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AUTHORITATIVE INTERVENTION IN LEGAL DISCOURSE: A GENRE-BASED STUDY OF JUDGEMENTS AND ARBITRATION AWARDS[1]

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ABSTRACT. *Professional genres are better understood and analysed in terms of the professional practices that they invariably co-construct in specific contexts; however, in ESP literature genres are often analysed in isolation, thus undervaluing the role and function of interdiscursivity in professional genres. This paper compares two legal genres that are the ultimate outcomes of litigation and arbitration (judgments and arbitrations awards), considering text-external factors, such as the traditional legal role of judges and the newer alternative role of arbitrators. Following Bhatia's (2004, 2008) multidimensional and multi-perspective model of analysis, we argue that both genres can best be described and explained in terms of judges' and arbitrators' institutional positioning, constituted by their linguistic and discursive practices, and distinguished in terms of the degree of authoritative stance, and the kinds of directness and indirectness expressed. This final aspect is investigated by highlighting the frequency of use and function of interactional devices (hedges and boosters), in an arbitration awards and judgments small sample.*

KEY WORDS. *genre, judgements, arbitration awards, interdiscursivity, hedges, boosters, authoritative positioning*

RESUMEN. *Los géneros profesionales son mejor entendidos y analizados según las prácticas profesionales que repetidamente construyen en contextos específicos; sin embargo en la literatura IFE se analizan los géneros aisladamente, lo que infravalora el papel y la función de la interdiscusirvidad en los géneros profesionales. Este artículo compara dos géneros legales que representan los resultados últimos de litigación y arbitraje (juicios y compensaciones de arbitrajes) considerando factores externos, como el papel tradicional y legal de los jueces y el novedoso papel alternativo de los mediadores. Aplicando el modelo analítico multidimensional de Bhatia (2004, 2008), mantenemos que ambos géneros se describen de manera más idónea según las posiciones institucionales de jueces y mediadores, expresadas en sus prácticas lingüísticas y discursivas, y diferenciadas según el grado de posicionamiento de autoridad así como el tipo de discurso directo o indirecto. Este último aspecto se investiga destacando la frecuencia de uso y la función de mecanismos de interacción (delimitadores e intensificadores) en una pequeña muestra de compensaciones de arbitrajes y juicios.*

.PALABRAS CLAVE: *género, juicios, concesiones de arbitraje, interdiscursividad, delimitadores, posicionamiento de autoridad.*

1. Introduction

In the Western world there are different ways of solving conflicts or disputes, such as agreement seeking or litigation. Recently, a number of alternative ways of resolving disputes have emerged under the umbrella term ADR (alternative dispute resolution) in which arbitration, mediation and other dispute resolution processes have been included. They have developed as a response to the need for a diversity of systems of dispute resolution within today's complex, industrialized and pluralistic societies.

When parties enter into a contract, they should consider, among many other aspects of the matter of the contract, how they will resolve any disputes arising out of it and how such resolution will be enforced. If the parties are domiciled in the same state, and the contract is to be performed there, then the decision may be simple. They might refer their disputes to the local state court knowing that its judgment will be enforceable against either of them. But if the parties belong to different states or the contract is to be performed in another state, the solution is more complicated.

Arbitration provides an alternative to the courts for the resolution of conflicts, both domestically and internationally. It is in the last half century or so that international arbitration has developed to the point at which it now provides a well-established mechanism for resolving disputes internationally. It could be said that nowadays anything that can be disputed or litigated can now be solved through arbitration.

My concern in this paper is with two genres (judgments and arbitral awards), which are associated with the discourse types and the social practices of litigation and arbitration. In litigation, judges play the traditional legal role of adjudicator. Adjudication[2] is carried out according to the law. In arbitration, the disputants try to work out their own solution with the help of a neutral third party, the arbitrator.

