* note 11.

¹⁴ See *infra* notes 32-35.

corners of the document as the borderline for the interpretation or construction of the contract. The parties' aim is thus to exclude that the contract is integrated by terms or obligations that do not appear in the document.

The parties are obviously entitled to regulate their interests and to specify the sources of their regulation. However, many legal systems provide for ancillary obligations deriving from the contract type,¹⁵ a general principle of good faith,¹⁶ or a principle preventing an abuse of rights.¹⁷ This means that a contract would always have to be understood not only on the basis of the obligations that are spelled out in it, but also in combination with the elements that, according to the applicable law, integrate it. A contract, therefore, risks having different content depending on the governing law: the Entire Agreement clause is meant to avoid this uncertainty by barring the possibility of invoking extrinsic elements. The Entire Agreement clause creates an illusion of exhaustiveness of the written obligations.

This is, however, only an illusion: first of all, often ancillary obligations created by the operation of law may not be excluded by the contract.¹⁸ Moreover, some legal systems permit bringing evidence that

¹⁵ For France, see, Xavier Lagarde et al., *The Romanistic Tradition: Application of Boilerplate Clauses Under French Law*, in *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW*, *supra* note 10, § 2. For Italy, see Art. 1347 C.c. [Civil Code] (It.); Giorgio De Nova, *The Romanistic Tradition: Application of Boilerplate Clauses Under Italian Law*, in *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW*, *supra* note 10, § 1, as well as the general considerations on Art. 1135 of the Civil Code in Section 1. For Denmark, see Peter Møgelvang-Hansen, *The Nordic Tradition: Application of Boilerplate Clauses Under Danish Law*, in *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW*, *supra* note 10, § 1.

¹⁶ See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, § 242 (Ger.) (for the general principle on good faith in the performance of contracts); see Gerhard Dannemann, *Common Law Based Contracts Under German Law*, *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW*, *supra* note 10, §§ 3.2-3.3 (for examples of its application by the Courts).

¹⁷ See, for Russia, Ivan Zykin, *The East European Tradition: Application of Boilerplate Clauses Under Russian Law*, in *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW*, *supra* note 10, § 1.

¹⁸ See, for France and Italy, *supra* note 15. For Finnish law, see Gustaf Möller, *The Nordic Tradition: Application of Boilerplate Clauses Under Finnish Law*, in

the parties' agreement creates obligations different from those contained in the contract.¹⁹ Furthermore, many civilian legal systems openly permit the use of pre-contractual material to interpret the terms written in the contract.²⁰ Finally, a strict adherence to the clause's wording may, under some circumstances, be looked upon as unsatisfactory even under English law, in spite of the formalistic interpretation style that English law may employ in respect of other clauses.²¹

BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 2.1.

¹⁹ See, for Germany, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 309, no. 12 (Ger.), prohibiting clauses which change the burden of proof to the disadvantage of the other party; see Ulrich Magnus, *The Germanic Tradition: Application of Boilerplate Clauses Under German Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 5.1.1.a. Italy, on the contrary, does not allow oral evidence that contradicts a written agreement. See Giorgio De Nova, *The Romanistic Tradition: Application of Boilerplate Clauses Under Italian Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 1.

²⁰ In addition to Germany, *supra* note 19, see for France, Xavier Lagarde et al., *The Romanistic Tradition: Application of Boilerplate Clauses Under French Law*, in CORDERO-MOSS (ed.), *supra* note 10, § 2; for Italy, Giorgio De Nova, *supra* note 15, § 4; for Denmark, Peter Møgelvang-Hansen, *The Nordic Tradition: Application of Boilerplate Clauses Under Danish Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 2.1; for Norway, Viggo Hagstrøm, *The Nordic Tradition: Application of Boilerplate Clauses Under Norwegian Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 3.1; for Russia, Ivan Zykin, *The East European Tradition: Application of Boilerplate Clauses Under Russian Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 2.1. The situation seems to be more uncertain in Sweden, see Lars Gorton, *The Nordic Tradition: Application of Boilerplate Clauses Under Swedish Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 5.4.2.d, and more restrictive is Finland, see Gustaf Möller, *The Nordic Tradition: Application of Boilerplate Clauses Under Finnish Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 2.1.

²¹ See Edwin Peel, *The Common Law Tradition: Application of Boilerplate Clauses Under English Law*, in BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW, *supra* note 10, § 2.1.

