CHAPTER TEN

CONTRASTIVE STUDY OF INTERNATIONAL COMMERCIAL ARBITRATION AND COURT JUDGMENTS: INTERTEXTUALITY THROUGH METADISCOURSE IN ACTION

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1. Introduction

International commercial arbitration is being increasingly considered as an efficient, economical and effective alternative to litigation. In this respect, arbitration is included in the group of ADR methods of solving disputes, together with conciliation and mediation. Companies are increasingly turning to ADR as the means to resolve their disputes, as a faster and less costly alternative to going to court. The parties themselves design their method of dispute resolution and choose the ground rules. In arbitration, the parties agree to be bound by the decision of the arbitrator. In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract. Arbitration lies, then, somewhere between mediation and litigation. This is all self-evident on theoretical grounds. There is, nevertheless, an emerging view (Nariman 2000, 261; Bhatia 2008, 169) that sees the discourse of international commercial arbitration, which emerged as an alternative to litigation discourse with a capacity to resolve disputes outside of the courts, as being 'colonized' by litigation, threatening the integrity[1] of arbitration practice, which is contrary to the spirit of arbitration as a non-legal practice.

This study investigates the extent to which the use of hedges and boosters can shed light on the phenomena of hybridization[2] and colonization of arbitration discourse by litigation practices and explore the

motivations for such a process. Drawing on Fairclough's notion of intertextuality and Hyland's (2005) metadiscourse framework, we examine more specifically how judges and arbitrators use hedges and boosters as interactional resources to adopt a stance on both their propositions and their audience and to express doubt and certainty in the negotiation of claims made. The central concern of the chapter is how texts (or rather judges and arbitrators as writers) negotiate past decisions, integrate these texts into their own texts and align themselves with these past decisions. Furthermore, we will argue that legal reasoning and interpretation is not primarily and exclusively an exercise of conclusive logic leading to inevitable outcomes, as claimed by traditional legal theory, but that legal reasoning and interpretation is an exercise in inter-subjective positioning and making choices, although not totally unrestricted choices.

Section 2 sets out the theoretical framework for the study. We argue for the dialogic nature of judgments and arbitration awards, by focussing on the use and distribution of some metadiscourse features in the different parts of the two genres. We accept Bhatia's definition of genre as a configuration of text-internal and text-external resources, thus highlighting two kinds of relationship involving texts and contexts: a) within and across texts focusing primarily on text-internal properties (intertextuality); b) within and across genres involving primarily text-external resources (interdiscursivity). The focus of this section is the relationship between language, context and social practice. Here we are concerned with the social construction of dialogue in judgments and arbitration awards – the social construction of facts, as well as the declaratory and justifying function of judgments and awards. The argument is that all structural elements of judgments and arbitration awards are dialogic, to a certain degree, but different elements draw on different kinds of dialogues. This section also discusses the rhetorical structure of both genres with a special focus on the way hedges and boosters are used as interactional metadiscourse markers.

Section 3 features the contrastive analysis of judgments and arbitration awards, presented as instantiations of professional discursive practices. Finally, some concluding remarks are made.

2. Theoretical framework

When judges and arbitrators write judgments and arbitration awards, they make sense of their texts in relation to similar and different texts.

This is what we refer to as *intertextuality*. Intertextuality can operate at two levels. At one level, there can be the presence of specific words of others mixed with the words of a writer in his text. This can be marked by a clear, explicit boundary between a writer's own text and another text, such as quotation marks. At another level, there can be a combination of different genres and different discourses. This is referred to as interdiscursivity[3] (Fairclough 1992; Chouliaraki and Fairclough 1999).

2.1. Fairclough and Intertextuality

A specific strength of Critical Discourse Analysis (CDA), according to N. Fairclough, is the extension of context to include intertextuality. This makes it possible to show and follow the traces of other texts and discourses in a text, and this, it will be shown, is one aspect of great importance in arbitral awards and judgments as instances of legal discourse.

The principle of intertextuality is, in fact, a re-conceptualization of the principle of the dialogic nature of texts, as the meaning of a particular text is seen as arising from relations between texts and social viewpoints, not from the minds of individuals. We make sense of texts in relation to similar and different texts. However, while all texts form intertextual links, different texts and different communities form different intertextual links: which texts are valued, why and how, and which ones are omitted.

