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ADMISSION OF EXTRINSIC EVIDENCE FOR CONTRACT INTERPRETATION: THE INTERNATIONAL ARBITRATION CULTURE IN LIGHT OF THE TRADITIONAL DIVISIONS

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Summary: Mergers and acquisition (M&A) operations generally follow wide due-diligence and investigation works. This suggests that a lot of elements outside of the final contract could help the judge or arbitrator interpret the intent of the parties. Yet, the common law tradition usually includes a so-called 'parol evidence rule' (PER) that prohibits the use of such evidence to this end, among numerous exceptions. Other legal tradition such as the civil law don't include such rule. As transnational M&A operations now generally use international commercial arbitration (ICA) as a way to solve potential disputes, parties can wonder if these extrinsic evidence can be used in an ICA context, given its multicultural legal habits. To answer this question, this article analyses the cultural roots that explain the existence or absence of the PER, and matches them with the specificities of ICA. There are two main explanations for the distinction between common law and civil law regarding the PER. One is substantial and regards the contractual interpretation approach. The second depends on the culture regarding evidence and the existence of exclusionary rules. These two explanations don't survive in ICA. Moreover, the specificities of ICA tend to encourage the admission of extrinsic evidence in contractual interpretation.

Keywords: Evidence; Contract interpretation; International Arbitration; Procedure; International litigation; extrinsic evidence; parol evidence rule.

1. Introduction

Some specialists have stated that the interpretation of the intent of the parties is one of the main challenges in post-closing disputes.[1] Yet, in a transnational context, the differences of culture and language can lead to even more bias in the interpretation of the contracts in this type of operation. For instance, post-closing mergers and acquisitions (M&A) operations disputes frequently regard

1 HAUSMANN Christian, TORRE Philippe, *Les garanties de passif*, Les éditions EFE, 2012, p. 158, no. 233.

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the so-called 'representations and warranty' provisions.[2] In these provisions, the seller of a company makes some factual statements (called 'representations') on the target company and gives a warranty to the buyer. These representations provisions by the seller are very specific to the target company and can be quite large. In order to interpret such provisions, in a multi-cultural environment, judges or arbitrators can't always use the commonly admitted definitions, as the specific situation described might reflect a totally different context. Additionally to the representations provisions, the seller also communicates what is called a 'disclosure letter' where he will disclose the exceptions to the representations,[3] and this disclosure letter might also be difficult to interpret as it states very specific situations.

Furthermore, M&A transactions usually follow important negotiations that include a wide amount of data.[4] In most of the cases, the buyer hires some experts that will make a due-diligence work and analyze the target company, at least from a financial and legal point of view. Consequently, there is an important amount of documents, communications, and potential testimonies that could be considered as 'extrinsic evidence' of the intent of the parties and that could help the arbitrators in their sales and purchase agreement (SPA) interpretation work. It would thus be "desirable to provide for the extensive taking of evidence"[5] in an M&A litigation context.

Yet, International commercial arbitration (ICA) became the most used way to solve disputes in international trade, and this is increasingly true regarding the M&A sector.[6] One of the reasons of such success, is that ICA allows to overcome the difficulties implied by the differences between the systems of law at stake in each case, the places of potential execution, and the different legal cultures of the parties.[7] Indeed, ICA developed its own culture and practice, influenced by the

2 EHLE Bernd D., Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions, *Comparative Law Yearbook of International Business*, 2005, Volume 27, p. 293.

3 FATAHLLA Raëd, PORTWOOD Tim, Arbitrage et Garantie de Passif, Questions de Preuve et de Procédure, *Droit et Patrimoine* 2008, no. 166. p. 74.

4 EHLE Bernd, *supra* note 2 at p. 292.

5 *Id*. at. p. 306.

