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IDENTIFYING AND INTERPRETING THE TERMS OF THE ARBITRATION AGREEMENT. WHY THE APPLICABLE LAW MATTERS

IDENTIFICAR E INTERPRETAR LOS TÉRMINOS DEL ACUERDO DE ARBITRAJE. POR QUÉ ES IMPORTANTE LA LEY APLICABLE

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ABSTRACT

This article will focus on identifying the main differences among the principal legal systems or traditions of contract law in providing rules or principles to identify and construe contractual terms, and their relevance to identifying and construing the terms of arbitration agreements. From an Anglo-Saxon and comparative perspective this article will identify some consequences of applying the appropriate law for the issue of identification and interpretation of the terms of arbitration agreements. We assume that the application of contract law principles is the main area of the law which claims for application. We concluded, among other ideas, that once these terms of the arbitration agreement have been identified, to interpret them, the main differences to consider are the interpreter's goal (subjective versus objective method of interpretation) and the existence of detailed rules of interpretation or statutory guidance to judges.

Keywords: International Commercial law; arbitration agreements; commercial contracts; applicable law; interpretation of contracts; legal interpretation rules and principles; comparative law.

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RESUMEN

Este artículo se centrará en identificar las más relevantes diferencias entre los principales sistemas jurídicos o tradiciones del derecho contractual a la hora de proporcionar reglas o principios para identificar e interpretar los términos contractuales, y su importancia para identificar e interpretar los términos de los acuerdos de arbitraje. Desde una perspectiva anglosajona y comparada se identificarán algunas consecuencias de la aplicación de la ley apropiada para la cuestión de la determinación e interpretación de los términos de los acuerdos de arbitraje. Se parte de la base que la aplicación de los principios del derecho contractual es el área principal del derecho que reclama su aplicación. Concluimos, entre otras ideas, que una vez identificados los términos del acuerdo de arbitraje, para interpretarlos, las principales diferencias a considerar son el objetivo del intérprete (mediante un método de interpretación subjetivo versus objetivo) y la existencia de reglas detalladas de interpretación u orientación estatutaria para los jueces.

Palabras clave: Derecho comercial internacional; acuerdos de arbitraje; contratos comerciales; ley aplicable; interpretación contractual; principios y reglas de interpretación; derecho comparado.

I. INTRODUCTION[•]

Arbitration *is a matter of contract*, as the U.S. Supreme Court has emphatically stated, on numerous occasions.[1] The contractual nature[2] of arbitration agreements has important consequences. It has been invoked by U.S. courts in

[•] Abbreviations list:

CISG:	United Nations Convention on Contracts for the International Sale of Goods.
FAA:	Federal Arbitration Act.
ICC:	International Chamber of Commerce.
PECL:	Principles of European Contract Law.
UCC:	United States Uniform Commercial Code.
UNIDROIT:	United Nations International Institute for the Unification of Private Law.
U.S.C.:	United States Code.

[1] See The American Law Institute, *Restatement of the Law, The U.S. Law of International Commercial and Investor–State Arbitration.*, ALI, Philadelphia, 2019, Proposed Final Draft, §1.2 [hereinafter *Restatement*]. See also the cases mentioned in Reporters' Note a): *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776 (2010); and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010).

[2] Arbitration agreement is not *just* any contract. It also has an adjudicatory function-nature. See generally:

many contexts, including when deciding the so-called "gateway issues,"[3] such as the issues of the existence of the arbitration agreement,[4] non-signatory,[5]

Born, Gary, *International Commercial Arbitration*, Kluwer Law International, The Hauge, 2021, 3rd ed.

[3] See generally: Bermann, George A., "The 'Gateway' Problem in International Commercial Arbitration", *The Yale Journal of International Law*, 2012, Vol. 37, n° 1, pp. 1-50. In p. 5, Prof. Bermann defines gateway issues as "… [i]ssues that a court entertains at the threshold to ensure that the entire process has a foundation in party consent." In the same p. 5: "But it is at the outset of arbitration that the tradeoff between efficacy and legitimacy interests in arbitration assumes its purest form. The question occupying center stage at this moment is whether a party unwilling to arbitrate is *obligated*, on the basis of a *prior undertaking*, to do so. If a court compels a party to arbitrate despite its not having *consented* to arbitration, the legitimacy of both the arbitration and any resulting award is compromised." (Citations omitted and emphasis added).

[4] See *Restatement*, cit. (n. 1), §2.13. See also *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296-297 (2010), as well as the other cases cited: "It is well settled in both commercial and labor cases that whether parties have agreed to "submi[t] a particular dispute to arbitration" is typically an "issue for judicial determination." *Howsam v. Dean Witter Reynolds, Inc*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (quoting *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)); see *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546–547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). It is similarly well settled that where the dispute at issue concerns *contract formation*, the dispute is generally for courts to decide. See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... *should apply ordinary ... principles* that govern the *formation of contracts*"); *AT & T Technologies*, supra, at 648–649, 106 S.Ct. 1415 (explaining the settled rule in labor cases that " 'arbitration is a matter of contract' "and "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, n. 1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (distinguishing treatment of the generally nonarbitral question whether an arbitration agreement was "ever concluded" from the question whether a contract containing an arbitration clause was illegal when formed, which question we held to be arbitrable in certain circumstances)" (emphasis added).

[5] See *Restatement*, cit. (n. 1), §2.15. See also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-945 (1995): "These two answers *flow inexorably from* the fact that arbitration is *simply a matter of contract* between the parties; it is a way to resolve those disputes -but only those disputes- that the parties have agreed to submit to arbitration;" and *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776 (2010): "The FAA reflects the fundamental principle that arbitration is a matter of contract." See also *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995): "Arbitration is *contractual by nature*— "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). Thus, while there is a strong and "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc*., 473 U.S. 614, 625, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985) (quotations omitted), such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. "It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir.1960); see also *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1064 (2d Cir.1993). This Court

invalidity,[6] and dispute falling out of the scope of the arbitration agreement.[7]

has made clear that a nonsignatory party may be bound to an arbitration agreement *if* so dictated by the "*ordinary principles of contract and agency*." *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir.1980); see also *A/S Custodia v. Lessin Int'l, Inc*., 503 F.2d 318, 320 (2d Cir.1974)." (Emphasis added). The third party not only can be "brought" to the arbitration, but can also "invoke" it or "benefit" from it under principles of general contract law. See *Ge Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*., 140 S.Ct. 1637, 1643-1644 (2020): "Chapter 1 of the Federal Arbitration Act (FAA) permits courts to apply state-law doctrines related to the enforcement of arbitration agreements. Section 2 of that chapter provides that an arbitration agreement in writing ''shall be … enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'' 9 U.S.C. § 2. As we have explained, this provision requires federal courts to ''place [arbitration] agreements ' ''upon the *same footing as other contracts*'' '.'' *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 474, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (quoting *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). But it does not ''alter background principles of state contract law regarding the *scope* of agreements (*including* the question of *who* is bound by them).'' *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). The ''traditional principles of state law'' that apply under Chapter 1 include doctrines that authorize the enforcement of a contract by a nonsignatory. Id., at 631, 129 S.Ct. 1896 (internal quotation marks omitted). For example, we have recognized that arbitration agreements may be *enforced by nonsignatories* through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel'. Ibid. (quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001). This case implicates domestic equitable estoppel doctrines. Generally, in the arbitration context, ''equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory.'' Id., at 200 (2017). In Arthur Andersen, we recognized that Chapter 1 of the FAA *permits a nonsignatory* to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement. 556 U.S. at 631–632, 129 S.Ct. 1896." (emphasis added).

[6] See *Restatement*, cit. (n. 1), §2.14. See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, n. 1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006): "To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 2 embodies the national policy favoring arbitration and places arbitration agreements on *equal footing* with *all* other contracts: …".

[7] See Born, cit. (n. 2), §9.01; and p. 1423: "International arbitration agreements are *creatures of contract*. Parties are almost entirely free to draft their arbitration clauses in whatever way they choose. As a consequence, *like other contracts*, arbitration agreements vary widely in language, length, sophistication and quality. Inevitably, *like other types of contracts*, arbitration agreements give rise to frequent questions of *interpretation*, particularly concerning the scope of the matters referred to arbitration. In the words of one commentator, there is an "irritatingly large quantity of court litigation relating to the width of arbitral clauses"" (citations omitted, emphasis added). Although this article primarily focuses on the Anglo-Saxon perspective, particularly within the context of the United States, some Spanish-language publications do address the arbitration agreement as a contract: Betancourt Gutiérrez, Julio César, *El contrato de arbitraje internacional*, Tirant lo blanch, Valencia, 2018; Caivano, Roque J, *Tratado de Arbitraje Comercial Internacional Argentino*, La Ley S.A.E., Buenos Aires, 2020, pp. 211-283; Merino Merchán, José F.; Chillón Medina, José María, *Tratado de Derecho Arbitral*, Aranzadi SA, Cizur Menor, 4th ed., 271-518; Silva Romero, Eduardo (Dir.), El Contrato de Arbitraje, Editorial Legis Editores S.A; Tawil, Guido S.; Romero Seguel, Alejandro; Díaz Villalobos, José Ignacio, *El arbitraje interno y comercial internacional*, Ediciones UC, Santiago, 2016, 2nd ed., pp. 25-52; Zuleta, Eduardo

As with any contract, it might be necessary for arbitrators and courts to *identify* and *construe*[8] the terms of arbitration agreements. Many national arbitration laws recognize the need for interpretation of those terms, but almost none contain specific rules.[9] It is worth inquiring about rules (if any) that courts and arbitral tribunals should apply for that purpose. The natural answer is to be found in *contract law*, as it has been almost *unanimously* stated, according to Born.[10] Even in the context of investor-state dispute settlement, the U.S. Supreme Court has invoked general principles of contract interpretation,[11] instead of invoking the set

(Dir.), *El Arbitraje Comercial Internacional*, Abeledo Perrot, Buenos Aires, 2008, pp. 77-432.

[8] In this article, interpretation and construction will be employed interchangeably as synonymous.

[9] See Born, cit. (n. 2), p. 1425-1426: "The UNCITRAL Model Law is representative of most national legislation in its approach to the interpretation of international arbitration agreements. Article 8 of the Model Law provides for the dismissal or suspension of litigation of "a matter which is the subject of an arbitration agreement," referring to matters falling within the arguable scope of the parties' arbitration agreement. Articles 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law (concerning recognition and annulment of awards) are similar, contemplating that determinations need to be made as to what matters the parties have and have not agreed to submit to arbitration. Nonetheless, none of these provisions further address issues of construction of the arbitration agreement. Other national arbitration statutes are similar to the Model Law, *recognizing the need for interpretation* of arbitration agreements, but n*ot specifying rules of construction or interpretation*. That is true under the U.S. FAA, the French Code of Civil Procedure, the Swiss Law on Private International Law, the Japanese Arbitration Law and almost all other modern arbitration legislation." The author mentioned only *one exception*: Italian Code of Civil Procedure, Art. 808 quater, added by Italian Legislative Decree of 2 February 2006, which expressly enacted the pro-arbitration policy in the issue of scope of the arbitration agreement.