A more specific focus of this study is the negotiation of inter-subjective positioning in relation to authority in judgments and awards. The paper explores the specific forms of negotiating alternative positions and also how texts (or rather judges and arbitrators as writers) negotiate past decisions, integrate these texts into their own texts and align themselves with these past decisions. Thus, it will become clear that the language of judgments and awards is functionally motivated by the very nature and the practices of both litigation and arbitration.

2. Outline of the study

Section 3 of this paper examines the professional practices of litigation and arbitration and their relationship with court judgements and arbitral awards, taking into consideration text-external factors of those two genres, such as the traditional legal role of judges with their authoritative interventions and the newer alternative role of arbitrators. It is here argued that they can best be described and explained in terms of institutional activity types carried out by judges and arbitrators, and constituted by their

linguistic and discursive practices, and distinguished in terms of their relative degree of control over the process, substance and outcome of the dispute.

Section 4 studies the role of judgements and awards as authoritative texts and explores to what extent those genres taken from English courts and arbitration tribunals show how judges' and arbitrators' intervention and control is affected by the contextual purpose of their interaction, their job being done. Judges, when writing their judgments, do more than adjudicate, and arbitrators do more than facilitate. Typically, their interventions can be distinguished by the degree of authoritative stance in both genres and by the appropriation of textual and other semiotic resources in arbitration. This is what we study in section 5. Finally, in Section 6 some concluding remarks are made related to the professional use of both genres.

3. The professional practices of litigation and arbitration[3]

We start comparing litigation and arbitration as social practices, first of all. Litigation is the conduct of a lawsuit, which is a civil action brought before a court, in which the party initiating the action seeks a legal or equitable remedy. Litigation is one way that people and companies resolve disputes arising out of an infinite variety of factual circumstances. The term "litigation" is sometimes used to distinguish lawsuits from "alternative dispute resolution" methods such as "arbitration" in which a private arbitrator would make the decision. Arbitration is a dispute resolution process where the opposing parties select or appoint an individual called arbitrator. Upon appointment, the arbitrator will arrange the process to hear and consider the evidence, review arguments and afterwards will publish an award in which the items of dispute are decided. His decision is binding. There is an identifiable core of linguistic practices which define arbitrators' and litigators' discourse. Those practices are pragmatically and ideologically driven.

The task of the judge in a lawsuit is to exert his control over the substance and outcomes of the process and over the process itself. In litigation, judges play the traditional legal role of adjudicator. Adjudication is the legal process by which a judge (or an arbitrator) reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Adjudication is carried out according to the law. In arbitration, the disputants try to work out their own solution with the help of a neutral third party, the arbitrator. Arbitrators are also adjudicators in the sense that their decision is binding for the parties involved.

The practical rationale for arbitration is based upon its claim to be cheaper, quicker and simpler than formal court processes. The impetus to arbitration and, indeed, the professional workforce, from which arbitrators tend to be drawn, has been dominated by a set of professional practices and ideologies of adjudication, which constitute the discourse of the law, but also of the social sciences, particularly counselling. This complex positioning of arbitration in relation to the social practices of adjudication and counselling provides a classic example of interdiscursivity.

Following Bhatia's multidimensional and multi-perspective model of analysis (Bhatia 2004, 2008), it is argued that both professional practices can best be described and explained in terms of judges and arbitrators institutional activity types, constituted by their linguistic and discursive practices, and distinguished in terms of their relative degree of control over the process and over the substance and outcome of the dispute. Judges do more than adjudicate, and arbitrators do more than facilitate. Their jobs constitute a range of functional or rhetorical modes. Typically, their interventions can be distinguished by the degree of authoritative intervention, and the kinds of directness and indirectness expressed. This final aspect is investigated by drawing attention to the frequency of use and function of interactional devices, such as hedges and boosters, in a small corpus of arbitration awards and judgments.