Intertextual analysis in Fairclough's model of CDA provides the means to go beyond the analysis of texts and to analyse the discursive practices of text production, distribution and consumption. An intertextual perspective of text as a link in a chain of prior and future text emphasizes the historicity of texts (text production). It explores the paths along which texts move, become transformed and shift from one text type to others (text distribution). And it emphasizes that text interpretation is shaped by prior texts, which a reader brings to bear for the interpretation of a new text (Fairclough 1992, 84f).

Fairclough raises several issues related to intertextuality. One of them is metadiscourse as "a peculiar form of manifest intertextuality where the text producer distinguishes different levels with her own text, and distances herself from some level of the text, treating the distanced level as if it were another, external text" (Fairclough 1992, 122). Metadiscourse can be marked lexicogrammatically through modality markers (hedges and boosters), expressions such as "sort of" or "definitely", or it can be marked as belonging to another domain of discourse by means of expressions like

"in legal terms" or "technically speaking". The concept of "metadiscourse" implies that a speaker or writer is positioned outside a discourse or that he wants to distance himself from the represented discourse. Metadiscourse is a clear manifestation of intertextuality and is closely related to the dialogic nature of the documents under scrutiny.

This is the type of strategy used by the judges in a criminal appeal, for example, when they write: "Neither disputed that they dug a grave, although they called it "a hole" in the following paragraph extracted from (Osland v The Queen).

> "**[3]** The prosecution case was that Mrs **Osland** and David Albion together planned to murder Mr **Osland**. It was put that, in furtherance of their plan, they dug a grave for their intended victim during the day of 30 July 1991. Later, on the evening of the same day and in furtherance of the plan alleged, Mrs **Osland** mixed sedatives in with Mr Oslands dinner in sufficient quantity to induce sleep within an hour. According to the prosecution case, David Albion carried the plan to finality after Mr **Osland** went to bed by fatally hitting him over the head with an iron pipe in the presence of Mrs **Osland**. And later, he and Mrs **Osland** buried Mr **Osland** in the grave they had earlier prepared. Mrs **Osland** and David Albion both gave evidence at the trial. Neither disputed that they dug a grave, although they called it "a hole".

This strategy allows the judges to represent the defendants' discourse (evidence given at the trial) in their own discourse (the judgment) and at the same to distance themselves from the defendants' representation and to put forward their own representation of the other text. This is done through constantly reminding the reader that the information displayed comes from the party's contention (Mrs Osland).

Our hypothesis assumes that the same applies to arbitrators when they write awards. Central to these arguments is the idea of dialogue and negotiation. If legal literacy involves negotiating a dialogue between different levels of textuality, at a basic level it requires a capacity simultaneously to use texts effectively in practical circumstances and also to be aware of its contingency, its political and ideological functionality and its generic conventionality. In a judgment, the writer enters into a number of dialogues with previous texts: with the evidence, arguments and submissions made by the litigants in court and with similar decisions in the past (precedent). In an arbitration award, the same applies to previous awards.

Both judges and arbitrators enter also into a dialogue with possible future texts: with a possible appeal against their decisions, and with other

judges and lawyers who will be involved in similar cases in the future. And finally, writers may enter into a dialogue with their colleagues on the bench who may have decided a case differently.

2.2. Hedges and boosters as instantiations of Interactional Metadiscourse

For the purpose of studying the use of hedges and boosters we adopted Hyland's taxonomy of interactional metadiscourse (Hyland and Tsé 2004; Hyland 2005). Hyland (2005) proposed an overall typology[4] of the resources employed by writers to express their positions and connect with readers. The model provides a comprehensive and integrated way of examining the means by which interaction is achieved in academic argument and how the discoursal preferences of different cultural contexts construct both writers and readers. Hyland uses metadiscourse as the "cover term for the self-reflective expressions used to negotiate interactional meanings in a text, assisting the writer (or speaker) to express a viewpoint and engage with readers as members of a particular community" (Hyland 2005, 46). Metadiscourse thus offers a way of understanding the interpersonal resources judges and arbitrators use to present propositional material and therefore a means of investigating the way they reason.