The effect of the clause, therefore, does not flow from its simple words, but is the result of a combination of the clause and of the governing law.

III. TRANSNATIONAL LAW: A UNIFORM LEGAL FRAMEWORK?

We have seen above that contracts' terms are not capable of being interpreted without making reference to the applicable legal framework. Even though arbitral tribunals in many situations are allowed to consider exclusively the terms of the contract without running the risk of triggering invalidity or unenforceability of the award, they may find that the terms of the contract are not a sufficient basis for the decision and must be integrated by external elements. Admittedly, arbitration may (to a certain extent, as was seen in Section 1) be capable of giving effect to the regulation agreed to by the parties in the contract without being obliged to comply with the peculiarities of the applicable law. However, the terms of the contract are not self-explanatory and have to be interpreted in light of the applicable legal framework, as was seen in Section 2. That the arbitral tribunal is free to interpret the contract and to decide how, if at all, the contract shall interact with the applicable law, does not give an answer to the question of how to interpret terms that are not self-explanatory. This may result in different interpretations of the same contract terms depending on the arbitrator's background and inclination, and thus impacts on party autonomy.

It is worthwhile exploring whether the idea of an absolute party autonomy may be reinstated by including a uniform legal framework into the closed circuit. It is often proposed that transnational sources may give a uniform legal framework for international contracts. Transnational sources are concerned with giving effect to commercial practice without abiding by the peculiarities of the various legal systems; this could be deemed to make national laws redundant.

The differences among the various national legal systems have prompted various initiatives to formulate trans-national sets of rules, in part developed spontaneously by business practice and in part restated and codified by branch organizations, international organisations, academic fora, etc. This complex of sources goes under

various names, such as *lex mercatoria*, transnational law or soft law.²² If transnational sources gave an exhaustive and harmonised regime, it would be possible to include these sources as the only applicable legal framework for the contract and thus reinstate the closed circuit.

As I argue elsewhere, however, transnational sources are not sufficiently precise and systematic to replace national laws²³ - not to mention the formal circumstance that transnational sources may not, as a matter of private international law, govern a contract to the exclusion of any state laws.²⁴ Some of the most recognized transnational sources – in particular, the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL) – are heavily based on a general principle of good faith.²⁵ Good faith is a legal standard that needs specification and there does not seem to be any generally acknowledged legal standard of good faith that is sufficiently precise to be applied uniformly, irrespective of the governing law.

Moreover, these instruments grant the interpreter much room for interference regarding the wording of the contract – based on the central role given to the principle of good faith. This seems to contradict the very intention of standard contracts. International contract practice is meant to be exhaustive and self-sufficient, and not to be influenced by the interpreter's legal tradition.²⁶ Any correction by principles such as good faith would run counter to the expectations of the parties.

²² Literature on the subject matter is very vast. Among the works most frequently referred to are FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* (1992); KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (2d. ed., 2010), and Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 *INT'L & COMP. L.Q.* 747, 747-768 (1985). For extensive references see ROY GOODE ET AL., *TRANSNATIONAL COMMERCIAL LAW – TEXTS, CASES AND MATERIALS 24* (Oxford Univ. Press 2007).

²³ For a more extensive discussion, see *INTERNATIONAL COMMERCIAL CONTRACTS*, *supra* note 9, §§ 2.4, 4.2.3.

²⁴ For a more extensive discussion, see *id.* § 4.2.3.

²⁵ For a more extensive discussion, see *id.* § 2.4.2.

²⁶ For a more extensive discussion of the ambitions of self-sufficiency in contract practice, *id.* ch. 1.

The same applies to the instruments developed so far in the ongoing work on a European contract law. The Academic Draft Frame of Reference, the Acquis Principles, and the Common European Sales Law (CESL), all largely based on the PECL, have a double approach to commercial contracts: they extend rules of consumer protection to commercial contracts (including an extensive and mandatory principle of good faith), and then moderate them by reserving for contrary good commercial practice. Reference to good commercial practice as the only concretisation of the principle of good faith assumes that the interpreter is in a position to define good commercial practice and to assess its content. What constitutes good commercial practice, however, is not clear. It may be assumed that it coincides with the above mentioned spontaneous or academic transnational sources that often are deemed to be particularly apt to govern international contracts and that go under the name of transnational law or *lex mercatoria*: scholarly works on the convergence of legal systems, general principles, restatements, and trade usages. As will be seen, these sources are not capable of giving a clear and harmonized picture of the transnational law of commercial contracts; hence, they do not give a clear picture of what good commercial practice is. Reference to good commercial practice, therefore, does not create a concrete standard of good faith.