[10] See Born, cit. (n. 2), pp. 1426-1431: "It is almost *uniformly held* or *assumed* that generally-applicable rules of contract construction apply to the interpretation of international arbitration agreements. Arbitral tribunals *routinely* refer to general canons of contract interpretation, often not derived from any single national legal system, in determining the meaning and scope of arbitration agreements. ... Similarly, national courts in both common law and civil law jurisdictions *almost uniformly* begin their analysis of the scope of an international arbitration agreement by applying ordinary rules of contract interpretation" (citations omitted and emphasis added).

[11] See *BG Group PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1208-1209 (2014): "As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, *like a contract's interpretation, a matter of determining the parties' intent*. *Air France v. Saks*, 470 U.S. 392, 399, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985) (courts must give "the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"); *Sullivan v. Kidd*, 254 U.S. 433, 439, 41 S.Ct. 158, 65 L.Ed. 344 (1921) ("[T]reaties are to be interpreted upon the *principles which govern the interpretation of contracts* in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties"); *Wright v. Henkel*, 190 U.S. 40, 57, 23 S.Ct. 781, 47 L.Ed. 948 (1903) ("Treaties must receive a fair interpretation, according to the intention of the contracting parties"). And where, as here, a federal court is asked to interpret that intent pursuant to a motion to vacate or confirm an award made in the United States under the Federal Arbitration Act, *it should normally apply the presumptions supplied by American law*. See UNCITRAL Convention on the Recognition and Enforcement of Foreign

of rules of interpretation provided by the *Vienna Convention on the Law of Treaties* (1969).[12]

This article employs a dogmatic methodology and will focus on identifying the main differences among the principal legal systems or traditions of contract law in providing rules or principles to *identify* and *construe* contractual terms, and their relevance to identifying and construing the terms of arbitration agreements.

The question about *which* law -which contract law principles- should be applied while determining the validity or the correct interpretation of arbitration agreements will not be addressed in this article, because there is literature focused on that issue.[13] This article will identify some *consequences* of applying the appropriate law for the issue of identification and interpretation of the terms of arbitration agreements. As it can be inferred, this article assumes that the application of contract law principles is the main area of the law which claims for application. Another two assumptions in this regard are made: (i) that *some legal system* is required for the issue of identification and interpretation of arbitration agreements, although not necessarily a *national* system of law;[14] and (ii) that the law applicable to the *validity* of the arbitration agreement is also applicable to *identify* and *construe* its terms.[15]

Arbitral Awards, New York, 1958 (*New York Convention*), Art. V(1)(e) (award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"); Vandevelde, *Bilateral Investment Treaties*, at 446 (arbitral awards pursuant to treaties are "subject to review under the arbitration law of the state where the arbitration takes place"); Dugan, Investor–State Arbitration, at 636 ("[T]he national courts and the law of the legal situs of arbitration control a losing party's attempt to set aside [an] award"). The Solicitor General does not deny that the presumption discussed in Part III, supra (namely, the presumption that parties intend procedural preconditions to arbitration to be resolved primarily by arbitrators), applies both to ordinary contracts and to similar provisions in treaties when those provisions are not also "conditions of consent." Brief for United States as Amicus Curiae 25–27. And, while we respect the Government's views about the proper interpretation of treaties, e.g., Abbott v. Abbott, 560 U.S. 1, 15, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010), we have been unable to find any other authority or precedent suggesting that the use of the "consent" label in a treaty should make a critical difference in discerning the parties' intent about whether courts or arbitrators should interpret and apply the relevant provision." (citations omitted and emphasis added)

[12] The said convention will not be covered by this article. But it worth to mention that its articles 31-33 address many of the issues in the context of contract interpretation, such as the role of ambiguity, the contextualist approach, the weight of parties' subsequent conduct, and the divergence between versions in different languages.

[13] See generally: Born, Gary, "The Law Governing International Arbitration Agreements: An International Perspective", *Singapore Academy of Law Journal*, 2014, Vol. 26, pp. 814-848.

[14] Born, cit. (n. 13).

[15] Even though it is not obvious, it is assumed in this article that the law that governs the *validity* of the arbitration agreement also governs its *interpretation*. That is the position adopted by Born, cit. (n. 2), pp.

The *practical importance* of our inquiry, i.e., why the law applicable to identify and construe the terms of the arbitration agreement matters, should not be underestimated: it provides both courts and arbitral tribunals with the legal rules or doctrines upon which they can justify their decisions.[16] The issues on which

1509-1510: "It is relatively clear that the interpretation of international arbitration agreements should not be governed by the law of the judicial enforcement forum, as some national courts have held. Rather, if a national law is to be applied, the interpretation of an international arbitration agreement *should generally be subject to the law applicable to the existence and substantive validity of that agreement*. This approach would produce more uniform results than application of the law of the judicial enforcement forum (which would vary depending on where litigation is brought) and would in most cases more closely accord with the parties' intentions. This result is also *consistent with most choice-of-law authorities in other contexts*. For example, the Rome Convention and Rome I Regulation provides that all questions concerning the interpretation of an agreement are governed by the law applicable to that agreement. Other choice-of-law authorities are similar. At the same time, the general and increasing international acceptance of "pro-arbitration" interpretative presumption should make the choice of law governing the interpretation of arbitration agreements less important in the future. As discussed above, most jurisdictions have adopted a "pro-arbitration" rule of construction of international arbitration agreements, reducing materially the practical significance of choice of law questions on this issue. Finally, the better view is that Article II of the *New York Convention* mandates an international rule of construction of arbitration agreements subject to the Convention. As discussed above, that rule requires interpreting international arbitration agreements expansively, not restrictively, and as resolving all doubts in favor of encompassing disputes within the parties' agreement to arbitrate. That uniform international rule applies without regard to the substantive law otherwise applicable to the interpretation of the arbitration agreement" (citations omitted and emphasis added). See also, *Restatement*, cit. (n. 1), §2.15 Comment d: "The fact remains that determining the scope of disputes subject to arbitration is by nature an exercise in *contract interpretation* and that the exercise properly has a *choice-of-law dimension*. On that view, determinations based on contract interpretation (such as scope of an arbitration agreement) are *properly subject to the same body of law that governs contract validity*. Accordingly, the Restatement subjects the interpretation of arbitration agreements, to the extent that case law under the FAA allows, to the same law that governs challenges to the validity of those agreements (see Comment d to § 2.14). That is precisely what the Restatement does in Chapter 4 with respect to post-award claims that an arbitration agreement is invalid and claims that a given dispute exceeds the scope of that agreement; the scope of application of an agreement to arbitrate is therefore subject in principle to the same applicable law, whether the inquiry is made prior to the arbitration or on post-award review" (emphasis added). But see *Id.*, pp. 1508, stating a different and opposite position on the issue of scope: "The Restatement's view [§2.15 Comment d] contradicts the clear weight of U.S. Supreme Court and other U.S. authority holding that there is a substantive rule of federal law, derived from the FAA, requiring that international arbitration agreements be interpreted expansively. The *better view*, as discussed above, is that this *pro-arbitration rule* of interpretation applies when questions regarding the interpretation of international arbitration agreements arise in U.S. courts. This conclusion is not only compelled by U.S. authority (in *Mitsubishi Motors*, *BG Group* and otherwise) but is also prescribed by the New York Convention" (citations omitted and emphasis added).

[16] See generally Born, cit. (n. 2), p. 1423: "In addition to disputes over the scope of arbitration clauses, arbitration agreements also give rise to *other interpretative issues*. These include disputes over the arbitral procedures, applicable institutional rules, arbitral seat and similar issues. As with questions of scope, these disputes essentially require interpreting the parties' arbitration agreement, in order to ascertain their intentions." (emphasis added).

the identification and interpretation of the terms of the arbitration agreement are numerous, as they are in any contract. But the issues that arise in the *context of enforcement* of agreements to arbitrate are the most developed by national courts because it is the stage of the proceeding when they have prime authority to do so. For instance, on the issue of not complying with a *condition precedent* to arbitrate, U.S. courts have made very explicit references to the rules of contract interpretation.[17] Regarding the issue of *scope* (dispute failing out of the scope of the arbitration agreement), U.S. courts have given it a different treatment in case of doubts (*ambiguity*), having developed a different standard based on the "strong federal policy in favor of arbitration." Arguably, the same rule can also be applied to issues other than scope.[18] But that strong policy cannot prevail over the parties' known intent,[19] because it requires that "doubts" exist. Nonetheless, this kind of

[17] See *White v. Kampner*, 229 Conn. 465, 641 A.2d. 1381, 1385-1386 (1994): "We conclude that the mandatory negotiation sessions constituted a condition precedent to arbitration, and the determination of whether these sessions were held was not part of the contractual submission. Accordingly, under the contractual language, the issue of arbitrability in this case was one for the trial court." In any case, it is clear that this issue is one of contract interpretation. Indeed, *HIM Portland* at 44, alludes to the "plain meaning" of the arbitration agreement. In the context of investor-state dispute settlement, but with equal importance in the context of international commercial arbitration, see *BG Group PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1208-1209 (2014), and the same quote and cases cited in footnote 11.

[18] See generally Born, cit. (n. 2), §9, and pp. 1424-1425: "In the words of one national court decision: "any *doubts* concerning the scope of arbitrable issues should be *resolved in favor* of arbitration." The better view is that this rule of interpretation is prescribed, as a matter of international law, by the Convention's pro-arbitration objectives and by Article II's requirement that Contracting States recognize and enforce international arbitration agreements. As discussed in detail below, a liberal rule of interpretation, based on a presumption favoring centralized "one-stop" dispute resolution, is mandated by the parties' intentions: rational businesspersons, acting in good faith, do not desire their disputes to be resolved in multiplicitous proceedings that impose costs, delays and the risks of inconsistent results, but instead desire a single, centralized forum for resolving their disputes. Articles II(1) and II(3) of the Convention require courts of Contracting States to give effect to these presumptive intentions (absent contrary agreement by the parties). This *pro-arbitration rule of interpretation*, and the authorities discussed below, are *applicable generally* to arbitration agreements subject to the Convention. In particular, this rule of interpretation is applicable both in disputes over recognition of arbitration agreements under Article II and in disputes over recognition of arbitral awards under Article V(1)(c). In both contexts, the overwhelming weight of national court decisions is consistent with the existence of this rule of construction" (citations omitted and emphasis added).

[19] See Born, cit. (n. 2), p. 1436: "Despite the FAA's presumption regarding the scope of arbitration agreements, the language and circumstances of the parties' arbitration agreement remain the foundation of U.S. decisions concerning the scope of those agreements. The FAA's "pro-arbitration" presumption is important, but it cannot operate in the absence of contractual language and, where the language of the parties' agreement indicates an intention to exclude particular matters from arbitration, that intention will be given effect." See also in Born, p. 1436: "The FAA's "pro-arbitration" presumption is important, but it cannot operate in the absence of contractual language and, where the language of the parties' agreement indicates an intention to exclude particular matters from arbitration, that intention will be given effect".

policy will not be addressed explicitly in this article, although it may alter, in some cases, the outcome of the analysis. Instead, we will continue to address the issue from a purely contractual perspective, bearing in mind that, in some circumstances, this strong policy in favor of arbitration may be determinative.[20]

II. IDENTIFICATION OF THE CONTRACTUAL TERMS

There are at least *three* main areas where differences can be appreciated, among diverse legal traditions, on the issue of identification of the terms of the contract: (2.1) the rules governing contract *formation*, i.e., whether they establish a "knock-out rule" or the "last-shot doctrine;" (2.2) the *parol evidence rule*; and (2.3) the incorporation of *implied obligations* to the contract, in accordance with the principle of good faith, the nature of the obligation, equity, trade usage, or other elements.