4. The role of Judgments and Awards

Both in the common law and in the civil law legal systems[4], judgments are extremely important texts; they are a source of law. On a practical level, a judgment is the final decision in a legal dispute, which is argued and settled in a court of law representing an order of the court determining winners and losers (Maley 1994[5]). However, the function of a judgment goes beyond the settlement of specific disputes. It has wider implications with respect to the past as well as the future. With respect to the past, a judgment justifies a court's decision and persuades the court's audience of the correctness of this decision – that is, that the decision is based on law. This includes providing a public account of the reasoning process, which leads to a judge's decision. With respect to the future, judgments have a guiding function for other judges, lawyers and the general public. A judgment states what the law is, and by stating the law, a judicial decision becomes binding for similar cases in the future. It is clear then that judgments are texts which are stamped with mark of authority.

In the same way, an arbitral award is a determination on the merits by an arbitration tribunal, and is analogous to a judgment in a court of law. It is referred to as an 'award', even where the entire claimant's claims fail (and thus no money needs to be paid by either party), or the award is of a non-monetary nature. It also has wider implications with respect to the past and to the future. With respect to the past, an arbitration award justifies an arbitral tribunal's decision and persuades the parties of the appropriateness of this decision. This also includes providing a public account of the arbitrator' s reasoning process. With respect to the future, arbitration awards also guide other arbitrators and the general public.

We could summarize the role played by both judgments and awards by saying that they have a *declarative* and *justifying* function[6]. We will concentrate on the declarative function, first of all.

4.1. *Judgements and Arbitration Awards as Authoritative Texts*

The fact that judgments and awards are considered declarations should be related to the authoritative character of both types of documents. When we refer to them as

"authoritative" we mean that those texts are, first of all, written by someone with authority and, secondly, they appear as public declarations of authority; those texts create new realities once they have been constructed. When words become "textualized" in a judgment or an award, they no longer merely reflect an underlying oral reality of the hearing or of its written record, but, in a very real sense, they create a new reality. Moreover, that new reality replaces both the oral transactions that led to its creation, as well as any written records of those transactions. Thus authoritative texts take on a life of their own.

A very important consequence is that an authoritative text, because it constitutes a new reality, does not necessarily have to be an accurate record of the underlying oral event. Of course, if a text does not properly reflect the underlying reality, it is open to attack on the basis that it was the result of mistake or fraud or undue influence. If such an attack is successful, it means that the text never really became authoritative. Once validly executed, however, the text is now what matters.

In litigation and arbitration, the final documents where the decision of the judges and arbitrators is made explicit are the judgment and the award. The next section will address some aspects of this type of authoritative text. Theoretically speaking, judges' and arbitrators' interventions can be distinguished by the degree of authoritative intervention and the kinds of directness and indirectness expressed from judges' interventions. But this has to be investigated by drawing attention to the frequency of use and function of interactional devices, such as hedges and boosters, in a corpus of arbitration awards and judgments.

4.2. *Authoritative intervention in the different stages of the discourses of litigation and arbitration*

In the next section, we establish the generic structure of arbitral awards and judgments. At the macro level, a generic structure of judgments has been identified (Maley 1985; Bhatia 1993) as well as a relationship between the structural elements and the communicative functions of declaring and justifying. Judgments consist of five parts or stages:

1. Facts
2. Issue(s)
3. Reasoning
4. Conclusion
5. Finding[6]

In general terms, with that generic structure in mind, we can make some assumptions about the communicative purpose and the macro structure of judgments. We also have some insights into the realisation of communicate purpose and structural elements through language. The justificatory function of a judgment is represented by the structural elements 'issue' and 'reasoning'. The declaratory function is represented by the elements 'conclusion' and 'finding'. Both judgments and arbitral awards share some features in common: they have a justificatory, a declaratory and a coercive function, as a result of their

authoritative nature, but the reasoning of judges and arbitrators, the negotiation of previous decisions, the positioning of writer and reader are still unexplored territory.