Transnational sources, thus, do not always provide a uniform solution. The arbitrator who is required to interpret contract terms will not find a definitive and uniform standard of interpretation in these sources, and will need to make recourse to other sources, thus interrupting again the closed circuit.

A. Interpretation of Force Majeure Clauses under Transnational Law

To test the ability of transnational law to overcome the disparity of legal traditions, we can look at the examples made in Section 2 above. We saw that the expression “beyond the control” in *Force Majeure* clauses may be interpreted differently depending on the governing law. Does the transnational law offer a uniform solution? One of the most successful instruments of harmonization of contract law is the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG), ratified by over sixty countries and looked

upon, especially in some academic circles,²⁷ as embodying principles that are generally recognized and reach well beyond the convention's scope of application.

According to Article 79 of the CISG, a party is not liable for failure to perform its obligations if it proves that the failure was due to an impediment beyond its control that was unforeseeable and could not reasonably have been overcome.

The CISG does not contain any reference to the diligence of the affected party as criterion for exempting it from liability; in another context, the convention confirms that diligence is not a criterion for excuse: Articles 45(1)(b) and 61(1)(b) regulate that each party may exercise contractual remedies for non-performance against the other party without having to prove any fault or negligence or lack of good faith on that party, nor do they mention that any evidence of diligence would relieve the other party from its liability.

The Secretariat Commentary does not address the question of how the criterion of the sphere of control shall be interpreted, whether literally, or as a reference to the diligent conduct of the seller.²⁸ Bearing in mind that the CISG requires it to be interpreted autonomously, without reference to domestic legal systems, it seems appropriate to apply the literal interpretation and to see Article 79 as a reference to an objective division of the landscape into two spheres, that of the seller and that of the buyer, without reference to specific actual possibilities to exercise control. This is confirmed by case law and doctrine, which affirm that procurement risk falls within the sphere of risk of the seller, and that therefore failure by the seller's supplier is not deemed to fall outside of the seller's sphere of responsibility (unless the relevant good has disappeared completely from the international market).²⁹ In the

²⁷ For a thorough analysis of the enormous impact of the CISG on scholars, see *THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS* 436 (Franco Ferrari, ed., Sellier European Law Publishers, 2008). Ferrari also shows, however, that the level of awareness about the CISG in the business community and among practicing lawyers is strikingly low. *Id.* at 421.

²⁸ *Commentary On The Draft Convention On Contracts For The International Sale Of Goods, Prepared By The Secretariat, U.N. Doc. A/CONF.97/5* (Mar. 1, 1979).

²⁹ See Dionysios Flambouras, *The Doctrines of Impossibility of Performance and clausula rebus sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale*

comment to the second paragraph of article 79 on use of sub-contractors, the Commentary specifies that this special rule does not include suppliers of raw material or of goods to the seller.³⁰

However, this is not the only way of understanding the criterion of “beyond the control.” Article 79 of the CISG may be interpreted differently, depending on the interpreter’s legal tradition – something that has been defined as “troubling.”³¹

Norway implemented the CISG with the Sale of Goods Act. The Sale of Goods Act, in Section 27, introduced the concept of impediment beyond the control of the prevented party, with a literal translation of Article 79 of the CISG.³² By introducing this concept, the legislator intended to mitigate the then-existing regime, which was based on strict liability.³³

Norwegian legal doctrine interprets the criterion of “beyond the control” not as having an *abstract* understanding of each party’s sphere of control, but on the basis of the *actual* sphere of control of each party.³⁴ Only if one party actually has the possibility of influencing a certain process are the events caused by that process deemed to be within the sphere of control of that party. That a party has started a process, in itself, does not mean that any events occurring in the course of that process are in the sphere of control of that party. The test must be if that party actually had the possibility of influencing the part of the process in connection with which those events occurred. Hence, in the case of procurement risk, the interpretation of what is “beyond

of Goods and the Principles of European Contract Law: A Comparative Analysis, 13 PACE INT’L L. REV. 261, n.20 (2001). See also COMMENTARY ON THE UN CONVENTION OF THE INTERNATIONAL SALE OF GOODS (CISG) art. 79, ¶¶ 11, 18, 37 (Schlechtriem & Schwenger, eds., Oxford Univ. Press 2010) (although ¶ 27 seems to embrace the Germanic tradition).