According to Hyland (2005), there are five categories of interactional metadiscourse: hedges, boosters, attitude markers, engagement markers and self-mentions. Of these we decided to study two complementary rhetorical strategies (hedges and boosters)[5], as they generally emerge as the most frequently employed interactional metadiscourse markers. Hedges and boosters are two sides of a same coin. They are communicative strategies used for increasing or reducing the force of statements. Their importance in professional discourse lies in their contribution to a relevant rhetorical and interactive tenor, conveying both epistemic and affective meaning.

As a summary of the theoretical framework, we combine intertextual analysis as from Fairclough's model of (Critical) Discourse Analysis (Fairclough 1992), which provides the means to go beyond the analysis of texts and to analyse the discursive practices of text production, distribution and consumption, with Bhatia's multiperspective model of discourse (Bhatia 2004, 18-19), which makes it possible to view discourse as text, genre, professional practice or social practice, and Hyland's model of metadiscourse.

2.3. Role of Judgments and Awards

Both in the common law and in the civil law legal systems,[6] judgments are extremely important texts; they are a source of law. On a practical level a judgment is the final decision in a legal dispute, which is argued and settled in a court of law representing an order of the court determining winners and losers. However, the function of a judgment goes beyond the settlement of specific disputes. It has wider implications with respect to the past as well as the future. With respect to the past, a judgment justifies a court's decision and persuades the court's audience of the correctness of this decision – that is, that the decision is based on law. This includes providing a public account of the reasoning process, which leads to a judge's decision. With respect to the future, judgments have a guiding function for other judges, lawyers and the general public. A judgment states what the law is, and by stating the law, a judicial decision becomes binding for similar cases in the future. Thus, a judgment has a *justifying* as well as a *declarative* function (Maley 1994).

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

Judgments are not only reasoning and justifying texts, they are also coercive texts. They can force people to do things. In criminal proceedings they can affect bodies in a physical sense by sending people to prison, or even, in some countries, to death. In civil proceedings they can force people to pay compensation for harm done to others, or to perform actions agreed on in contracts, to give just a few examples. In arbitration procedures arbitral awards seem to perform the coercive function as well as they are binding for both parties.

2.4. The Language of Judgments and Arbitral Awards: Declaring and Justifying.

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

1. Facts: account of the events
2. Issue(s): problem(s) to be solved
3. Reasoning: justification of decision
4. Conclusion: principle or rule that applies to case
5. Finding: Solution to problem posed in Issue.

The structure of arbitral awards is not so well established as that of judgments, but there are, nonetheless, certain elements that seem to be essential for the generic structure of each award to be fully developed. The following structure is tentatively proposed on the basis of our analysis only:

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

Both judgments and arbitral awards have some features in common. They have a justificatory, a declaratory and a coercive function. The justificatory function of a judgment is represented by the structural elements 'issue' and 'reasoning' ("Procedural history" and "Summary of Facts" in awards). The declaratory function is represented by the elements 'conclusion' and 'finding' in judgments and by "considerations" and "decisions" in awards. The coercive function affects all parts of both judgments and awards.

In general terms, we know about the communicative purpose and the macro structure of judgments and arbitration awards[7] and we have some insights into the realisation of communicative purpose and structural elements, but the reasoning of judges and arbitrators, the negotiation of previous decisions, the positioning of writer and reader are still a relatively unexplored territory.

2.5. Arbitral Awards and Judgments as instantiations of professional discursive practices.

When comparing awards and judgements, the first impression we have is that in both cases we are dealing with legal genres: special items or words that have a legal flavour or a special meaning in legal documents like judgments – such as claimant, respondent, construction, privilege – also appear in arbitral awards. We also come across expressions (phrases and sentences) that have the same flavour, for example hereto and notwithstanding. This may sound too superficial; therefore, we should be looking more in depth into other aspects of the linguistic practices of both professional genres, such as their rhetorical structure, their communicative purpose and their way of reasoning, to assess whether superficial similarities are also a manifestation of deeper similar discursive practices.

The two genres analysed in this paper have been selected for being the final expression of two legal professional processes. Judgments and arbitral awards are as outcomes of the processes of litigation and arbitration respectively, of which they represent the most crucial documents, where authors have to defend their viewpoints strongly in order to make their decisions appear fair and well grounded and, therefore, credible.