2.1.- Contract formation

In the context of contract formation, one can identify that legal systems may adopt two different -and opposite- rules or principles: the "knock-out rule" or the "last-shot doctrine."[21] While both doctrines assume that a contract has been formed, they seek to answer which terms will govern the relationship when each party claims that their own terms do. The former considers that the terms of the contract are those which are common in both parties' forms, while the latter considers that the last form sent controls. A dispute regarding the form that would prevail arises when the terms of the offer differ from the terms of the acceptance, even though there is no doubt that a contract has been formed because performance has already occurred, at least in part. This gives rise to the so-called "battle-of-the-forms" issue. U.S. common law of contracts[22] and English law[23] are among those who adopt the "last-shot" doctrine, i.e., the last form controls. Nevertheless, the "knock-out" rule

[20] Even accepting that rule of interpretation broader than encompassing only the issue of scope, there are a lot of issues about which there is no "pro-arbitration" nor "anti-arbitration" perspective. In fact, the application of that label can be, in different times but with respect to the same issue, controversial. See Bermann, George A., "What does it mean to be 'pro-arbitration'?", *Arbitration International (Oxford)*, 2018, Vol. 34, pp. 341–353.

[21] For a comparative study, see generally: Rühl, Giesela, "The Battle of the Forms: Comparative and Economic Observations", *University of Pennsylvania Journal of International Law*, 2003, Vol. 24, n° 1, pp. 189-224. See also von Mehren, Arthur Taylor, "The Battle of the Forms: A Comparative View", *The American Journal of Comparative Law*, 1990, Vol. 38, n° 2, pp. 265–298.

[22] See von Mehren, cit. (n. 21), p. 282.

[23] See Rühl, cit. (n. 21), pp. 95-196.

is to be applied in the U.S., in the context of sales of goods, under the *Uniform Commercial Code* (UCC) §2-207(3).[24] Therefore, in that context, common terms adopted and default rules for terms in which both forms are not common. Similarly, in continental systems, the "knock-out" rule applies. That is the case, for example, of France and Germany.[25] Under the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), there has been a long debate about what doctrine is adopted. [26] Article 19(2) clearly refers to the "last-shot" rule, but subsection (3) deprives it of every practical effect, excluding its application for the terms of price, payment, quality and quantity of the goods, place and time of delivery, extent of liability, and dispute settlement. German and U.S. courts have favored the "knock-out" rule,[27] which is also set forth in soft-law instruments, such as the *UNIDROIT Principles on International Commercial Contracts* and the *Principles of European Contract Law* (PECL).[28]

Applying those alternatives to the arbitration agreement, the question is what happens when parties' terms differ on the dispute settlement clause, because only one contemplates an arbitration agreement or because they both do, but with different terms, e.g., scope, condition precedent, the seat of the arbitration, institutional rules, procedural features, among others. Under the "knock-out" rule, the arbitration agreement would be part of the contract only if it is present in both forms, and its terms will apply only if they are also common to both forms. If they are not, a default rule will apply, usually through a choice-of-forum analysis. On the other hand, if the "last-shot doctrine" applies, the last form sent controls.

The consequences of applying any of doctrines above-mentioned, which is itself a consequence of determining which legal system to apply to the arbitration agreement, is as relevant as it could be: it will resolve if parties agreed to one particular arbitration agreement or another one, and even if they agreed to arbitrate at all. That will be a direct consequence of selecting and applying one particular legal system, when parties have exchanged documents that differ on the dispute resolution clause, but they have performed the contract despite that difference. In the example of the forms differing in that one has an arbitration agreement and the other one has not, the party resisting arbitration will probably argue that

[24] That is the literal approach, adopted by courts and commentators generally. See von Mehren, cit. (n. 21), pp. 289-290.

[25] See Rühl, cit. (n. 21), p. 205.

[26] See Rühl, cit. (n. 21), pp. 196-198.

[27] See Folsom, Ralph H.; Van Alstine, Michael P.; Ramsey, Michael D.; Schaefer, Matthew P.; *International business transactions. A problem oriented coursebook*, West Publishing Co., St. Paul, MN, 2019, 3rd ed.

[28] See Rühl, cit. (n. 21), p. 199.

the applicable law provides that default rules should apply, so the arbitration agreement is not a contractual term agreed by the parties. On the other hand, the party submitting its claim to arbitration will argue that the last form controls, so, in its view, the arbitration agreement is binding. The standing for claiming for applying one over the other theory, and thus the success of the party requesting or resisting arbitration, will depend on the applicable law.

2.2.- Parol evidence rule

A second rule that might guide in some cases the identification of the terms of the arbitration agreement is the *parol evidence rule*. This legal principle, which presents different degrees of application and effects, requires the control of evidence to supplement the terms of a written -and integrated- contract. It is adopted by many common law jurisdictions,[29] with strength within the U.S.,[30] where three alternatives have been adopted: the so-called "hard" or "traditional"

[29] Zuppi, Alberto Luis, "The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria", *Georgia Journal of International and Comparative Law*, 2007, Vol. 35, n° 2, pp. 239-258. The author mentioned the United States, England, Australia, Canada, New Zealand, and some "Mixed Jurisdictions," under which he included Louisiana, Scotland, South Africa, and Québec. What the author concludes upon these called "Mix Jurisdictions" is very illustrative to taste the different views about the rule: "There is no other location where the parol evidence rule might be seen in all its possible varieties as in the mixed jurisdictions. The range goes from the clear common law attitude adopted in South Africa, passing through the contradictions shown in Louisiana, the transformations of Scotland, up to the clear civil law attitude assumed in Québec. Nothing could better summarize the discrepancies, ambivalence, and fluctuations triggered by the rule." Even with merger clauses -which seem to be the most clear and accepted test to determine if a document is integrated- there is some controversy among two of the most prominent scholars of American Contract Law. As Scott and Kraus posit it: "3. Williston and Corbin on Merger Clauses. The debate over interpretive styles began with the titans of contract, Samuel Williston and Arthur Corbin, and, as we have suggested, it continues to the present. That debate was reflected in their different views on the effect to be given to merger clauses. Professor Williston adopted the position that if the parties "provide in terms that the writing shall be a complete integration of their agreement . . . the expressed intent will be effectuated. 4 S. Williston, Contracts § 633, at 1014 (3d ed. 1961). Professor Corbin might not have agreed: The writing cannot prove its own completeness and accuracy. Even though it contains an express statement to that effect, the assent of the parties thereto must still be proved. 3 A. Corbin, Contracts § 582, at 448-49 (2d ed. 1960) (emphasis added). Yet Corbin also claims: If a written document, mutually assented to, declares in express terms that it contains the entire agreement of the parties, and that there are no antecedent or extrinsic representations, warranties, or collateral provisions that are not intended to be discharged and nullified, this declaration is conclusive as long as it has itself not been set aside by a court on grounds of fraud or mistake, or on some ground that is sufficient for setting aside other contracts. Id. § 578, at 402-03." Scott, Robert E.; Kraus, Jody S., *Contract Law and Theory*, Carolina Academic Press, North Carolina, 2013, 5th ed., pp. 559-560 (emphasis suppressed).

[30] See footnote 47. The application of the rule has acquired more relevance and further developments in the U.S., probably due to the maintain of the right to a jury in civil matters.

rule, adopted by most states,[31] the "soft" parol evidence rule,[32] and the rejection of the rule when the CISG applies. A very concise and accurate description of the parol evidence rule in the U.S. can be found in Schwartz and Scott (2010).[33]

[31] Scott & Kraus, cit. (n. 29), p. 539, footnote 1, mentions 38 states in which the "hard" parol evidence rule is being applied. The footnote refers to Schwartz, Alan, and Scott, Robert E., "Contract Interpretation Redux", *The Yale Law Jorunal*, 2010, Vol. 119, pp. 926-964.

[32] Scott & Kraus, cit. (n. 29), pp. 538-539. The "soft" version has been established by The American Law Institute, *Restatement of the Law (Second) of Contracts*, ALI, Philadelphia, 1971, §§ 209-217 [hereinafter *Restatement (Second) of Contracts*], as well as the *Uniform Commercial Code* (UCC) §§ 2-102 ("Unless the context otherwise requires, this chapter applies to transactions in goods; they do not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers."). But see 1-303 (2) ("Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating or invalidating cause, supplement its provisions.").

[33] Schwartz & Scott, cit. (n. 31), p. 539: "The parol evidence rule functions to permit parties to *control the admissibility* of certain kinds of *evidence*. The rule holds that when parties fully integrate a final written agreement, they cannot later prove understandings that the integrated writing did not contain. Parties may want to exclude evidence of possible understandings reached during the contracting process for three reasons: (a) tentative agreements may later be abandoned; (b) agents may misrepresent their principal's commitments during the course of negotiations while the final agreement likely will set things straight; or (c) parties may prefer to exclude a portion of their agreement from legal enforcement. The common law consistently defers to these reasons, treating the decision to integrate an agreement as in the *parties' discretion*. American courts, however, divide over the appropriate *test* for determining whether or not parties intended to integrate part or all of their agreement into an exclusive, legally enforceable writing. *Formalist courts*, such as common law courts in New York, use a *hard* parol evidence rule. Derived from the traditional rule at common law, a hard parol evidence rule gives presumptively conclusive effect to merger clauses, and, in the absence of such a clause, determines whether the written agreement is fully integrated by applying the four corners presumption. This presumption holds that the contract is fully integrated if it appears final and complete on its face. A hard parol evidence rule thus maximizes party discretion over the content of the legally enforceable contract: it functions as a procedural default rule that shrinks the evidentiary base on which the court finds the terms of the contract, but the rule permits parties to expand that base as they see fit. When parties fully integrate the agreement and use a merger clause, an interpretation dispute over contract terms may be resolved on *summary judgment*. *Antiformalist jurisdictions*, such as California, favor a *soft* parol evidence rule. The test for integration in these states *admits extrinsic evidence* of meaning, even if the writing has an unambiguous merger clause or would appear final and complete on its face under the four corners presumption. Antiformalist courts believe that a merger clause raises a *rebuttable presumption* of integration that may be overridden by extrinsic evidence that the parties lacked the intent to integrate. When a merger clause is absent, soft rule courts reject the four corners presumption in favor of admitting any extrinsic evidence that may aid in determining the parties' intent to integrate their writing. A court that uses a soft parol evidence rule is *likely to deny a motion for summary judgment*, thus increasing the expected litigation costs of both parties. Moreover, a soft parol evidence rule functions, in effect if not formally, as an open gate: any extrinsic evidence that a party sees as advantageous ex post will likely be considered. Thus, contrary to the stated purposes of the

Both versions of the parol evidence rule -hard and soft- bar parties from offering certain evidence, when the document in which the contract has been written is integrated. They differ in the admissible tests to determine this previous issue of integration. In the civil law tradition, the statutory provisions that govern this issue[34] exclusively bar the proof of witnesses, an aspect that restricts the effect of the rule. In addition, but in a different aspect, the civil law provisions expand the rule's scope of application because no test or integration is required: only that contract be in writing. An excellent explanation of these rules is in POTHIER

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rule, the soft version withdraws from parties the ability to determine the evidentiary base that the court will later see" (citation omitted and emphasis added).