³⁰ See *supra* note 28, at 64.

³¹ Schlechtriem & Schwenger, eds., *supra* note 29, art. 79, ¶ 11, at n.30.

³² Sale of Goods Act of 13 May 1988 §27 (Nor.).

³³ Ot.prp. nr. 80 (1986–87), pp. 38 et seq. and, extensively on the preparatory works in this context, Viggo Hagström, *Obligasjonsrett*, § 19.4.2. (Universitetsforlaget, 2d. ed., 2011).

³⁴ See Hagström, *supra* note 33. For a more extensive analysis, see Giuditta Cordero-Moss, *Lectures on comparative law of contracts*, 166 Institutt for privatretts stensilserie bd. 151 et. seq. (2004).

the control” is opposite to the outcome under the CISG: the producer chose its supplier, and this choice is certainly within the producer’s sphere of control (it could have chosen another supplier, and then the default would not have happened). However, the producer has no actual possibility of influencing the performance of the supplier, therefore any impediment in connection therewith is to be deemed outside of its sphere of control.³⁵

In conclusion, the CISG does not seem to provide a uniform standard for the interpretation of Force Majeure clauses.

B. Interpretation of Entire Agreement Clauses under Transnational Law

The other example of contract term with inconsistent legal effects made in Section 2 above, is the Entire Agreement clause.

This clause is recognised in Article 2.1.17 of the UPICC and Article 2:105 of the PECL, with some restrictions: the provisions specify that prior statements or agreements may be used to interpret the contract. This is one of the applications of the general principle of good faith; it is, however, unclear how far the principle of good faith goes in overriding the clause inserted by the parties. If prior statements and agreements may be used to interpret the contract, does this mean that more terms may be added to the contract if, for example, the parties have discussed certain specifications at length during the negotiations and this has created in one of the parties the reasonable

³⁵ Viggo Hagstrøm *supra* note 33, § 5.3. Hagstrøm’s interpretation is based on a Supreme Court decision rendered in 1970, long before the implementation of the CISG in the Norwegian system. However, the Supreme Court’s decision is still referred to as correctly incorporating Norwegian law after the enactment of the Sales of Goods Act, as the reference made by Hagstrøm confirms. *See also* Anders Mikkelsen, *HINDRINGSFRI TAK 33* (Gyldendal, 2011). A Supreme Court decision affirmed that liability is strict when the goods to be delivered are generic. *See* HR-2004-00755-A-Rt-2004-675 (Supreme Court, Dom) (Nor.). The test will then be whether the defects objectively are within the sphere of control of the seller. In this context, therefore, the Supreme Court has rejected the test of actual control and is more in line with the regulation contained in the CISG. This approach is consistent with the German tradition, that distinguishes between generic obligations (where liability is strict) and specific obligations (where the criterion of diligence applies). This distinction was abandoned with the 2002 reform of the BGB.

expectation that the specifications would be implied in the contract even though they were not included in the final contract text? Article 1.8 of the UPICC would seem to indicate that this would be the preferred approach under the UPICC. According to this provision, a party may not act in a way inconsistent with reasonable expectations that it has created in the other party. This is spelled out in the PECL, Article 2:105, Paragraph 4, which states that, “[a] party may by its statements or conduct be precluded from asserting a merger clause³⁶ to the extent that the other party has reasonably relied on them.”

According to this logic, the detailed discussion during the phase of negotiations of certain characteristics for the products may create the reasonable expectation that those specifications have become part of the agreement even if they were not written in the contract; their subsequent exclusion on the basis of the Entire Agreement clause may be deemed to be against good faith.

According to the opposite logic, however, the very fact that the parties have excluded from the text of the contract some specifications that were discussed during the negotiations, indicates that no agreement was reached on those matters. Exclusion of those terms from the contract, combined with the Entire Agreement clause, strongly indicates the will of the parties not to be bound by those specifications. Their subsequent inclusion on the basis of the good faith principle would run counter to the parties’ intention.