The central argument here is that the discourse of arbitration is constituted by identifiable linguistic practices, which make it specific, but at the same time it shows links with the professional discourse of law, i.e. the discourse of litigation. The difference between them lies on the text-external resources that are linguistically realised in both genres. Drawing on documentary data, the study investigates the extent to which the integrity of arbitration principles is maintained in arbitration practice, pointing out phenomena of hybridization and colonization of arbitration discourse by litigation practices and exploring the motivations for such an inter-discursive process.

3. Exemplification of the contrastive analysis of judgments and arbitration awards.

In this section we are going to deal with the different instantiations of interactional metadiscourse markers in arbitration and litigation practices.

As a pilot study, we have selected a sample of three items per category (three arbitral awards and three judgments). We will take examples where intertextuality through metadiscourse occurs and we will analyse each example to see what the intention of the author appears to be in relation to the context where these elements appear.

3.1. Awards

The awards employed for the analysis of this paper have been randomly selected from the Investment Treaty Arbitration website. The cases are Mondev International. Ltd. V. United States, Desert Line v. Yemen and BG Group Plc v. Argentina. In the following examples, we will see instantiations of hedges that intend to distance the author from the content expressed in the propositions. In this way, in example [1] "could possibly constitute" and "might arguably have violated" are pointing to alternative views from those originally expressed in the legal process. In addition, we see an instance of an enhanced alternative viewpoint thanks to the combination of a booster and a hedge ("must still be possible"). Once the alternatives have been exposed, the author proceeds to conclude. The reader can notice the concluding character of this statement thanks to the insertion of the booster "cannot". "Cannot assist" conveys a high level of commitment on behalf of the author to the propositional content of this concluding remark.

> (1) 70. Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it *must* still *be* possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which *could possibly constitute* a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPAs claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre–1994 conduct which *might arguably have violated* obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev.
> Mondev International Ltd. v. United States, page 11

Excerpt (2) below is an example of intertextuality in which the legal bindings related to arbitration are exposed. That is, expressions typical of

litigation are making appearance in this document in order to provide legal support to the argumentation. Of course, the final decision would be valid even if this was not made explicit in the award. However, the arbitrator prefers to remind both parties of the legal consequences of this decision. Although most of the metadiscursive devices are contained in the legal quotation, the author in selecting the text, is aware of the binding connotations these boosters have. Here, "established", "shall decide", "shall be binding" and "established" are functioning as deontic modality markers and they are brought into the award in order to warn or remind the parties that the arbitrator's decision, subjective as it may be, is binding (unless they decide to take the case to litigation).

(2) 100. Article 1131 of NAFTA provides that:
"1. A Tribunal *established* under this Section *shall decide* the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement *shall be binding* on a Tribunal *established* under this Section."
Mondev International Ltd. v. United States, page 16.

On the whole, in the reasoning section of the awards we can observe that both boosters and hedges are being used in favour of the author with self-distancing or engaging purposes towards the propositional content of other texts or of the author's own words. Consequently, we could say that these interactional elements also fulfil a justifying or declaring function within the reasoning section of the awards analysed in this paper. In the conclusions section, the author also appears to be using intertextuality through metadiscourse in order to make the tone more declarative when presenting the arguments that are going to support the final decision. Example (3) illustrates this point with "should never have been brought". The combination of the hedge "should" and the booster "never" create a statement with a clear declarative function. Thanks to the combination of these two elements ("should" and "never"), the effect produced is that of closing down alternatives. A similar effect is achieved through the use of the modal "should" in example (4), in which the author shows a fairly high degree of commitment to the statement containing it. Therefore, it can be affirmed that this element entails a declarative function and signals the approximation to the final decision.

(3) 58. As to the question of costs and expenses, the United States sought orders that Mondev pay the Tribunal's costs and the legal expenses of the United States on the basis that its claim was unmeritorious and *should*

never have been brought.
Desert Line Projects LLC v. Yemen, page 26

(4) 247. The content of the minimum standard *should* not be rigidly interpreted and it should reflect evolving international customary law.
BG Group Plc v. Argentina , page 41

In example (5), taken from the conclusions section, we see that the author uses the booster "cannot be", expressing high epistemic modality, with the effect of ruling out alternative views to the one here expressed.