[34] See, *e.g*., ZUPPI, cit. (n. 29), p. 263. The provisions cited by authors as parallel of the parol evidence rule from civil codes are usually referring to both the statute of frauds and the parol evidence rule. Provisions that establish some parallel to the parol evidence rule are mentioned next. See, *e.g.*, Article 1341 of the French Civil Code ("Art. 1341. It is necessary to execute an instrument drawn up in the presence of notaries or made under private signature in all matters when a sum or value exceeding five hundred francs is involved, even for voluntary deposits; and no proof by witnesses against or beyond the content of an instrument, nor as to what is alleged to have been said previously, at the time of or since it was drawn up shall be allowed, even if the sum or value in dispute is less than five hundred francs. All of which is without prejudice to what is specified in the laws relating to commerce." (Translation provided by Henry CACHARD, *French Civil Code,* Lecram Press, Paris, 1930). See also Article 1709.2 of Chilean Civil Code, Article 1726 of the Ecuadorian Civil Code. See also Article 1767 of the Colombian Civil Code, which was identical to the Chilean provision, but has been derogated. It is worthy to note that after the 2016 reform of the French Civil Code, the article that served to model to other codifications was substantially changed. Now, it is as follows: "Article 1359. L'acte juridique portant sur une somme ou une valeur excédant un montant fixé par décret doit être prouvé par écrit sous signature privée ou authentique. Il ne peut être prouvé outre ou contre un écrit établissant un acte juridique, même si la somme ou la valeur n'excède pas ce montant, que par un autre écrit sous signature privée ou authentique. Celui dont la créance excède le seuil mentionné au premier alinéa ne peut pas être dispensé de la preuve par écrit en restreignant sa demande. Il en est de même de celui dont la demande, même inférieure à ce montant, porte sur le solde ou sur une partie d'une créance supérieure à ce montant." (*The promise relating to a sum or a value exceeding an amount fixed by decree must be proven in writing under a private or authentic signature. It cannot be proved in addition to or against a writing establishing a legal act, even if the sum or the value does not exceed this amount, except by another writing under private or authentic signature. Anyone whose claim exceeds the threshold mentioned in the first paragraph cannot be exempted from proof in writing by restricting his request. The same applies to anyone whose claim, even less than this amount, relates to the balance or part of a claim greater than this amount*. Free translation). Note that the restriction is not only referred to witnesses, but any evidence other than a signed writing. See also Article 51 of the Spanish Commercial Code, which only enact a statute of frauds rule, but not a version that could parallel the parol evidence rule. But see Article 2722 of the 1942 Italian Civil Code: "Art. 2722. Patti aggiunti o contrari al contenuto di un documento. La prova per testimoni non è ammessa se ha per oggetto patti aggiunti o contrari al contenuto di un documento, per i quali si alleghi che la stipulazione è stata anteriore o contemporanea." (*Agreements added to or contrary to the content of a document. Evidence by witnesses is not allowed if it concerns agreements added to or contrary to the content of a document, for which it is attached that the stipulation was prior or contemporary*. Free translation). Note that this provision is quite similar to the common law parol evidence rule. See ZUPPI, cit. (n. 29), p. 260.

(1761),[35] whose influence in French codification is well known and its influence -directly or indirectly- in many other civil law jurisdictions. Notwithstanding the clarity of the civil law provisions mentioned before, their procedural effect is not properly addressed in those jurisdictions.[36] At the international level, the CISG rejects the parol evidence rule, a circumstance that has led legal experts to offer a comparative study on the content and basis of the rule.[37] In any case, the CISG

[35] Pothier, Robert J., *A Treatise on Obligations, considered in a moral and legal view*, Translation, Martin & Ogden Publishers, Newburn N.C., 1802, pp. 214-215: "From this disposition of the ordinance may be derived four general principles which decide the cafes in which testimonial proof ought to be admitted or rejected. These principles are, I. he who had it in his power to procure literal proof, is not admitted to bring testimonial proof, when the thing exceeds one hundred livres, if there is no inchoate proof in writing. II. *When there is an instrument in writing*, those who were *parties*, their heirs or successors, cannot be admitted to testimonial proof *contrary to or besides* this instrument, even when the thing should not exceed one hundred livres; if they have no indicate proof in *writing*. III. One is admitted to testimonial proof of things of which literal proof could not be obtained, to whatever sum they may amount. IV. Likewise, when by an accidental and unforeseen circumstance, acknowledged by the parties or proved, the literal proof is loft, one is admitted to testimonial proof, to whatever sum the thing may amount" (emphasis added). In the following pages, the author explains each of those principles. We are focused on the second: "SECOND PRINCIPLE. That testimonial proof is not admitted contrary to a writing, nor besides what it contains. 758. Literal proof is preferred in our law to testimonial: therefore, the ordinance forbids the admission of testimonial proof contrary to what is contained in a writing. . . 759. The ordinance not only excludes the proof by witnesses of what would be directly contrary to an instrument of writing; it does not permit the admission of anything besides the contents of these instruments, neither of what should be alleged to have been said at the time, before or since: for as they have made an instrument of writing, the party must blame himself alone for not having then expressed what he now alledges [sic]. For example. The debtor will not be received to prove by witnesses that there has been granted him a certain time for the payment, if it is not expressed in the instrument; neither of the parties will be admitted to prove that a certain place was agreed upon for the payment, if the instrument does not express it. A fortiori, the creditor will not be admitted to prove by witnesses that there is more due him than is expressed in the instrument. A fortiori, the creditor will not be admitted to prove by witnesses that there is more due him than is expressed in the instrument." (emphasis modified).

[36] It will usually determine the result of the final judgment, since there is not such a thing as the motion for summary judgment. Thus, the evidence that the parol evidence rule seeks to exclude will have been produced anyway. We note that, via masquerade interpretation, the same result might seek to be obtained under the parol evidence rule. It is not clear that parties may, under those legal systems, create the effect provided by the parol evidence rule -excluding any evidence other than the integrated document- by merely agreeing it, given that there might be public interests involved. Finally, under those systems there may exist a broad exception for commercial matters, leaving the provisions that parallel the parol evidence rule without application in most of the cases concerning international commercial arbitration. See Zuppi, cit. (n. 29), at 261.

[37] The clarification provided in the mid-2000 by the *CISG Advisory Council* is very useful, not only for the said purpose, but also to succinctly explain the content and grounds of the rule. That instrument has been invoked, *e.g.*, by the UNCITRAL; HCCH; UNIDROIT, *Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales*. United Nations, Vienna, 2021, 120 pp., pdf. file available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/

provides for an exception to the rejection of the parol evidence rule: when parties have clearly agreed otherwise, in a qualified or special -not ordinary- merger clause.[38] The importance of the parol evidence rule under de CISG is diminished by treating the effect of that qualified merger clause as a question of interpretation.[39] It is unclear if the UNIDROIT Principles on International Commercial Contracts or the PECL leave place for applying the rule.[40] The excluded evidence can be used,

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en/tripartiteguide.pdf. (pp. 106-107). See also p. 37: "153. The principle of freedom of evidence also applies and the contract can be evidenced by any means including witnesses, thus displacing domestic evidentiary rules such as those that exclude oral testimony ("parole evidence rule")". For an explanation about the *rejection* of the rule under the CISG, as well as its content and grounds, see CISG Advisory Council (Ed.), "Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG", *Pace International Law Review*, 2005, Vol. 17 n° 1, pp. 61-77. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA. The leading case is, according the said opinion, is *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 114 F.3d 1384 (11th Cir. 1998), in which the Court of Appeal of the 11th Circuit held the following "we conclude that the CISG, which governs international contracts for the sale of goods, precludes summary judgment in this case because MCC has raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the pre-printed contract. The CISG also precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement. Accordingly, we REVERSE the district court's grant of summary judgment and REMAND this case for further proceedings consistent with this opinion." One of the justifications given in that document for the prevalence of the rule in the U.S. -the right to a jury in civil matters- provide a very good reason not to apply it when the dispute will be resolved by a judge or an arbitrator, without a jury. But in the U.S. the application of the rule *does not depend* on whether a jury will be demanded.

[38] See CISG Advisory Council, cit. (n. 37): "4.1. When the parties agree to a Merger Clause, its effect may be to derogate under Article 6 from norms of interpretation and evidence contained in the CISG. In this regard Merger Clauses have two objectives. The first objective is to bar extrinsic evidence that would otherwise supplement or contradict the terms of the writing. Such Merger Clauses mainly derogate from Article 11, which provides that a sales contract may be proved by any means, including witnesses. The second objective is to prevent recourse to extrinsic evidence for the purpose of contract interpretation. This objective would constitute a derogation from the Convention's canons of interpretation incorporated in Article 8. Under the CISG the *extent* to which a Merger Clause *accomplishes* one or both of these purposes is a *question of interpretation* of this clause . . . 4.6. Under the CISG, a Merger Clause does not generally have the effect of excluding extrinsic evidence for purposes of contract interpretation. However, the Merger Clause *may* prevent recourse to extrinsic evidence for this purpose if *specific wording*, *together* with all other relevant *factors*, make *clear* the parties' *intent* to derogate from Article 8 for purposes of contract interpretation. 4.7. Article 9 requires a court or tribunal to consider a number of factors when determining whether usages have been agreed or trade practices have been established between the parties. A Merger Clause generally will not be held to exclude trade usages relevant under Article 9(1) or established practices concerning the implicit background of the transaction *unless* those usages and practices are specifically mentioned." (footnotes omitted and emphasis added).

[39] CISG Advisory Council, cit. (n. 37).

[40] It has been concluded, from Article 4.3 of the 2016 UNIDROIT Principles on International Commercial Contracts, that the so-called "soft law" instruments also reject the parol evidence rule. See Yildirim,

notwithstanding, to interpret the terms of the contract, as it is recognized in many common law jurisdictions.[41]

In sum, with respect to the parol evidence rule, its treatment in the applicable law may differ: from being rejected, as it is in the CISG, to being extended to bar only witness testimony, as it is in the civil law tradition, to being extended to exclude even written evidence, as it is in the U.S. Occupying the middle ground, is English law, which seems to have also expanded the rule to written evidence, while recognizing so many exceptions that the rule has become only a rebuttable presumption, with little effect.[42] Many jurisdictions from the common law tradition have developed their own variances of the parol evidence rule, as many states of the U.S., which differ among themselves.[43] Soft-law instruments also have a specific, different treatment.

Even if the underlying contract -in which the arbitration agreement is contained- has been reduced in writing expressly by a merger clause or implicitly by, for example, the completeness of the entire contract on its face, it is likely to happen that a court or arbitrator will find them to be integrated. Even in the clearer case of the merger clause, many questions may be posed: What will be the effect of a general or ordinary merger clause in the underlying contract? Will it apply to the (severable) arbitration agreement? Will that clause exclude written evidence or only witness testimony? Imagine that there is a separate arbitration agreement that is not contained in the integrated document, e.g., in the case of a separate dispute settlement agreement, applicable to many contracts and parties. Would a separate arbitration agreement set forth in a document written prior to the integrated one, which is silent on the issue of dispute resolution method, be admissible as evidence? The answer to those questions -and others alike- depends on the law applicable to the arbitration agreement, and particularly how it regulates the precise effect and scope of the parol evidence rule.