The generic structure of arbitral awards is not so well established as that of judgments, but there are, nonetheless, certain elements that seem to be essential for the generic structure of each award to be fully developed:

1. Introduction / The parties /
2. Procedural History/ Summary of procedure
3. Summary of facts and Parties' Contentions/ Factual Background
4. Analysis of issues/ Considerations/ Applicable law/ Legal Considerations
5. Decision.

As actual texts, judgements and arbitral awards share, both share their *declarative* and *justifying* function. All the statements made, both in judgments and arbitral awards, have to be well grounded before a final declaration is pronounced declaring winners and losers. Those who make the declarations have to give the reasons for their decision.

As authoritative texts, both judgments and arbitral awards are executed in a rather ritualistic way and their content tends to have a relatively formal and predictable structure, in the same way as wills, for example, which virtually always bear the title *Last Will and Testament*. As pointed out in Tiersma (1999: 60), this caption is not only redundant, but from a modern perspective it borders on being silly, because it appears on every will that a person executes, including the first one. However, the title, and the ritualistic language that follows it, helps clarify that this writing is intended to be an authoritative text. This is sometimes called the *ritual function* of the execution formalities. In other words, the formalities and ritual help us identify a piece of writing unambiguously as an authoritative legal text.

5. Authoritative stance and appropriation of textual and other semiotic resources and conventions

After comparing a small corpus of 10 judgements and 10 arbitral awards, I took into account their schematic structure in order to see whether and to what extent certain parts are more descriptive, more justifying or declaratory than others. The same scheme seemed to emerge to be working in both genres and in almost the same way. The degree of authoritative intervention was focused upon in the analysis of both genres and slight differences were found between them. Those differences are related to the presence or absence of certain text-external factors, such as the traditional legal role of judges and the newer alternative role of arbitrators.

In order to illustrate the main differences found, I will bring a number of examples in order to show how arbitration has become more and more legalistic in the last few years and how this is manifested in the language used in the two genres compared.

First of all, legal writing places heavy reliance on authority. Authoritative texts are presumed to be a clear and complete expression of the communicative intentions of their

makers. By authoritative legal texts I mean those that create, modify, or terminate a legally recognized state of affairs. In many ways, these texts constitute what J.L. Austin might have called *written performatives*. Lawyers often refer to such texts as *operative*. They include documents like judgments and awards. The difference between them lies in the fact that there is a functional correlation between rulemaking in litigation and the absence of rulemaking in arbitration. That makes arbitral awards less authoritative than judgments[7]. The tenor [8]of discourse in both cases is different, and that creates a stylistic variation between them that results in large part from the textual conventions of both professions, which enable the creation of texts which, once properly enacted or executed, come to be viewed as the authoritative expression of the intentions of their authors, but to a different degree.

Example 1: ADF GROUP INC. v UNITED STATES OF AMERICA
Case No. ARB (AF)/00/1

The conclusions the Tribunal has reached may be summed up in the following terms:

(1) The Tribunal *has jurisdiction* to pass upon the Investor's claim that the U.S. measures in question are inconsistent with NAFTA Article 1103.

(2) The Investor's claims concerning construction projects other than the Springfield Interchange Project have not been considered in this proceeding because they are *inadmissible* and are, accordingly, *dismissed without prejudice*.

(3) The Tribunal does not find that the U.S. measures in question are inconsistent with NAFTA Article 1102. Assuming, however, arguendo, that the U.S. measures are inconsistent with the provisions of Article 1102, the Respondent is, in any event, entitled to the benefit of NAFTA Article 1108 (7) (a) which renders inapplicable the provisions of, inter alia, Article 1102 in case of procurement by a Party. Procurement by the Commonwealth of Virginia for, or in connection with, the Springfield Interchange Project, constitutes procurement by a Party within the meaning of Article 1108 (7) (a). The Investor's claim concerning Article 1102 is, accordingly, *denied*.