(5) 152. But the distinction between conduct compliant with or in breach of NAFTA Article 1105(1) *cannot be* co–extensive with the distinction between tortuous conduct and breach of contract. For example, the Massachusetts legislation immunizes public authorities from liability for assault and battery. An investor whose local staff had been assaulted by the police while at work *could well claim* that its investment was not accorded "treatment in accordance with international law, including… full protection and security" if the government were immune from suit for the assaults. In such a case, the availability of an action in tort against individual (*possibly unidentifiable*) officers *might not be* a sufficient basis to avoid the situation being characterised as a breach of Article 1105(1).
Mondev International Ltd. v. United States, page 25

This opening statement is developed further with recourse to more metadiscursive elements. In this way, "could well claim", "possibly unidentifiable" and "might not be" are resulting from this initial premise. The author ends this argumentation by concluding that "the availability of an action in tort against individual officers might not be sufficient" for the situation to be considered a breach. These words already give the audience a pretty evident clue to the final outcome in this award, as if the author, wanted to orient the audience towards receiving his decision as the most suitable or commonsensical one.

In example (6), the author prefers to keep an impersonal tone when stating his or her personal opinion, by using third person self-reference ("the Arbitral Tribunal"). However, the reference to the Arbitral Tribunal entails a declarative function given the powerful character of arbitral figures in the present society. In consequence, although "consider" and "necessary" might be suggesting a personal opinion lacking authority in other circumstances, in this context, the result is a declaration. In addition, this argument anticipates the final decision while at the same time supporting it. Thus, in this case, intertextuality is realised through an expression that has the same function of a booster since it is used to

express commitment to the propositional content of the statement in question.

(6) 215. There is therefore no reason to scrutinize the other violations of the BIT alleged by the Claimant and contested by the Respondent. The Arbitral Tribunal *considers* it *unnecessary* to determine whether the factual record ultimately also supports a finding of liability under other provisions of the BIT.

Desert Line Projects LLC v. Yemen, page 34

Then, in example (7), the author concedes the possibility ("may") that the supporting argumentation is brief and not too specific ("may be exceptionally succinct") but is still stating that he agrees with it, although this agreement could include the exception of minor details (the present Arbitral Tribunal broadly comes to the same conclusion).

(7) 272. The Arbitral Tribunal observes that the Yemeni Arbitral Tribunal held with this regard that "[t]his claim is not based on legal or contractual grounds" (Exh. CM–88, p. 36). This reasoning *may be exceptionally* succinct, but the present Arbitral Tribunal *broadly* comes to the same conclusion, as explained herein below.

Desert Line Projects LLC v. Yemen, page 40

Equally, in the final part of the award, the finding (example 8 below), we can find metadiscursive elements that are meant to be playing in favour of the main author's intentions.

(8) C. Award

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

1. The Arbitral Tribunal has jurisdiction over the present dispute;
2. The Settlement Agreement contravened the Respondent's obligations under Art. 3 of the BIT and, therefore, it is not entitled to international effect;
3. The Yemeni Arbitral Award *shall be implemented* in its entirety, and be fully respected as definitively binding on both Parties;
4. The Respondent's counterclaims *shall be dismissed*…

Desert Line Projects LLC v. Yemen, pages 44-45

The ultimate purpose of the award is to reach a decision that suits both parties and, in order to do so, the arbitrator needs to resort to certain strategies that will allow him or her to put a slant on the document. To start with, the author shows full commitment to the propositional content. by making use of a booster that gives these final words a fastening or

compelling tone. As it can be seen, This is where the metadiscursive elements “orders”, “shall” and “will” come into play. Even though the document has legal power of its own, the author seems to prefer to use this kind of term not only to signal that the final decision is coming, but also to endow this decision with an extra dose of legal authority. Possibly, the author hopes in this way to avoid any questioning of this decision too. Example (8) displays various instantiations of the booster “shall” (“shall be implemented”, “shall be dismissed”) and the performative verb “order” conveying a clear declarative function to the text.