A court will probably not give effect to the parties' intention to exclude extrinsic evidence of an integrated arbitration agreement unless the applicable law is from one of the formalist jurisdictions of the common law. On the contrary, it

Ahmet Cemil, *Interpretation of Contracts in Comparative and Uniform Law*, Kluwer Law International, Netherlands, 2019. A similar provision can be found in Article 5:102 of the PECL. But Articles 2.1.17 of UNIDROIT Principles on International Commercial Contracts, and 2:105 of PECL, expressly give effect to merger clauses. See Zuppi, cit. (n. 29), p. 272. The Article 2:105 of the PECL requires that they have been negotiated.

[41] Zuppi, cit. (n. 29), p. 272.

[42] See Yildirim, cit. (n. 40), pp. 101-103.

[43] The differences among countries of the common law tradition can be seen in Zuppi, cit. (n. 29), pp. 241-248; and CISG Advisory Council, cit. (n. 37). Differences among states within the U.S. can be seen in Schwartz & Scott, cit. (n. 31).

is more likely that a court -other than the ones that get used to the hard version of the parol evidence rule- will admit extrinsic evidence and resolve the dispute on the merits, i.e., not by preliminary objections or summary judgment. That has the consequence of depriving parties' intention of the ability to effectively exclude evidence other than the integrated document to prove additional terms of the arbitration agreement.

When parties' intention is clear and unambiguous, as well as the precise effect that they want to attach, e.g., to a merger clause related to their arbitration agreement, an arbitrator will probably follow parties' intention, especially taking into account Article 31(2)(a)(iv) of the *UNCITRAL Model Law on International Commercial Arbitration*, if applicable.

2.3.- Implied obligations derived from Good Faith

Another area in which the identification of the terms of a contract may vary among jurisdictions is the presence of a rule allowing the introduction of terms *not expressly* included in the contract. Many civil law jurisdictions include that kind of provision, which refers to good faith as the main criteria, following the Roman tradition.[44] It has been said that common law countries, even providing judges with broader powers to "make law," are much more reluctant to exercise the power to recognize implicit obligations derived from the principle of good faith, in the contractual context.[45] Nonetheless, other common law jurisdictions,

[44] See Guzman Brito, Alejandro, "La Buena Fe en el Código Civil de Chile", *Revista Chilena de Derecho*, 2002, Vol. 29, n° 1, pp. 11-23. See also Articles 1134.3 and 1.135 of the French Civil Code, Sections 157, 241, and 242 of the *BGB*, Articles 1374 and 1375 of the 1942 Italian Civil Code, Article 1258 of the Spanish Civil Code, Article 1546 of Chilean Civil Code, Article 1562 of the Ecuadorian Civil Code, Article 1603 of the Colombian Civil Code, and, arguably, Article 1362 of the Peruvian Civil Code. After the 2016 reform of the French Civil Code, the mentioned dispositions are now in Articles 1104 and 1194, furthering away the grounds on good faith for the second disposition. As it is pointed out by Guzman, some French commentators had linked both dispositions, one as a consequence of the other. See Guzman, cit., at Footnote 17, referring to F. Laurent and G. Baudry-Lacantinérie - L. Barde.

[45] In the U.S., the UCC and the *Restatement (Second) of Contracts*, cit. (n. 32), establish a similar general duty of good faith. See UCC §§ 1-304 ("Every contract or duty within the Uniform Commercial Code imposes an *obligation of good faith* in its performance and enforcement"). See also *Restatement (Second) of Contracts*, cit. (n. 32), § 205. But it is not possible to conclude from that duty that courts may infer implicit, independent obligations. In fact, they may not. See UCC § 1-304, comment 1: "This section sets forth a basic principle running throughout the Uniform Commercial Code. The principle is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. While the applicability of the duty is broader than merely these situations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Act. It is further implemented by Section 1-303 on course of dealing, course of performance,

such as England, Australia, Canada and Singapore have recognized some implied contractual obligations based on the principle of good faith,[46] but in a narrower sense than the principle is applied in civil law jurisdictions.[47] To clearly identify the differences between legal systems in this regard would be as slippery as capturing the whole concept and scope of good faith.[48] In any case, there is no doubt that it would differ among different jurisdictions and among different legal traditions, as well as among different times, even having similar statutory provisions, such as those of the *German Civil Code* (BGB) and the UCC.[49] It seems that the extent to which the principle of good faith can impose obligations not agreed by the parties would differ among jurisdictions, not only due to different statutory provisions, but also to the difficult task of identifying the specific situations in which it would be appropriate to invoke such a broad, and almost vague concept. It will probably be easier in cases where is necessary to impose sanctions to bad faith conducts, in contrast to situations where "honesty" or "fairness" may require

and usage of trade. This section does not support an independent cause of action for failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith *merely* directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, *and does not create a separate duty* of fairness and reasonableness *which can be independently breached*" (emphasis added). See also *Restatement (Second) of Contracts*, cit. (n. 32), § 205, comment c: "Good faith performance. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering or imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."

[46] See Paterson, Jeannie M., "Good Faith Duties in Contract Performance", *Oxford University Commonwealth Law Journal*, 2014, Vol. 14, n° 2, pp. 283-309.

[47] The broader effect under civil law tradition comes from the Roman system and it is described by the Chilean Romanist, Alejandro Guzman Brito, in relation with the French and Chilean statutory provisions. See Guzman, cit. (n. 44). The Chilean codifier, notwithstanding depart from French Civil Code, rejects the broad notion of "ex bono et aequo" that appears in Justinian Institutes, and replaced it in order not to give too much power to judges to intervene in the economy of the contract (Guzman, cit., n. 44, p. 16).

[48] As Gillette state it, "Opinions probably would *differ* about the existence of bad faith conduct in a specific situation, and to the extent that *disagreement persists*, the same *institutional difficulties in creating and enforcing a remedy* affect the determination of bad faith conduct." Gillette, Clayton P., "Limitations on the Obligation of Good Faith", *Duke Law Journal*, 1981, n° 4, p. 646.

[49] See, *e.g.*, a comparison between BGB §242 and UCC §1-203, that although with textual similitude, the latter is applied in a much narrower sense. See Gillette, cit. (n. 48), pp. 646-647. The same can be said referring to the French Civil Code, and one of its partial followers, such as the Chilean Civil Code. See Guzman, cit. (n. 44).

a positive action. In the field of international law, the CISG includes a similar, general provision, but only referred to trade usage, and not to equity or good faith.[50] There is debate as to what extent the exclusion of good faith and fair dealing from article 8 is determinative, and whether it is possible to supplement the absence of specific regulation in the CISG.[51] Finally, soft-law instruments widely accept the incorporation of terms derived from trade usage and good faith to the contract.[52]

The concise description proposed in this article show how different systems vary, even with similar or almost equal statutory provisions, and therefore how the analysis of the applicable law is relevant in this respect. Leaving international trade usages aside, the application of these kind of principles seems to be very idiosyncratic, where the courts' role is an important factor, as well as their willingness to "make justice" in one specific case, in some cases turning away from the "strict" rule of law. That may make some differences when invoking implied obligations mandated by the principle of good faith. It is harder to imagine the concrete hypothesis, as it is difficult to capture the entire institution and to what extent it can create entirely new obligations.[53] Those obligations, complementary to the arbitration agreement and procedure, probably will have less chance to be recognized under the common law than the civil law tradition.[54] At least the *source* of the authority -both for courts and arbitrators- to integrate those obligations will be less clear than it is under express statutory provisions of many civil codes of the continental system. Article 2 A(2) of the UNCITRAL Model Law on International Commercial Arbitration might provide that source, in absence of another one. But that provision only appeared in the 2006 amendment,[55] which has not been enacted

[50] See CISG, Article 9(2). Even though Article 7 refers to good faith, it is only for the purpose of interpreting the convention itself, not the contract.

[51] See Yildirim, cit. (n. 40), pp. 141-143.

[52] See UNIDROIT Principles on International Commercial Contracts, Article 1.6, 1.7, and 1.9. See also PECL Principles, Articles 1:105, 1:106, 1:201, and 1:202.

[53] See footnote 46.

[54] For example, it has been said in the U.S. that "an expansive good faith obligation undermines the predictive capacities of commercial actors without producing countervailing benefits" Gillette, cit. (n. 48), p. 650.

[55] See *UNCITRAL Model Law on International Commercial Arbitration*, Chapter I, Article 2A – as added [International origin and general principles], in Holtzmann, Howard M., Neuhaus, Joseph, *et al.*, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law International, Netherlands, 2015, pp. 24-27. See p. 25: "Paragraph 2 of Article 2 A calls for applying the Law, where a matter is not "expressly settled" by its text, "in conformity with the general principles on which this Law is based." Those principles can be gleaned from the text of the Law and the drafting history. It is submitted that among those principles are a broad realm of party autonomy (see, e.g., Articles 3, 10, 11, 13(1), 15, 17, 19(1), 20–26); subject to party control, a similarly broad freedom for the arbitral tribunal to structure arbitral proceedings as it

in the majority of jurisdictions that enacted the original version.[56]

One plausible situation on which resorting to implied obligations from good faith might be accepted is when arbitration agreement is incomplete in defining, e.g., what it means the obligation to negotiate before submitting the dispute to arbitration, what is the exact procedure for appointing arbitrators, or what happen when one party fails to make its appointment. Good faith may have some role to play in fulfilling those procedural rules or even in creating them, but that possibility might be denied in some jurisdictions. The same can be said, e.g., in relation to the duty to timely object procedural flaws, even if the *lex arbitri* nor the institutional rules provide for it. Courts and arbitrators may reach the same conclusion, even in the absence of a rule like Article 4 of the UNCITRAL Model Law on International Commercial Arbitration, by invoking obligations derived from good faith.

III. INTERPRETATION OF CONTRACTUAL TERMS

The second main issue to be addressed in this article, as announced, is related to interpreting the contract terms, i.e., determining the meaning of the already identified terms of the contract.[57] It is also an issue where legal systems provide different answers. Familiar concepts like *textualism*, *contextualism*, *plain meaning, ambiguity*, and *objective* or *subjective* method of interpretation become relevant here. Again, a treatise will be necessary to fairly compare different systems, each one with its own developments, history and complexities. But for our purposes -just to formulate the question- it is enough to say a word about them.

In the issue of interpretation, there are less dramatic consequences than those that depart from the parol evidence rule's regulation, or from the incorporation of obligations derived from the principle of good faith. That is because modern laws are characterized by adopting a hybrid method of interpretation -combining some subjective and objective principles- and to apply some detailed rules of interpretation. But differences remain, not only in (A) determining the goal of the interpretation process -the real parties' intent or how the contract would have

considers appropriate (see, e.g., Articles 18, 19(2)); and limited scope for court intervention in the arbitral process and review of arbitral decisions (see, e.g., Articles 5, 6, 35 and 36)." The whole Article 2A has its origin in Article 7 of the CISG, but certainly add subsection 2, of practical importance, that allows to apply good faith not only to the interpretation either of the law or of the treaty, but also to the contract. That element is absent in the CISG.

[56] For the actual status of the *UNCITRAL Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006, can consult the following link: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

[57] See Scott & Kraus, cit. (n. 29), pp. 539-542.

been understood by a reasonable third person- but also in (B) accepting or not some detailed rules of interpretation, like the interpretation against the drafter, the reference to trade usages, course of performance or subsequent conduct,[58] course of dealing, *effet utile*, among others. The question will be not only if those rules or criteria will be available, but also how to apply them.