(4) The Investor has shown prima facie that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1106 (1) (b) and (c). The Respondent is, however, entitled to the benefit of NAFTA Article 1108 (8) (b), which renders inapplicable the provisions of Article 1106 (1) (b) and (c) in case of procurement by a Party. The Springfield Interchange Project involves procurement by the Commonwealth of Virginia, which constitutes procurement by a Party in the sense of Articles 1106 (1) (b) and (c) and 1108 (8) (b). The Investor's claim concerning Article 1106 is, accordingly, *denied*.

(5) The Tribunal does not find it necessary to resolve the issue of whether the U.S.-Albania and the U.S.-Estonia bilateral investment treaties accord treatment more favourable than the treatment available under NAFTA Article 1105 (1). The Investor is not entitled to the benefits claimed under NAFTA Article 1103, which Article is inapplicable by virtue of NAFTA Article 1108 (7) (a) in case of procurement by a Party. The Investor's claim concerning Article 1103 is, accordingly, *denied*.

(6) The Tribunal does not find that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1105 (1) as construed in the FTC Interpretation of 31 July 2001, which Interpretation *is binding* upon the Tribunal.

In its Counter-Memorial, the Respondent asked the Tribunal for an order requiring the Investor to bear the costs of this proceeding, including the fees and expenses of the Members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the United States by reason of this proceeding. Having regard to the circumstances of this case, including the nature and complexity of the questions raised by the disputing parties, the Tribunal believes that the costs of this proceeding *should be shared on a fifty-fifty basis* by the disputing parties, including the fees and expenses of the Members of the Tribunal and the expenses and charges of the Secretariat. Each party *shall bear* its own expenses incurred in connection with this proceeding.

Done at Washington, D.C., in English language.

FLORENTINO P. FELICIANO
President of the Tribunal
Date: 4 January 2003

ARMAND DEMESTRAL	CAROLYN B. LAMM
Member	Member
Date: 6 January 2003	Date: 6 January 2003

Example 2: EMILIO AGUSTÍN MAFFEZINI (CLAIMANT) v. THE KINGDOM OF SPAIN (RESPONDENT). CASE NO. ARB/97/7

For the reasons stated above the Tribunal *unanimously decides* that:

(1) The Kingdom of Spain *shall pay* the Claimant the amount of ESP 57,641,265.28 (fifty-seven million six hundred forty one thousand two hundred and sixty-five Spanish pesetas and 28 cents).
(2) Each of the parties *shall bear* the entirety of its own expenses and legal fees for its own counsel.
(3) All other claims *are dismissed*. So *Decided*.

Example 3: DESERT LINE PROJECTS LLC V YEMEN, AWARD, ICSID CASE NO ARB05/17; IIC 319 (2008), 6 February 2008

In view of the above, the Arbitral Tribunal hereby *orders* that:

1. The Arbitral Tribunal *has jurisdiction* over the present dispute;
2. The Settlement Agreement contravened the Respondent's obligations under Art. 3 of the BIT and, therefore*, it is not entitled* to international effect;
3. The Yemeni Arbitral Award *shall be* implemented in its entirety, and be *fully respected as definitively binding* on both Parties;
4. The Respondent's counterclaims *shall be dismissed*;
5. The Claimant's claim based on the Yemeni Arbitral Award *is granted* in the amount in Omani Riyals equivalent to YR 3,585,446,554 at the exchange rate of the Omani Central Bank as of 9 August 2004; this amount *shall be paid* within 30 days from the notification of the award;
6. The Claimant's claim based on the late release of the bank guarantees *is dismissed;*

7. The Claimant's claim based on the inability to exercise a buy–back option with respect to a property in Oman *is dismissed*;
8. The Claimant's claim based on the loss of business opportunities in Oman and Yemen *is dismissed*;
9. The Claimant's claim eased on moral damages, including loss of reputation, is granted in the amount of USD 1,000,000; this amount *shall be paid* within 30 days from the notification of the award;
10. A simple interest of 5% *is due* on the amount to be paid under the Yemeni Arbitral Award from 9 August 2004 until full payment. No interest is due on the amount for moral damages; in case of no payment of the amount for moral damages within 30 days from the notification of the award, it will bear interest of 5% until full payment;
11. The costs of the proceeding, including the fees and expenses of the Tribunal and the ICSID Secretariat, *shall be borne* 30% by the Claimant and 70% by the Respondent;
12. The Respondent *shall pay* the Claimant an amount of US$ 400,000 for legal expenses; this amount *shall be paid* within 30 days from the notification of the award;
13. All other claims *are dismissed*.