In example (9), drawn from the finding of another award, the same strategy is deployed. The author makes use of boosters as part of the declarative discourse that states the decision taken. We even notice in this award that the booster has been typed in capital letters ("DECIDES"). Again this seems to have a double purpose. On the one hand, the author is facilitating the visualisation of the decision and, on the other hand, he is enhancing the subsequent propositional content.

(9) For the foregoing reasons, the Tribunal unanimously DECIDES:
[…]
(e) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.
Mondev International Ltd. v. United States, page 26.

The same applies to example (10), from another award, where the booster “decision” appears separated from the actual finding.

(10) XII. Decision
467. For the foregoing reasons, the Arbitral Tribunal unanimously renders the following award:
[…]
(3) The Republic of Argentina breached Article 2.2 of the Argentina–U.K. BIT.
(4) The Republic of Argentina shall pay BG Group Plc. the sum of US$185,285,485.85 (one hundred and eighty five million two hundred and eighty five thousand four hundred and eighty five US dollars and 85/100) for damages to BG Group Plc.'s investment claimed in this arbitration.
(5) The Republic of Argentina shall pay BG Group Plc. interest on the sum set out in decision (4) above from 6 January 2002 until the date of payment, at the average interest rate applicable to US six–month certificates of deposit, compounded semi–annually.
BG Group Plc v. Argentina, page 60.

3.2. Judgments

In this section, we will carry out a similar analysis of metadiscourse in judgements in order to obtain contrastive results to be compared with thoese related to the arbitral awards. The judgments in this section have been randomly selected, as was the the case for the awards. They were rendered in three different cases: Indeni Petroleum v V.G. Limited (withdrawn from the Southern African Legal Information Institute), Federal Deposit Insurance v. Cromwell Crossroads Ltd. (United States District Court of Connecticut), and Yorli v. Sheanan (United States Court of Appeals, Seventh Circuit). The analysis will first address the reasoning sections and subsequently the conclusions and finding sections of the judgments.

In example (11), from the reasoning section of Indeni Petroleum v V.G. Limited, the booster "must" is repeaed twice ("must have been tried" "there must be a judgment"), thus enhancing the propositional content, namely the conditions that "must" be fulfilled for the Law Reform Miscellaneous provisions to be applicable.

> (11) The main thrust of Mr. Kabukas argument is that for the court to exercise its discretion under Section 4 of the Law Reform Miscellaneous Provisions) Act, Cap 74 the proceedings *must* have been tried by a court of record and there *must* be a judgment.
>
> Indeni Petroleum v V.G. Limited, page 12

A similar effect is produced in examples (12) and (13). In example (12), referred to the case of Yorli v. Sheanan, the author stresses the necessity that certain conditions be fulfilled for the relevant legislation a to apply, through the booster "must". In example (13), from the same case, the author presents the contention of one of the parties with a high degree of commitment while attaching a tone of subjectivity to the content of such contention.

> (12) In order to establish a violation of § 1983, a plaintiff *must* show "he was deprived of a right secured by the Constitution or laws of the United States and that the deprivation was caused by a person acting under color of state law." Kelley v. Myler, 149 F. 3d 641, 648 (7th Cir. 1998) (emphasis added). In order to establish the causation element of a § 1983 violation, a plaintiff *must* show that the defendant "was personally involved or acquiesced in the alleged constitutional violation." Kelly v. Municipal Courts of Marion County, Indiana, 97 F.3d 902, 909 (7th Cir.

1996).
Yorli v. Sheanan, page 8

(13) *It is undisputed that* Lewis *felt* as far back as 1994 that he was the victim of discrimination. Under Hardin, the continuing violation cannot save Lewis' claims.
Yorli v. Sheanan, page 25

In example (14) the author uses the hedge "presumably" with the main intention of reducing his commitment to the statement that there was actually a typographical error. Again, even if judges would not be expected to further justify their argumentation apart from reading the facts and relating them to the legal background, we notice that they seem to be making an extra effort to please the parties involved.

(14) As there was, *presumably*, a typographical error in the Plaintiff's motion to enforce, the court denied the Plaintiff's motion without prejudice and allowed the motion on or before January 31, 2006.
Federal Deposit Insurance v Cromwell Crossroads, page 14

Moving on to the conclusions sections, also here we have encountered cases where strategies of commitment modulation are used to orient the reception of the judgement. To emphasise the reasons that led the defendants to ask that some parts of the plaintiff's statements be struck, in example (15), the author quotes their words attributing them explicitly to the parties by means of the projecting clause "they argue". In addition, the use of the verb "argue" has a hedging effect, as it signals a certain distance of the drafter from the defendants' personal opinion.