Institutional arbitration rules will usually fill many, but not all, the gaps related to the arbitral procedure. But even there, vagueness and/or ambiguity can be found in almost every creative arbitration agreement that sets forth a special contractual disposition that prevails under those rules of interpretation. The problem arises mainly in those arbitration agreements that create or establish complex systems of appointment of the members of the arbitral tribunal, intervention or joinder by other parties of the same or different contracts, limitations of quantity or kind of evidence that either party can present, weight of evidence, confidentiality issues, multi-tier dispute resolution clauses,[59] among other issues.

3.1.- The interpreter's goal. Subjective versus objective method of interpretation. Textualism versus contextualism.

Maybe a fair starting point is to clarify that all systems seek to strike a balance between a purely objective and a purely subjective method of interpretation.[60] The

[58] See Born, cit. (n. 2), at footnotes 49 ("Judgment of 5 December 2008, 27 ASA Bull. 762, 770 (Swiss Fed. Trib.) (2009) ("court will not have to consider only the wording and the factual matrix in which the parties expressed their intention, but also the circumstances which preceded or prevailed at the time of the making of the agreement, to the exclusion of subsequent conduct"); Beale, Hugh (ed.), *Chitty on Contracts*, Sweet & Maxwell Ltd., London UK., 2018, 33rd ed., §13-136 ("Subsequent actions are therefore inadmissible to interpret a written agreement, although there are certain exceptions to this rule") and 50 ("Filanto SpA v. Chilewich Int'l Corp., 789 F.Supp. 1229, 1241 (S.D.N.Y. 1992) ("in determining the intent of a party[,] due consideration is to be given to any subsequent conduct of the parties"); CISG, Art. 8(3); U.S. UCC §2-208; *Restatement (Second) of Contracts*, cit. (n. 32), §202(4) (1981) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement"). For international arbitral awards considering the parties' post-contractual conduct in interpreting an arbitration agreement, see *ICC Award*, Case No. 7792, 122 J.D.I. (Clunet) 993, 996 (1995); *Saudi Arabia v. Arabian Am. Oil Co. (Aramco)* [Ad Hoc Award, 23.08.1958], 27 I.L.R. 117, 198 (1963).").

[59] See, *e.g.*, *White v. Kampner*, 229 Conn. 465, 641 A.2d. 1381, 1384 (1994). In that case, the Supreme Court of Connecticut held that the presumption in favor of coverage did not apply because the plain meaning of the arbitration agreement did not leave space for doubts about the existence of a condition precedent agreed by the parties.

[60] Yildirim, cit. (n. 40), pp. 25-26: "Despite all their differences, individual legal systems have a common feature in their approaches to the interpretation of contracts: *every legal system seeks a balance between subjective and objective interpretation*. In legal systems where the subjective approach dominates,

question that each method seeks to answer differs: under a subjective method, the adjudicator must address what the contracting parties understood from the declaration of intention in the contract, while under the objective method, it has to address what a reasonable third person would have understood.[61] Even if both methods reach, most times, similar results,[62] at least two considerations make the question relevant: that the way or means to reach the solution can be as important as the solution itself,[63] and also that the mere possibility that the solution may differ in just one case justifies the effort to follow the ways or means provided for by the applicable law to reach a conclusion. And the possibility that they differ should not be underestimated, if we compare, on the one hand, the focus on parties' real intent is mentioned as the primary goal of construction by many continental systems, with the English disregarding that real intent, on the other hand.[64] The common law diverges among countries and, even within one country, as in the case of the U.S..[65] Again, we refer to SCHWARTZ and

principles and theories of objective interpretation redress the balance. Alternatively, in legal systems where the objective approach is preferred, it remains possible to find all the elements and principles of subjective interpretation" (emphasis added). A brief description of both objective and subjective method of interpretation, and how they are adopted among different systems, can be found in YILDIRIM, cit. (n. 40), pp. 25-123.

[61] That reasonable person is usually placed in the same circumstances as the parties, which gives it a subjective component.

[62] YILDIRIM, cit. (n. 40), p. 26: "The consequence of this common trend in contemporary legal systems is that they adopt similar or even the same methodologies for interpretation, they bring similar solutions to the same problems, and their practice is ultimately similar, no matter how different are the provisions contained in their legislation."

[63] Specially to avoid a challenge to an award that has not applied the law chosen by the parties, in the case that a clear choice has been made regarding the arbitration agreement itself.

[64] Expressed by YILDIRIM, cit. (n. 40), p. 99: "Lord Denman defined this approach in his 1833 decision of Rickman v. Carstairs, "[t]he question in this and other cases of construction of written documents is not what was the intention of the parties, but what is the meaning of the words they have used." Literal interpretation prevails over the real intent of the parties in English law. For this reason, objective theory characterizes the English approach to the interpretation of contracts. The real or *subjective intent of the parties is not relevant*, and only their extrinsic *expressions* are the proper subject of interpretation. In other words, the subject of interpretation is not the real intent of the parties, what they meant, or what they understood. Rather, it is what a *reasonable third person* in the *same position* with the parties would have understood from the statements and conduct of the parties" (citations omitted).

[65] As an example, two opposite approaches can be observed in the states of New York and California, where textualism and contextualism are, respectively, adopted. The contrast is well presented by the following cases: *W.W.W. Assocs. v. Giancontieri*, on one hand, and *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, on the other. See SCOTT & KRAUS, cit. (n. 29), pp. 569-577. The full citation of the cases is as follows: *W.W.W. Assocs. v. Giancontieri,* 566 N.E.2d 639 (1990); and *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 69 Cal. Reptr. 561, 442 P.2d 641 (1968). Under the UCC §2-202, the plain meaning rule is rejected and both the UCC and the *Restatement (Second) of Contracts*, cit. (n. 32), adopt a more subjective method of interpretation. See

Scott (2010) to succinctly explain the U.S. law on the issue of interpretation of the terms of the contract.[66] English law, as already mentioned, adopts a less systemized but objective approach to contract interpretation.[67] Although objective, there is room

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UCC §§ 2-202, comment 1(b); and *Restatement (Second) of Contracts*, cit. (n. 32), § 212 comment a. See also Scott & Kraus, cit. (n. 29), p. 541: "While the First Restatement of Contracts largely followed the common law's objective standards, the Second Restatement endorses a relatively subjective, context-sensitive interpretive standard" (citations omitted).

[66] Schwartz & Scott, cit. (n. 31), pp. 962-963: "Contests over the meaning of contract terms thus follow a predictable pattern: one party claims that the words in a disputed term should be given their *standard dictionary meaning*, as read in light of the contract as a whole, the pleadings, and so forth. The counterparty argues either that the contract term in question is *ambiguous* and extrinsic evidence will resolve the ambiguity, or that extrinsic evidence will show that the parties *intended* the words to be given a *specialized* or *idiosyncratic meaning* that varies from the meaning in the standard language. As with the division over hard and soft parol evidence rules, courts have divided on the question whether express contract terms should be given a "*contextual*" or a "*plain meaning*" interpretation. Under the latter practice, when words or phrases appear to be *unambiguous*, extrinsic evidence of a possible contrary meaning is *inadmissible*. The plain meaning rule operates in tandem with a hard parol evidence rule to reduce expected adjudication costs. If the contract is fully integrated, and if contractual terms are facially clear, then the dispute can be resolved at *summary judgment*. Parties may realize this cost advantage whether or not contextual inquiries into meaning exacerbate the risk of strategic behavior in litigation. Parties who want the court to see additional evidence, but avoid trials, can (and must) embed the evidence in the contract itself. In this way, the plain meaning rule functions as a useful aid to contract design by offering parties the opportunity either to expand or to contract the context on which meaning questions are decided. A contextual meaning rule, on the other hand, limits parties' freedom to narrow the interpretive context even when doing so would maximize the expected value of the contract. The preceding discussion illustrates why it is important for parties to control by contract the rules that determine the evidentiary base for resolving interpretive disputes. Sophisticated commercial parties incur costs to cast obligations expressly in written and unconditional forms to permit a party to stand on its rights under the written contract, to improve party incentives to invest in the deal, and to reduce litigation costs. Parties know better than courts how best to trade off these front-end and back-end contracting costs. Contextualist courts and commentators prefer to withdraw from parties the ability to use these instruments for contract design. The contextualists, however, cannot justify rules that so significantly restrict contractual freedom in the name of contractual freedom." (citations omitted and emphasis added).

[67] See Yildirim, cit. (n. 40), pp. 96-108. A good description of the English objective method of interpretation can be found: "Even though the objective approach dominates English law, this does not mean that the intent of the parties is irrelevant. On the contrary, the purpose of interpretation is to establish the intent of the parties to the contract. The process of interpretation is therefore based on the objective manifestation of intent. In this process, the background facts at the time of the conclusion of the contract are also taken into consideration. A certain parallelism can be observed between the efforts of continental systems toward objectivizing their subjective approaches and the objective approach of English law". Yildirim, cit. (n. 40), pp. 100-101. The author also describes the "Lord Hoffman's Five Principles of the Interpretation of Contracts," which he identified as "the most cited." Those principles are: (i) "Interpretation is the ascertainment of the meaning which the document would convey to a *reasonable person* having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;"; (ii) "Subject to the requirement that it should have been reasonably

for contextualism.[68] Continental systems, on the other hand, are usually divided between those that adopt a more subjective and those which adopt a more objective method of interpretation.[69] For the subjective method, and the rules of interpretation

available to the parties and to the exception to be mentioned next, it [the admissible background] includes absolutely anything which would have affected the way in which the language of the document *would have been understood by a reasonable man*;" (iii) "The law *excludes* from the admissible background the *previous negotiations* of the parties and their declarations of subjective intent. They are admissible *only* in an action for rectification;" (iv) "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The *meaning of words* is a matter of dictionaries and grammars; the *meaning of the document* is what the *parties* using those words against the relevant background *would reasonably have been understood to mean*. The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionaly happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax;" and (v) "The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic *mistakes*, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had." YILDIRIM, cit. (n. 40), pp. 105-108 (citations omitted and emphasis added).

[68] *Id*., rule No. 4. YILDIRIM, cit. (n. 40), p. 107: "The first part of the fourth principle states that the meaning understood by a reasonable third person with the relevant background *prevails over the literal meaning* of the words" (emphasis added).