The foregoing shows that the application of the UPICC and of the PECL requires a specification of the principle of good faith. Is it to be intended as an overriding principle, possibly creating, restricting or modifying the obligations that flow from the text of the contract? Or is it meant to take the text of the contract as a starting point, ensuring that the obligations contained therein are enforced accurately and precisely as the parties have envisaged them? This represents the dichotomy between, on the one hand, the understanding of fairness as a principle ensuring balance between the parties notwithstanding the regulation on which the parties may have agreed, and, on the other hand, the understanding of fairness as a principle ensuring

³⁶ “Merger clause” is another definition of the Entire Agreement clause, which may also be called the “Integration clause.”

predictability, and leaving it to the parties to evaluate the desirability of their contract regulation. This dichotomy characterises the different approaches of the common law and the civilian tradition.³⁷ To enhance the ability of the UPICC to harmonize contract law, UNIDROIT has created in 1992 a data base collecting court decisions and arbitral awards on the various provisions of the UPICC. This is, therefore, the best source to turn to when inquiring how to interpret the Entire Agreement clause under the UPICC.

As of 2013, the Unilex database contained five decisions on Article 2.1.17 of the UPICC. These decisions are not based on a consistent understanding of the standard according to which the clause shall be applied.³⁸ The Unilex database shows two approaches to Article 2.1.17 of the UPICC: one advocating the primacy of the contract's language, and the other assuming that the UPICC provides for the primacy of the real intention of the parties, which in turn may lead to considerably restricting the effect of the Entire Agreement clause. Evidently, this is not sufficient to give guidance as to which approach to choose when addressing the conflict between the contract's language and the principle of good faith. This leaves so much room to the discretion of the interpreter that it seems unlikely for Article 2.1.17 of the UPICC to give a harmonized regulation of its subject-matter. The UPICC, therefore, does not contribute considerably to a harmonized standard of interpretation.

IV. ARBITRAL TRIBUNALS: FAITHFUL TO THE INTENTION OF THE PARTIES

Above we have seen that the arbitral tribunal may, to a large (but not unlimited) extent, disregard the governing law without consequences for the validity and enforceability of the award; we have also seen that this is not a sufficient answer to the question of how to interpret terms of the contract that are not self-explanatory; we have further seen that it is not always possible to find a uniform standard of interpretation in translation sources. A principle that is often invoked

³⁷ For a more extensive discussion, see INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 9, ch. 3.

³⁸ *Id.* § 2.4.2.1.

in these circumstances is that the arbitral tribunal has a duty to be faithful to the will of the parties.

Does a duty to be faithful to the will of the parties give sufficient guidelines?

The arbitral tribunal may certainly not be inclined to let the terms of the contract be overridden by the formalities of the various national legal systems, but that does not give an answer to the question of how contract terms shall be interpreted.

We can assume a long-term loan agreement with an Early Termination clause permitting immediate termination of the contract and consequently the immediate repayment of the whole principal upon breach of the obligations contained in a certain clause.

A literal interpretation of the Early Termination clause permits termination even when the breach is insignificant – for example, when the borrower has submitted its financial statements to the lender with one-day delay.³⁹ The breach may have had no consequences on the borrower's creditworthiness, on its ability to repay the loan, or on the lender's ability to verify these matters; the real reason for the lender to terminate the loan may have been that the interest rates had increased since the time of signing the loan, and that the lender considered the threat of early termination as effective leverage for negotiating a higher interest rate. This would not be relevant in a literal interpretation: the clause would be considered applicable without regard to the real reasons for which it is invoked.

A purposive interpretation of the clause takes into consideration the purpose of the clause and tries to assess whether the particular situation may be deemed to fall into the scope of the clause. This may lead to considering the clause as not applicable in a situation where the reasons for which it is invoked do not correspond to the purpose of the clause.

³⁹ The borrower's obligation to submit its financial statements is usually in loan agreements and is generally to be found in the section of the so-called covenants. It is meant to make it possible for the lender to control the borrower's continued creditworthiness.

What is more faithful to the intention of the parties: a literal implementation of the clauses that may permit speculative or abusive conduct or an integration of the clauses with considerations of business purpose, good faith, and trade usages? There seems to be no absolute answer to the question of what interpretation better meets the expectations of the parties: a strictly literal interpretation of the terms of the contract, or an integration of the contract with principles of good faith and commercial sense based on law, trade usages, transnational principles or other sources. The former would better reflect the parties' expectations if it is assumed that the parties have consciously intended to achieve specific legal effects with each and every of the words that they have written in the contract. This, however, does not reflect the reality of how contracts are drafted and negotiated, as will be seen below.