Prof. Pierre Tercier, President, Date: 21.01.08
Prof. Jan Paulsson, Arbitrator, Date: 29 Jan 2008
Prof. Ahmed S El–Kosheri, Arbitrator, Date: 23.01.08.

Secondly, there is *appropriation* of textual and other semiotic resources and conventions in arbitral awards taken from litigation, due to a functional correlation between legal decision-making and arbitration decision-making in the *reasoning* and *decision* sections of both genres. That provides an example of *interdiscursivity*: arbitrators' practice carries institutional and social meanings from litigators' discourse and social practice.

Both genres coincide in being declarative and authoritative. There is a fundamental correlation between them. In the *decision* section of both genres we do not see much difference: authors use more direct language to show authoritative stance. Authors make use of a more direct language that provides the message with further authoritativeness in both genres. This turn corresponds to the ultimate binding character of the genres.

In the *reasoning*[9] section, however, there are more interactional elements in awards than in judgments and, thus, the language is more indirect. Judgments contain less hedging in the argumentation and a higher frequency of formulaic legal expressions and concise language.

In the next examples (4) and (5) the authors of the awards expose the contentions of the respondent and the claimant in that order. The authors firstly present the issue to be discussed, that is, the fact that the respondent claims that the present case does not fall under the jurisdiction of the Arbitral Tribunal for not having obtained an "investment certificate" (Article 1.1 of the BIT[10]). Example 4 shows the author's use of monoglossia ("never"), evaluation ("principal") and heteroglossia ("may") to present what they consider to be the "principal" reasons of the respondent to state that the investment of the present case does not fall under the BIT. It should also be noted that the term "accepted" appears in inverted comas, perhaps to make it clear that this statement belongs to the

respondent's voice and not the authors'. In addition, the authors state that the statements of the respondent are justified for being based on "plain language" of the BIT. The monoglossic "cannot" and the following evaluative expressions "unduly formalistic" and "lacking in good faith" reveal the authors' respect for the respondent's words, making an appeal to the standard of fair and equitable treatment. From these grounds, the authors will then unfold the argumentation in the line of the claimant's argument.

> **Example 4**: 93."With respect to the Respondent's argument that the Government never "accepted" the Claimant' s investment so as to qualify if for coverage under the BIT, the *principal* strands of its reasons *may* be summarized as follows: (…) c) failure to register under Yemeni Investment Law nº 22 of 1991 as amended in 1997 and 2002 (hereinfafter referred to as the "YIL") did not render the Claimant's activities unlawful per se, but disqualified it from invoking the BIT; d) the position taken by the Respondent is based on the plain language of the BIT; it *cannot* be criticized as *unduly formalistic* or lacking in good faith (…).

Example 5 shows the counter-argumentation on behalf of the claimant. The language employed here is direct and contains simple constructions that convey a sense of authoritativeness. Therefore, it could be said that this example is, somehow, carrying out a more declarative function than the previous one.

> **Example 5**: 94. The Claimant countered if that: a) Art. 1(1) does ot refer to the YIL; if the Contracting States had wanted to define the meaning of "laws and regulations" by reference to the YIL, they would have done so *expressly* (Claim. 19 March 2007, no 18) (…) d) the Claimant's investment does not fall within the scope of the YIL (Claim. 19 March 2007, no 23 et seq.), which regulates *only* investments licensed under its provisions, as opposed to all investments in Yemen.