[69] A remarkable change has been the one which occurred in 2016 in France, with its reform to the droit des obligations. After having influenced many other civil law countries now in force, the French have moved on from a very subjective method of interpretation to a more objective method. See Article 1156 of the Napoleon Code (1188 nowadays): "The common intention of the contracting parties should be sought in contracts, rather than being guided by the literal meaning of the words" (translation provided by Cachard, H., *French Civil Code*, Lecram Press, Paris, 1930). See also Articles 1157-1164. See also YILDIRIM, cit. (n. 40), pp. 27-28: "The subjective approach to interpretation, which is based on the intent of the parties, prevails in French law. This is a natural consequence of the influence of liberalism, which enshrines the principle of freedom of contract (liberté contractuelle) in the French law of obligations. ... The limits of subjective interpretation are becoming increasingly more defined, and French literature and case law have likewise increasingly recognized that it is not always possible to determine the common intent of the parties. Therefore, courts must take into account the objective elements in the interpretation of a contract, such as good faith and fair dealing and usages. As a result, today the subjective and objective methods of interpretation are being applied together in French law." (citations omitted). See also Article 1188 of the French Civil Code actually in force, whose newly incorporated second incise adds the reference to what a reasonable man would have understood, placed in the same circumstances. *On the other hand*, *BGB* has been regarded as one that placed itself on the objective method side. See also YILDIRIM, cit. (n. 40), p. 58: "The general approach by the Prussian Civil Code of 1794 was individualist, in accordance with the liberal thought underlying it. Therefore, this code adopted a subjective approach with respect to the interpretation of contracts. However, the BGB of 1900 adopted a more collectivist approach, focusing on the social aspects of law. Unlike the Prussian Civil Code, the BGB is not opposed to judicial intervention in contracts. The doctrine of "Treu und Glauben" (*good faith and fair dealing*) underlies this shift in perspective. The Naturalist School of Law and in particular Hugo Grotius' criticism of the subjective approach of Roman law played an important role in this shift. The *objective approach* to the interpretation

that have been adopted in many countries, we again refer to POTHIER (1761).[70] In countries that adopt a subjective method of interpretation, the literal meaning of the terms has a great weight, although *less* than the real intent of the parties, if proved.[71] In some continental systems, judges adopt the *in claris non fit interpretatio* rule (or no interpretation is required to clarify what is already clear), as is the case with

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of contracts was adopted in German law as a result of this shift in perspective, differing not only from most Latin jurisdictions but also from the other Romano-Germanic jurisdictions. In accordance with the objective theory, when interpreting declarations of intent, the *focus* is not on what the party making the declaration meant but on what a *reasonable third person would understand* from the declaration. If the meaning that the addressee understood from the declaration is afforded legal protection, then there is no room to determine the "real intent"" (citations omitted and emphasis added). See also §§ 133, 157. Although the second appears to displace the former per specificness, both are applied to contract interpretation. And despite the fact that the former appears to be extremely subjective, that is not how it has been applied. See YILDIRIM, cit. (n. 40), pp. 61-65.

[70] See POTHIER, cit. (n. 35), pp. 60-65: "First Rule. 91. We ought, in agreements, to attend to what has been the *common intention* of the contracting parties, *rather than* to the *grammatical sense* of their expressions. ... For example. You rented from me a small apartment, in a house, the rest of which I occupied. I give you a new lease in these words; "I have let my house to B. for three "years, on the terms mentioned in the preceding lease." Will you have a right to pretend that 1 leafed the whole house to you? No. For although these words "my house," in their grammatical sense, signify the whole house and not a single apartment, yet it is plain that our intention was only to renew the lease of the apartment which you rented from me; and this intention, of which there can be no doubt, ought to prevail over the expression in the lease. Second Rule. 92. When a clause is susceptible of two meanings, it ought rather to be understood in that in which it may have some effect, than in that in which it cannot have any. ... Third Rule. 93. When, in a contract, words are susceptible of two meanings, they ought to be understood in the sense most suitable to the nature of the contract. ... Fourth Rule. 94. What may appear ambiguous in a contract, is to be interpreted by what is customary in the place: ... Fifth Rule. 95. Custom is of so great authority for the interpretation of agreements, that clauses which are customary in a contract, are taken as a part of it, by implication, without being expressed: ... Sixth Rule. 96. A clause is to be interpreted by the other clauses in the same instrument, whether they precede or follow. ... Seventh Rule. 97. In cafes of doubt, a clause ought to be interpreted against him who stipulated the thing and in favor of him who contracted the obligation. ... Eighth Rule. 98. However general may be the words in which an agreement is expressed, it comprehends those things only on which it appears the parties intended to contract, and not those which they had not in view. ... Ninth Rule. 55. When the object of the agreement, is an universality of things, it comprehends all the particular things which compose this universality, even those of which the parties had no knowledge. ... Tenth Rule. When in a contract a case has been mentioned, on account of the doubt there may have been, whether the engagement resulting from the contract, would otherwise extend to it, the parties are not presumed to have intended to restrain the legal extent of the engagement with regard to other cases which are not expressed. ... Eleventh Rule. 101. In contracts, as well as in testaments, a clause inserted in the plural number often divides itself in to several singular things." (emphasis added). By referring to POTHIER, we indirectly refer to DOMAT. See YILDIRIM, cit. (n. 40), p. 26.

[71] See, e.g., Article 57 of the Spanish Commercial Code, which expressly states that grammatical, natural or usual sense of the words is demanded by the principle of good faith in the performance of the contract.

Spanish[72] and Italian law.[73] In the international field, Article 8 of the CISG[74] sets forth a hybrid model which seeks first to ascertain the real, common intention of the parties (subjective method of interpretation, but with objective elements),[75] and then, if such determination is not possible, to ascertain what the understanding of a third reasonable person in the position of the party who received the statement would have been (objective method). The final paragraph of the same article invites us to consider all relevant circumstances, thereby adopting a very contextualist approach.[76] Soft-law instruments, such as UNIDROIT Principles on International Commercial Contracts and PECL, follow the CISG model, but adding a list of examples of those broad circumstances that should be taken into account when construing parties' intent. These soft-law instruments do not present substantive differences among themselves.[77]

As discussed above, there is much room for vagueness and/or ambiguity in arbitration agreements. That is especially true in more complex or sophisticated agreements. The more that is written, the greater the risk. But even as a previous step, it is necessary to ask if we need to find ambiguity in order to allow courts or arbitrators to construe the terms of the arbitration agreements. It will depend on the applicable law. Then, if there is ambiguity, contextual evidence may be not material to the outcome, and even inadmissible under a strict textualist system of interpretation. In other system, such as the CISG, contextual evidence will always be relevant and admissible. The very goal of the adjudicator, and thus the ways or means by which it has to conduct the inquiry, may be different under different legal systems.

[72] See Spanish Civil Code, Article 1281: "Artículo 1281. Si los términos de un contrato son claros y no dejan duda sobre la intención de los contratantes, se estará al sentido literal de sus cláusulas. Si las palabras parecieren contrarias a la intención evidente de los contratantes, prevalecerá ésta sobre aquéllas." (Article 1281. If the terms of a contract are clear and leave no doubt about the intention of the contracting parties, the literal meaning of their clauses. If the words seem contrary to the evident intention of the contracting parties, the latter shall prevail over the former. Free translation).

[73] See Yildirim, cit. (n. 40), pp. 41-42.

[74] CISG, Article 8: "Article 8 (1)(3)(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties".

[75] See Yildirim, cit. (n. 40), pp. 135-138.

[76] Subsection 3 of Article 8 of CISG is as follows: "(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." List is not exhaustive. See Yildirim, cit. (n. 40), p. 141.

[77] Yildirim, cit. (n. 40), pp. 125-126.

This will be relevant not only for the adjudicator -arbitrator or court, who should argue in accordance with the applicable law, i.e., from a more subjective or a more objective perspective- but also for parties: they will have to justify their position from the same legal system, which can be difficult if counsel comes from a different one. That is not uncommon in the international commercial arbitration field, so it is relevant to be aware of the difference when the dispute is referred to the interpretation of the terms of the arbitration agreement, as it will be if one party is trying to defeat the arbitration agreement because some dispute is arguably not included in its scope.

In that context, for example, the standard dictionary meaning of a word like "enforcement" might or might not be contradicted by extrinsic evidence of a specialized meaning given by the parties. In addition, the dispute could be whether the word "enforcement" of an arbitral award includes its "execution," in jurisdictions where that is arbitrable. So the first question -for counsel and adjudicators- will be if they have to focus on what a third person could understand from the word "enforcement" or what parties effectively understood, considering their context. If the adjudicator admits evidence against the plain meaning of the word "enforcement," it will depend, again, on the applicable law. Less dramatically, that law will at least determine the relevance and materiality of the extrinsic evidence about the subjective intent of giving to a word a different meaning than the standard one.

3.2.- Detailed rules of interpretation or statutory guidance to judges

A third main area in which legal systems differ is in the recognition of some details rules of interpretation. In fact, some common law jurisdictions have been reluctant to adopt detailed rules to guide judges in interpreting contractual terms, as the ones that exist in civil law jurisdictions.[78] Many of those rules are the same that the ones mentioned above, from Pothier.[79] In any case, even detailed rules of interpretation that overlap with those equivalents of other civil law jurisdictions -such as many French and Italian rules- can be applied very differently.[80] By the way of example of one detailed rule of interpretation that has received unequal

[78] Yildirim, cit. (n. 40), p. 190.

[79] See Pothier, cit. (n. 35), pp. 60-65, and our footnote 70.

[80] See Yildirim, cit. (n. 40), p. 39: "These provisions of the CC. It. [Italian] are based on the corresponding provisions of the CC. Fr. [French] and *overlap* with them to a large extent in terms of their content. Nevertheless, some of these overlapping provisions are conceived and *applied very differently* in Italian law than they are in French law. For this reason, it is *impossible* to speak of true *unanimity* within the Latin legal family regarding the interpretation of contracts" (citations omitted and emphasis added).

treatment or recognition, we can mention the rule against the drafter, or *contra proferentem*, which is recognized under the French legal system,[81] and even in U.S. arbitration case law,[82] but not as a general principle in Italian or German law.[83] In fact, a century ago, the German system turned from adopting detailed statutory rules of interpretation to establishing only two general statutory provisions.[84] In the context of the CISG, as mentioned above, there is discussion on whether it is possible to use detailed rules of interpretation imported from national laws, in the absence of specific regulation in the treaty.[85] Soft-law instruments, such as UNIDROIT Principles on International Commercial Contracts and PECL, follow the CISG model as a general principle, but, in addition, they include detailed rules of interpretation.[86]

So, when construing the terms of an arbitration agreement, it is not clear how a judge or arbitrator will apply rules of interpretation, such as the rule against the drafter, the reference to trade usages, course of performance or subsequent conduct,[87] course of dealing, or *effet utile*. It may -and should- depend on the applicable law. The question will not only be whether those detailed rules or criteria will be available, but also how to apply them. In fact, the same rule can be applied very differently among different jurisdictions.[88] The applicable law may also make the application of those detailed rules of interpretation mandatory for the adjudicator or just a mere guidance. If the pro-arbitration policy is applicable as a

[81] Yildirim, cit. (n. 40), p. 34. See also *Restatement (Second) of Contracts*, cit. (n. 32), §§ 201, 202, 203.

[82] See, *e.g.*, Born, cit. (n. 2), at footnote 44: "Paul Revere Variable Annuity Ins. Co. v. Kirschhofer, 226 F.3d 15, 25 (1st Cir. 2000)." In that case, the court held: "One important constraint is that the federal policy favoring arbitration *does not totally displace ordinary rules of contract interpretation*. Thus, numerous courts have employed the *tenet of contra proferentem* in construing ambiguities in arbitration agreements against the drafters. See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); Security Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 374 (6th Cir.1999), cert. denied, --U.S.--, 120 S.Ct. 1220, 145 L.Ed.2d 1120 (2000). We think that this is a proper use of contra proferentem."

[83] See Yildirim, cit. (n. 40), pp. 55, 67.

[84] See Yildirim, cit. (n. 40), p. 58.

[85] See Yildirim, cit. (n. 40), pp. 141-143.