(15) Defendants Fred and Frank Guerra and Andrew Douvris have filed motions to strike plaintiffs' local rule 56.1 statements. They *argue* that the court *should* strike certain paragraphs of plaintiffs' responses to defendants' fact statements because these paragraphs "do not squarely and concisely respond to [defendant's] Statement of Facts, but instead, assert additional matters, or that admit the statement of fact but then assert various other matters."
Yorli v. Sheanan page 30

In example (16), the judge describes a past action. However, in doing so, the author makes use of a hedging expression in order to distance himself from that action. Therefore, the description is "re-constructed" adding up the personal perspective of the author through metadiscourse.

(16) The court granted this motion on January 4, 1994, but *it appears that* the change in this action's title caption was not effected.
Federal Deposit Insurance v Cromwell Crossroads page 28

As it seems to be typical of the finding sections of both the awards and the judgments analysed in this paper, the author prefers to make use of boosters that are meant to provide their discourse with a tone of commitment and enforceability. Even though in both cases authors are granted the legal power to make their decisions enforceable, they seem to make recourse to discursive strategies that highlight the presence of the author. Example (17) and (18) below clearly illustrate this point:

[17] (1) the Clerk of the Court *shall* change the title caption in the docket for this case so that "Federal Deposit Insurance Corporation as Receiver of Central Bank" is removed and substituted with "C.C. Cromwell Limited Partnership" as the plaintiff; (2) all further submissions by the parties *shall* contain the following caption: Limited Partnership, Plaintiff, v. Cromwell
Federal Deposit Insurance v Cromwell Crossroads page 28

(18) For the reasons we have given, we *find* no merit in the appeal which we dismiss with costs. The costs *are to be taxed* in default of agreement.
Indeni Petroneum v V.G. Limited, page 15.

In particular, in example (17), the expressions "shall change" and "shall contain", are reminescent of the constructions found in the conclusions sections in the awards. In example (18) "are to be taxed" expresses a sense of obligation while "we find", which Hyland includes in his boosters taxonomy (2005: 221), conveys a sense of strong commitment to the propositional content of the statement containing it. Furthermore, through the use of this verb, the reader can easily identify this statement as the judge's final decision. .

4. Final Considerations

Litigation and arbitration are two different conflict resolution methods. However, as it has been explained in the introduction section of this paper, they perform very similar functions in our society: they both declare winners and losers in a dispute and in both judgements and arbitration awards the author unfolds information extracted from the parties' contentions and legal documents with the aim of reaching a ruling. In

addition, the two genres share a similar structure, with sections in which the arguments of the parties and the related legal background are exposed to the public, followed by section in which on the ground of such reasoning process conclusions are drawn and the final ruling is declared.

Drawing on Fairclough's conception of metadiscourse as a form of intertextuality whereby the author distances herself from some levels of the text (Fairclough 1992, 122), we have focussed in particular on the categories of boosters and hedges as interactional metadiscourse markers. Their distancing or committing effects have been investigated in comparable samples of awards and judgements and the results obtained clearly confirm that intertextuality through metadiscourse is common in both genres

Intertextuality prototypically appears in the shape of quotations embedded in a text, and this is also the case in our samples. After all both judgments and awards must include the parties' contentions, legal references and other relevant information that supports the argumentation of the author. And, as, it would be impossible to quote these discourses entirely in the final documents, the author, picks the information that he or she considers most important or relevant to support the final decision, an operation which is not neutral in itself. However, intertextuality take also a more indirect form: the information selected is not reported "raw", as the author constructs his or her own argumentation using strategies that help him or her show a higher or lower level of commitment towards the propositional content of their statements, among which boosters and hedges play a fundamental role

In the analysis here carried out, on the one hand, we have been able to see how hedges can open alternative paths to develop the author's argumentation or, lessen the author's commitment to the propositional content of a particular statement with the aim of leading the reader to an agreement with the final decision or ruling. Hedges perform, then, a justifying function. On the other hand, boosters perform an enhancing effect on the propositional content, by focussing the attention of the reader on certain arguments that result crucial for the development of the reasoning leading to the final decision. In consequence, hedges and boosters are strongly related to the justifying function of language inasmuch as they appear within the reasoning sections of both awards and judgments. In the conclusions and finding sections of both the awards and judgments used in this paper, authors use a more authoritative tone and make use of boosters with that objective in mind. Thus, it could be affirmed that boosters perform a clear declarative function in these sections, particularly even more so in the finding sections.