Example 6 is already part of the reasoning move of the arbitral award. As such, it is displaying a justifying function of the language. In this example, two references of external sources should not be noted as appeal to authority through intertextuality and interdiscursivity ("no later" and "as early as possible"). The argumentation is tainted with subjectivity through the numerous items displaying evaluation and/ or monoglossia ("It is difficult", "must", "especialy", "wholly", "shall be filed", "never", " … as persuasive as it is unattractive". In point 102, the authors broaden the possibilities of interpretation of Art 1(1) through the heteroglossic "may". In order to further support the idea of a different interpretation, the authors resort to a series of strategies including an appeal to authority by making reference to arbitral precedents. In the process of exposing such reference, authors also make use of monoglossia ("making clear") in order to enhance this alternative interpretation, nominalizations such as "legality" and "illegality", ("breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership") to refer to this alternative interpretation expressly and through an appeal to authority of similar arbitral cases that make actual use of this alternative interpretation.

> **Example 6**: c) The Arbitral Tribunal's Analysis 97. *It is difficult* to accept that the Respondent's two simple objections, based on the alleged absence of two elements which should have been manifest to the Government (namely the failure of acceptance of the investment and the absence of the particular certificate which it alleges *must* have been delivered by the General Investment Authority) could not have been made in the first half of 2005 when the Claimant indicated its intention of pursuing ICSID arbitration, *especially* since the Respondent alleges that each of these elements *wholly* precludes the Claimant's access to ICSID. The fact that objections *shall be filed* with ICSID "*no later"* than the deadline for the Counter-Memorial does not mean that the Respondent was not bound to raise them before that date, if such objections were or ought to have been already manifest, in view of the "*as early as possible" requirement in the first sentence of Article 41*. 102. The phrase "according to its laws and regulations" in Art. 1(1) *may* syntactically be considered to qualify either of the two words accepted or investment.
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> 104. In State practice in the BIT area, the phrase "according to its laws and regulations" is quite familiar. Moreover, it has been well traversed by arbitral precedents, notably Inceysa v. Republic of el Salvador, ICSID Case Nº ARB/03/26, 2 August 2006) and Fraport (Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case Nº ARB/03/25, 16 August 2007) which make clear that such references are intended to ensure the *legality* of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership. No such *illegality* has been alleged, let alone proved, in this case. As *another ICSID tribunal* put it with regard to the there applicable Algeria-Italy BIT: page 16.

The preceding examples are a clear and complete expression of the communicative intentions of their makers. There is no doubt about it, even if they are interpreted in a literal or de-contextualized sense. Today, given the importance of authoritative legal texts, it is not surprising that they are generally created or executed in relatively formal ways. Arbitration awards must invariably be in the form of authoritative text, so the execution of these texts especially tends to be quite ritualistic. Once an authoritative legal text has been created, it is necessary to determine what it contains. As mentioned above, the fact that something is an authoritative text makes this issue easier to resolve. Such texts are not only executed in a rather ritualistic way, but their contents also tend to have a relatively formal and predictable structure.

6. Concluding remarks

The tenor of arbitration awards construes the relationship between reader and writer and the attitudes and judgments of the writer in more informal way than the tenor of litigation.

Both genres sound reasoned and authoritative. One of the challenges of judicial and arbitral writing is the embedding of *evaluation* so that both judgments and arbitral awards sound *reasoned* and *authoritative*. They are also declarative acts in the end and they have to prove that the declaration is well grounded.

When comparing awards and judgments, there is a noticeable difference: there is appropriation of textual and other semiotic resources in arbitration (move structure, formulaic expressions); those resources are taken from litigation, due to a functional correlation between court decision-making and arbitration decision-making in the *reasoning* and *decision* sections of both genres. That provides an example of *interdiscursivity*: arbitrators' practice is influenced by institutional and social meanings that belong to litigators' discourse and social practice.