[86] The very heading of the articles is very suggestive: (i) In the case of UNIDROIT Principles on International Commercial Contracts (Articles 4.1-4.8): Intention of the parties, Interpretation of statements and other conduct, Relevant circumstances, Reference to contract or statement as a whole, All terms to be given effect, Contra proferentem rule, Linguistic discrepancies, and Supplying an omitted term; and (ii) In the case of PECL (Articles 5:101-5:107): General Rules of Interpretation, Relevant Circumstances, Contra Proferentem Rule, Preference to Negotiated Terms, Reference to Contract as a Whole, Terms to Be Given (Full) Effect, and Linguistic Discrepancies.

[87] See Born, cit. (n. 2), at footnotes 49; and our footnote 58, same quote and cases cited.

[88] See footnote 78.

rule of interpretation when parties' intent gives rise to doubts, it is unclear whether it will displace other last-resort rules of interpretation, like the interpretation against the drafter. Some courts in the U.S. have addressed that specific issue.[89]

In sum, whether some particular rule of interpretation is available for the adjudicator in relation to the arbitration agreement's terms will depend on the applicable law, and it will also depend on how that rule is to be applied. Some laws provide a long menu of detailed rules, some of them also consider those rules mandatory provisions, while some others as a mere guidance. Some countries adopt other arbitration-specific rules of interpretation, which may displace general contract law rules. Some jurisdictions, even with the same rule, apply them differently. Those differences may be relevant when a court or arbitrator must determine the terms of the arbitration agreement.

For example, if in one particular arbitration agreement is not clear that a precondition to arbitrate -like mediation- is mandatory as a previous step for submitting a dispute to arbitration-, and the party other than the drafter of the clause urge to constitute the arbitral tribunal quickly, the latter may apply the rule against the drafter in order to allow the party other than the drafter to submit its dispute to arbitration without complying with the precondition to arbitrate, rejecting the objections to jurisdiction or admissibility that the drafter may have raised. A rule like the course of performance or subsequent conduct may also provide for a solution, e.g., if the parties have already submitted a different dispute to arbitration without complying with a precondition to arbitrate, in the previous example, or, in another example, if they have submitted any dispute to arbitration when the very existence of the arbitration agreement is dubious. If provided by the applicable law, the course of dealing may also be useful to interpret an arbitration agreement that

[89] See Born, cit. (n. 2), at footnote 46: "Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1418-19 (U.S. S.Ct. 2019) ("The general contra proferentem rule cannot be applied to impose class arbitration in the absence of the parties' consent. Our opinion … is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. … In those cases, we did not seek to resolve the ambiguity by asking who drafted the agreement. Instead, we held that the FAA itself provided the rule. As in those cases, the FAA provides the default rule for resolving ambiguity here."); Hudson v. ConAgra Poultry Co., 484 F.3d 496, 503 (8th Cir. 2007) ("We note that this common-law rule of construction [i.e., contra proferentem] would favor the Hudsons' interpretation, but it cannot overcome the statutory rule of construction favoring arbitration as embodied by the Federal Arbitration Act"); Falcone Bros. P'ship v. Bear Stearns & Co., Inc., 699 F.Supp. 32, 34 (S.D.N.Y. 1988) ("This general principle of contract interpretation [i.e., contra proferentem] is, however, displaced in this context by the more specific rule requiring that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration")." But see footnote 89. See also Italian Code of Civil Procedure, Art. 808 quater, which expressly enacted the pro-arbitration policy in the issue of scope of the arbitration agreement. In that case, it would be harder to apply the same rule to issues other than scope, considering that Congress set forth the principle only for that purpose. It is not clear that the rule may be applied by analogy by an Italian court, much less by an arbitrator.

is present in a different contract entered into by the same parties.

IV. CONCLUSIONS

The conclusions of this article can be set forth as follows:

1.- Arbitration agreements are *contracts*.

2.- As with any contract, its terms must be *identified* and *interpreted*.

3.- *Contract law* is the field of law that takes the primary place on these two issues (identification and interpretation of arbitration agreement's terms).

4.- Among jurisdictions, *laws differ* on how to identify the terms of any contract, as well as they do on the method and rules of interpretation of them.

5.- Those differences -applied to the provisions of an arbitration agreement- should be born in mind when parties draft both a contract and an arbitration agreement and by adjudicators when having to identify and construe their terms.

6.- For *identifying* the terms of the arbitration agreement, there are differences in the contract formation ("knock-out rule" or "last-shot doctrine"), parol evidence rule (admissibility of evidence for demonstrate terms additional to those that are part of an integrated document) and the introduction of terms not expressly included in the contract derived from good faith.

7.- For *interpreting* the -already identified- terms of the arbitration agreement, the main differences are the interpreter's goal (subjective versus objective method of interpretation) and the existence of detailed rules of interpretation or statutory guidance to judges.

REFERENCES

a) books, papers and legal materials

BEALE, Hugh (ed.), *Chitty on Contracts*, Sweet & Maxwell Ltd., London UK., 2018, 33rd ed.

BORN, Gary, *International Commercial Arbitration*, Kluwer Law International, The Hauge, 2021, 3rd ed.

BORN, Gary, "The Law Governing International Arbitration Agreements: An International Perspective", *Singapore Academy of Law Journal*, 2014, Vol. 26, pp. 814-848.

BERMANN, George A., "The 'Gateway' Problem in International Commercial Arbitration", *The Yale Journal of International Law*, 2012, Vol. 37, n° 1, pp. 1-50.

BERMANN, George A., "What does it mean to be 'pro-arbitration'?", *Arbitration International (Oxford)*, 2018, Vol. 34, pp. 341–353.

BETANCOURT GUTIÉRREZ, Julio César, *El contrato de arbitraje internacional*, Tirant lo blanch, Valencia, 2018.

CAIVANO, Roque J, *Tratado de Arbitraje Comercial Internacional Argentino*, La Ley S.A.E., Buenos Aires, 2020.

CISG Advisory Council (Ed.), "Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG", *Pace International Law Review*, 2005, Vol. 17 n° 1, pp. 61-77.

FOLSOM, Ralph H.; VAN ALSTINE, Michael P.; RAMSEY, Michael D.; SCHAEFER, Matthew P.; *International business transactions. A problem oriented coursebook*, West Publishing Co., St. Paul, MN, 2019, 3rd ed.

GILLETTE, Clayton P., "Limitations on the Obligation of Good Faith", *Duke Law Journal*, 1981, n° 4, pp. 619-665.

GUZMAN-BRITO, Alejandro, "La Buena Fe en el Código Civil de Chile", *Revista Chilena de Derecho*, 2002, Vol. 29, n° 1, pp. 11-23.

HOLTZMANN, Howard M., NEUHAUS, Joseph *et al.*, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law International, Netherlands, 2015.

MERINO MERCHÁN, José F.; CHILLÓN MEDINA, José M., *Tratado de Derecho Arbitral*, Aranzadi SA, Cizur Menor, 2014, 4th ed.

PATERSON, Jeannie M., "Good Faith Duties in Contract Performance", *Oxford University Commonwealth Law Journal*, 2014, Vol. 14, n° 2, pp. 283-309.

POTHIER, Robert J., *A treatise on obligations, considered in a moral and legal view*, Translation, Martin & Ogden Publishers, Newburn N.C., 1802.

ROMERO SEGUEL, Alejandro; DÍAZ VILLALOBOS, José Ignacio, *El arbitraje interno y comercial internacional*, Ediciones UC, Santiago, 2016, 2nd ed.

RÜHL, Giesela, "The Battle of the Forms: Comparative and Economic Observations", *University of Pennsylvania Journal of International Law*, 2003, Vol. 24, n° 1, pp. 189-224.

SCHWARTZ, Alan; SCOTT, Robert E., "Contract Interpretation Redux", *The Yale Law Jorunal*, 2010, Vol. 119, pp. 926-964.

SCOTT, Robert E.; KRAUS, Jody S., *Contract Law and Theory*, Carolina Academic Press, North Carolina, 2013, 5th ed.

SILVA ROMERO, Eduardo (Director), *El Contrato de Arbitraje*, Legis Editores S.A., Bogotá, 2005.

TAWIL, Guido S.; ZULETA, Eduardo (Directors), *El Arbitraje Comercial Internacional*, Abeledo Perrot, Buenos Aires, 2008.

THE AMERICAN LAW INSTITUTE, *Restatement of the Law (Second) of Contracts*, ALI, Philadelphia, 1971.

THE AMERICAN LAW INSTITUTE, *Restatement of the Law, The U.S. Law of International Commercial and Investor–State Arbitration.*, ALI, Philadelphia, 2019, Proposed Final Draft.

UNCITRAL; HCCH; UNIDROIT, *Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales*. United Nations, Vienna, 2021, 120 pp., pdf. file, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf.

VON MEHREN, Arthur Taylor, "The Battle of the Forms: A Comparative View", *The American Journal of Comparative Law*, 1990, Vol. 38, n° 2, pp. 265–298.

YILDIRIM, Ahmet Cemil, *Interpretation of Contracts in Comparative and Uniform Law*, Kluwer Law International, Netherlands, 2019.

ZUPPI, Alberto Luis, "The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria", *Georgia Journal of International and Comparative Law*, 2007, Vol. 35, n° 2, pp. 233-276.

b) Case law and rulings (in chronological order)

Wright v. Henkel, 190 U.S. 40, 57, 23 S.Ct. 781, 47 L.Ed. 948 (1903).

Sullivan v. Kidd, 254 U.S. 433, 439, 41 S.Ct. 158, 65 L.Ed. 344 (1921).

Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir.1960).

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960).

Saudi Arabia v. Arabian Am. Oil Co. (Aramco) [Ad Hoc Award, 23.08.1958], 27 I.L.R. 117, 198 (1963).

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546–547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).

Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 69 Cal. Reptr. 561, 442 P.2d 641 (1968).

A/S Custodia v. Lessin Int'l, Inc., 503 F.2d 318, 320 (2d Cir.1974).

McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir.1980).

Air France v. Saks, 470 U.S. 392, 399, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985).

Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 625, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985).

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

W.W.W. Assocs. v. Giancontieri, 566 N.E.2d 639 (1990).

Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir.1993).

White v. Kampner, 229 Conn. 465, 641 A.2d. 1381, 1385-1386 (1994).

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

ICC Award, Case No. 7792, 122 J.D.I. (Clunet) 993, 996 (1995).

Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776 (2d Cir. 1995).

MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 114 F.3d 1384 (11th Cir. 1998).

Howsam v. Dean Witter Reynolds, Inc, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444, n. 1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009).

Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296-297 (2010).

Rent-A-Ctr., West, Inc. v. Jackson, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776 (2010).

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).
Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).
BG Group PLC v. Republic of Argentina, 134 S.Ct. 1198, 1208-1209 (2014).
Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019).
Ge Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC., 140 S.Ct. 1637, 1643-1644 (2020).

c) Legislation

French Civil Code (1804), translation provided by H. Cachard, Lecram Press, 1930.
U. S. Uniform Commercial Code (UCC), 1952.
Chilean Civil Code, 1857.
German Civil Code [*Bürgerliches Gesetzbuch*] (BGB), 1900,
Ecuadorian Civil Code, 1861.
Colombian Civil Code, 1887.
Spanish Commercial Code, 1885.
Spanish Civil Code, 1889.
Italian Code of Civil Procedure, 1940.
Italian Civil Code, 1942.
Peruvian Civil Code, 1984.
UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (*New York Convention*), 1958.
United Nations Convention on Contracts for the International Sale of Goods (CISG), 1980.
UNIDROIT Principles on International Commercial Contracts, 2016.
UNCITRAL Model Law on International Commercial Arbitration, 1985.

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