A. The Dynamics of Contract Drafting

Often, some of the clauses in a contract are inserted without the parties having given any particular consideration to their content or their effects under the applicable law.⁴⁰ This practice may be surprising, considering the importance that the governing law has for the application and even the effectiveness of contract terms, as was seen above. However, the practice of negotiating detailed wording without regard to the governing law, or even of inserting contract clauses without having negotiated them, is not necessarily always unreasonable. From a merely legal point of view, it makes little sense, but from the overall economic perspective, it is more understandable. The gap between the parties' reliance on the self-sufficiency of the contract and the actual legal effects of the contract under the governing law does not necessarily derive from the parties' lack of awareness regarding the legal framework surrounding the contract. More precisely, the parties may often be aware of the fact that they are unaware of the legal framework for the contract. The possibility that the wording of the contract is interpreted and applied differently from

⁴⁰ A more extensive analysis of the practice of contract drafting is made in INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 9, ch. 1.

what a literal application would seem to suggest may be accepted by some parties as a calculated risk.⁴¹

Considerations regarding the internal organization of the parties are also a part of the assessment of risk. In large multinational companies, risk management may require a certain standardization, which in turn prevents a high degree of flexibility in drafting the single contracts. In balancing the conflicting interests of ensuring internal standardization and permitting local adjustment, large organizations may prefer to enhance the former.⁴² It is, in other words, not necessarily the result of thoughtlessness if a contract is drafted without having regard for the governing law. Neither is it a symptom of a refusal of the applicability of national laws. It is the result of a cost-benefit evaluation, leading to the acceptance of a calculated legal risk. The sophisticated party, aware of the implications of adopting contract models that are not adjusted to the governing law and consciously assessing the connected risk, will identify the clauses that matter the most, and concentrate its negotiations on those, leaving the other clauses untouched and accepting the corresponding risk.

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

B. The Need for Predictability

On the other hand, predictability is extremely important in commercial contracts. The parties are interested in enforcing their rights, and, for this purpose, they depend on one or more national legal systems and their courts. Therefore, once a contract is finalized, parties are interested in its enforceability and in the predictability of the parameters according to which enforcement may be achieved.⁴³

⁴¹ See more extensively David Echenberg, *Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?*, in *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW*, *supra* note 10.

⁴² See more extensively, Maria Celeste Vettese, *Multinational Companies and National Contracts*, in *BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW*, *supra* note 10.

⁴³ See QUEEN MARY UNIVERSITY OF LONDON SCHOOL OF INTERNATIONAL ARBITRATION, 2010 INTERNATIONAL ARBITRATION SURVEY:

Litigation lawyers carefully analyse the specific contract and its effects under the governing law and try to assess as precisely as possible the possibility of winning a case in court or in arbitration on the basis of the contract wording, the applicable law and the degree of factual background that the governing law allows to bring into the dispute. Thus, on the one hand, drafting lawyers, while negotiating a contract, may have willingly disregarded the legal effects of some clauses. On the other hand, litigation lawyers, while assessing enforceability of the same contract, will carefully study its legal effects under the governing law. The varying degree of awareness during negotiations, thus, must be considered in light of the need for predictability once a dispute arises.

Furthermore, contracts are often meant to circulate, for example, because they are assigned to third parties, are used as security, or serve as a basis for calculating insurance premiums. In these situations, it is essential that contracts are interpreted strictly in accordance with their terms: third parties are not aware of and should not be assumed to take into consideration the relationship between the original parties to the contract, what the original parties may have assumed or intended, or any circumstances that relate to the original parties and that may have had an impact on these parties' interests. It is, therefore, expected that a contract is interpreted primarily, if not exclusively, in light of its terms – without considering things such as what a fair balance between the parties' interests would be or what one party's expectations might have been.