The two distinct language functions can be identified then in both judgements and awards, with the justifying function located mainly in the reasoning section, while the conclusions and finding display a prevalence of the declarative function. Incidentally, this shows that he two functions that Maley found in the language of judgments (1985) are also present, in the language of arbitral awards, realized by means of intertextuality in the shape of interactional discourse markers.,.

We could have expected differences in the realization of the declarative and justifying functions in judgements and awards since these two processes differ greatly in the way they are meant to solve conflicts. Arbitrators have to be accountable to their customers in a way judges do not need to. On the one hand, judges stand in front of the two parties with the mere obligation of deciding on a verdict based upon the facts they are given and the whole process is based on litigation. On the other hand, arbitrators have to decide, mainly on the basis of common sense, and convince the parties that their decision is the most logical and coherent according to the facts given. Therefore, it might be expected that awards differ from judgements for a greater effort of arbitrators to actively convince their audience; the audience they have been hired by, of the validity of their decision. Besides, arbitrators may use modality and persuasion to promote themselves for future clients too.

However, after the comparative study carried out, ,we can conclude that judgments and arbitral awards share many similarities in their discourse. In particular, similarities in hedging and boosting strategies and functions between judgments and arbitral awards depend on the discourse community's expectations, and the addresser's specific intentions. As stated above, both the authors of the awards and judgments in this paper make use of intertextuality through metadiscourse. They do so in order to support their ideas without sounding too assertive and also to make declarations in the conclusions and finding sections. These results suggest that this may occur in the analysis of a wider corpus of judgments and awards. Our intention in the future, is to carry out, then, an analysis of this strategy within a corpus containing more items per genre category and even explore other strategies that these genres may share

Notes

[1] We refer here to the notion of "generic integrity", as was put forward by Bhatia (2004, 152). We understand that generic integrity is not static or pre-established. On the contrary, generic integrity is built as a response to the communicative needs associated with a particular professional culture. On the basis of this hypothesis, our purpose in this paper is to explore the generic integrity of two types of texts (arbitration awards and judgments), analyzing their text internal features (closely related to the construction and interpretation of texts) and the link of these features to the professional culture of each discursive community.

[2] This will be substantiated through the study of inter-generic hybridization of arbitration awards by judgements.

[3] In Fairclough (1992) there is a distinction between intertextuality and interdiscursivity. The former is also referred to as "manifest intertextuality", the latter as "constitutive intertextuality" (or interdiscursivity).

[4] Many other definitions and taxonomies of metadiscourse have been proposed: Vande Kopple 1985, 2002; Crismore and Fansworth 1990; Markkanen et al. 1993; Luuka 1994; Bunton 1999; Hyland 2000; 2005; Hyland and Tse, 2004; Dafouz 2003).

[5] Hedges are linguistic devices that indicate the writer's decision to recognize alternative voices and viewpoints and so withhold complete commitment to a proposition. Boosters, on the other hand, are linguistics resources that allow writers to close down alternatives and express tjheir certainty in what they say. Most commonly expressed through deontic and epistemic modality markers, modal verbs, and lexical items. Some boosters include: always, beyond doubt, certain, certainly, clear, clearly, conclusively,, definite, definitely, demonstrate, doubtless, evident, evidently, find, finds, found, incontestable, indisputable, must (possibility), obviously, prove, show, undeniable, … Hedges include: about, almost, apparently, appear, approximately, broadly, claim, argue, estimate, fairly, feel, frequently, in general, in my opinion, likely, maybe, might, mostly, perhaps, plausible, possibly …

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

[7] Maley 1985 and Bhatia 1993 are the main references when dealing with the structure of judgments.

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