There is no such functional correlation, however, between rulemaking in litigation and the absence of rulemaking in arbitration. That makes arbitral awards less authoritative, which is shown in the *reasoning* move of the awards: awards are more persuasive; *legal reasoning* has been described as an attempt to engage in dialogue with the purpose to persuade (Goodrich 1986: 179) In order to persuade, legal reasoning enters into two kinds of dialogue: the first mediates between the writer's text and other related texts, between legal discourse and other discourses, between the writer's position and alternative positions (*engagement*).

Both genres coincide in being declarative and authoritative. There is a fundamental correlation between them. In the *decision* section of both genres we do not see much difference: authors use more direct language to show authoritative stance. In the *reasoning* section: there are more interactional elements in awards than in judgments and, thus, the language is more indirect. Judgments contain less hedging in the argumentation and a higher frequency of formulaic legal expressions and concise language.

This study has focused on two different discourses: litigation an arbitration, concentrating on two parallel texts, which are supposed to be the final written outcome of a long-standing decision making process. One question we have asked ourselves is: "Do patterns of reasoning and positioning apply across both discourses generally or are there differences within them?"

We found similarities between them in terms of rhetorical structure, but there were also differences. Of special interest are how a judge positions himself in relation to statute law and interpretations of statutes in precedents as compared with the arbitrator in relation to international rules and previous awards.

Inter-discursively, this study has dealt with two discourses – the abstract discourse of legal rules and the supposedly less abstract, more commonsense discourse of arbitration. What has been investigated is how legal discourse enters into dialogue with the discourse of arbitration, and how these two discourses position against each other and how a writer positions himself in relation to these two discourses.

Finally, I want to suggest that there is great potential for linguists, legal scholars and other social researchers to collaborate in exploring the relationship between institutional contexts and texts. In our analysis it has been found that there is a dialectic relationship between context and text. This study has focused on texts. While text analysis can provide a better understanding of social practices, not all social practices can be reduced to texts. Therefore, a better understanding of the social and institutional contexts of which legal discourse is a part is needed through ethnographic research. Legal institutions are also workplaces where workers interact with each other in a variety of ways.

NOTES

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[1] Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved.

[2] Most legal disputes are resolved through an out-of-court settlement between the parties. However, if the disputing parties are unable to reach agreement, there are a number of options available. The traditional choice is litigation, with the case ultimately being tried in court and decided by a judge and/or a jury. Besides litigation, various forms of alternative dispute resolution (ADR) are also available. Arbitration is one of them.

[3] Civil law or Continental law or Romano-Germanic law is the predominant system of law in the world. Civil law as a legal system is often compared with common law. The main difference that is usually drawn between the two systems is that common law draws abstract rules from specific cases, whereas civil law starts with abstract rules, which judges must then apply to the various cases before them. Common law systems place great weight on court decisions, which are considered "law" with the same force of law as statutes. By contrast, in civil law jurisdictions (the legal tradition that prevails in, or is combined with common law in, almost all non-Islamic, non-common law countries); judicial precedent is given relatively less weight.

[4] This is what Maley (1994) calls the *declarative function* of judgments.

[5] In law, a declaration ordinarily refers to a judgment of the court or an award of an arbitration tribunal. It is a binding adjudication of the rights or other legal relations of the parties.

[6] I would suggest that the term "decision" would be a better choice, taking into account the ambiguity of the term "finding".

[7] In democratic societies the judiciary interprets and applies the law and is entrusted the judicial authority. This is not the case with arbitrators.

[8] *tenor* refers to the participants in a discourse, their relationships to each other, and their purposes.

[9] Legal reasoning has been described as an attempt to engage in dialogue with the purpose to persuade (Goodrich 1986: 179) In order to persuade, legal reasoning enters into two kinds of dialogue: the first mediates between the writer's text and other related texts, between legal discourse and other discourses, between the writer's position and alternative positions (*engagement*).

[10] Bilateral International Treaty.

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