C. How to Square the Circle: The Applicable Law

The arbitral tribunal is, therefore, expected to understand the dynamics of negotiations in order to properly give effect to the intention of the parties. Blindly applying the wording of the contract without any regard to the principles of the governing law or, to the extent that they are determinable and applicable, of transnational law, would not necessarily reflect the true intention of the parties if the clause that is being applied literally is one of the boilerplate clauses that

CHOICES IN INTERNATIONAL ARBITRATION: CHOICES IN INTERNATIONAL ARBITRATION 13 (2010). *See also* THE LAW SOCIETY, LAW SOCIETY REPORT: FIRMS' CROSS-BORDER WORK 1, 8 (2010). For further references, see INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 9, § 2.1.

the parties did not consider. Integrating or correcting a clause with national or transnational principles, on the other hand, might not necessarily reflect the parties' intention either, if the clause that is being interpreted is one of the clauses that the parties carefully negotiated.

Leaving broad discretion to the interpreter, however, runs the risk of undermining predictability, if the criteria for exercising such discretion are not clearly determinable. As was seen above, interpretation of the contract should take into consideration the need for predictability. Overriding the terms of the contract in the name of principles of good faith or equity, thus, would lead to results that are not compatible with the expectations of international business practice, if the standards that are applied are not clearly determinable. From the overview made in Section 3 above, it seems that the standard of good faith is not sufficiently determinable on a transnational level. This seems to speak for the advisability of taking into consideration the criteria developed in the applicable law.

D. Variety of Approaches

There is no uniform answer to the question of what interpretation is the most faithful to the parties' intentions. A seminar organised at the University of Oslo in 2011⁴⁴ discussed the arbitrators' approach to the interpretation of contracts and identified a variety of approaches.⁴⁵ The results of this seminar are summarised below.

Contracts are not necessarily always applied in strict accordance with their terms. There are different degrees of interference and the sources of the interference also vary quite considerably. There is a scale moving from a strict application of the governing law to integrate the contract, via interpretation of the contract terms in the context of transnational soft law principles such

⁴⁴ See *Arbitration and Party Autonomy (APA)*, *supra* note 9. The programme for the seminar, the list of panel participants and the transcript from the panel discussions are available at <http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/events/2011/2011-arbitration-and-the-not-unlimited-party-autonomy.html>.

⁴⁵ See *INTERNATIONAL COMMERCIAL CONTRACTS*, *supra* note 9, ch. 3, § 7; see also Giuditta Cordero-Moss, *Interpretation of Contracts in International Commercial Arbitration: Diversity on More than One Level*, 22 *EUR. REV. PRIVATE L.* 13, 13-36 (2014).

as the UPICC and the PECL (which are heavily based on the principle of good faith and may give rise to a substantial possibility of interfering with the contract language), to interpretation of the contract on the basis of its own terms combined with the parties' interests and trade usages, to interpretation of the contract solely on the basis of its own terms. There is also a further approach to interpretation of the contract, which goes under the label of "splitting the baby." This Solomonic approach consists of rendering an award in the middle range between the claims of each of the parties. This is not necessarily based on a literal consideration of the contract terms or on an integration of the contract with other sources, but simply on the desire to accommodate both parties.⁴⁶ 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.⁴⁷ 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, but 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.

CONCLUSION

Party autonomy is limited in international arbitration, in spite of the widespread opinion that contracts are self-sufficient and that, together with arbitration, they create a closed circuit that manages to leave national law out.

First of all, the legal framework for arbitration ensures that arbitration enjoys a significant autonomy, but this autonomy is not unlimited. If the losing party decides not to comply with the arbitral

⁴⁶ This appears in the 2012 Survey of the School of International Arbitration of Queen Mary University of London. QUEEN MARY UNIVERSITY OF LONDON AND WHITE & CASE, 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS § 7 (2012).

⁴⁷ Queen Mary University, *supra* note 46, at 38.

award, courts of law may exercise judicial control. Judicial control on arbitration is restricted, but there is room for overriding party autonomy in several respects.

Furthermore, even within the area where no judicial control may be exercised and arbitration is autonomous, the necessity may arise to integrate contract terms with external sources. Contract terms do not always have an absolute meaning with legal effects flowing directly from the words, and recourse to a legal framework may be required to interpret the terms and to define their legal effects. To the extent that transnational sources provide a uniform legal framework, they may integrate the contract and reinstate self-sufficiency. Where transnational sources are not sufficient, however, the arbitral tribunal will have to integrate the contract with external principles and rules, primarily stemming from the governing law.

All the above constitutes limitations to party autonomy in arbitration.