6 *Id*. at pp. 287 and 288 ; COURET Alain, Les cessions de droits sociaux, *Revue de l'Arbitrage*, 2013, Issue 3 pp. 651–671 ; MOREAU Bertrand, L'arbitrage et l'efficacité de la garantie de passif, *Revue de Jurisprudence Commerciale*, 2006, no. 1, p. 65 ; VIANDIER Alain, Arbitrage et garanties de passif, *Revue de l'Arbitrage*, 1994 Issue 3, pp. 439–460 ; GESSEL-KALINOWSKA VEL KALISZ Beata, Representations and Warranties in Cross Border Mergers and Acquisitions: The Challenges of Cultural Diversity, *ICC International Court of Arbitration Bulletin*, 2013, Vol. 24 no. 1 pp. 30–40 ; PANHARD Maxime, When Contractual Good Faith Meets a Controversial M&A Issue : The Sandbagging Practice in International Arbitration, *The International Lawyer*, 2018, Vol. 51, No 1, p. 69.

7 BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER Martin, *Redfern and Hunter on International Arbitration,* 2015, Oxford University Press, no. 6.01 pp. 28–30.

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national systems but that doesn't depend on any of them.[8] Even though, the differences between these systems can have an impact in ICA, because of the choice of the applicable law, because of the choice of some procedural rules, or simply because of the culture of the arbitrators or the parties.

The application of the so-called 'parol evidence rule' (PER), which prohibits the admission of extrinsic evidence to interpret a contract, is one of these differences. It is typically applied in the common law tradition but does not exist in the civil law tradition.[9] Generally, the PER implies that extrinsic evidence can't be admitted to temper, vary or disprove the writing. By the terms 'extrinsic evidence' we usually refer to all the elements outside of the contract such as prior negotiations or arrangements, communications between the parties, or the execution of the contract. It is however important to mention that the application of the PER contains numerous exceptions, so its impact in practice is very limited.[10] Still, given the numerous investigations and due-diligence that come before the closing, M&A operations imply a high volume of potential extrinsic evidence.

Given these theoretical divisions highlighted by the PER and the potential impact in some cases such as post-closing disputes, parties can wonder how international arbitrators apply this rule in a multi-cultural context. We will first highlight the roots of the division between admission or exclusion of extrinsic evidence for contractual interpretation (1); to find that these roots don't survive in ICA, where the specificities tend to favor admission of extrinsic evidence (2).

2. The cultural roots of the traditional division between admission or exclusion of extrinsic evidence for contract interpretation

Different approaches regarding contractual interpretation explain the existence or absence of the PER in the national systems (2.1), but also considerations linked to the culture regarding evidence (2.2).

2.1 The substantial cause: different contractual interpretation approaches

When analyzing contractual interpretation in the different legal systems, the distinction between theoretical traditional approach and evolving legal mechanisms is important. Indeed, if the approach is traditionally different, or even opposed, in some legal systems, these legal mechanisms result in a limited impact in practice.

8 GAILLARD Emmanuel, *Aspects Philosophiques du droit de l'arbitrage international*, 2008, ADI Poche, Martinus Nijhoff, 240pp.

9 ROSENGREN Jonas, Contract Interpretation in International Arbitration, 30 J.Int'l Arb. 1, 2013, p. 6.

10 *See infra* notes 66 and 67.

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2.1.1 Different theoretical approaches in the legal traditions

The classical comparison work usually tends to set against the 'objective' approach of the common law systems to the 'subjective' approach of the civil law systems.[11] The 'objective' approach excludes extrinsic evidence while the 'subjective' approach admits other elements to interpret it.[12]

Indeed, common law tradition systems developed contract law mechanisms led by the idea of legal certainty for the parties.[13] As a result in theory, contracts shall be interpreted literally, and common law systems thus are seen as 'objective'.[14] The general idea is that the best way to find the intent of the parties is to interpret literally the contract.[15] Following this idea, no other rule of interpretation should apply as they can lead to more subjectivity,[16] and the judge must stay within "the four corners"[17] of the contract. Thus, the application of the PER is a specificity of the common law system.[18] On the other hand, it is common to say that the civil law tradition tend to promote a 'subjective' approach, where a contract shall be interpreted by favoring the will of the parties over the literal meaning of the words.[19] As a consequence, the judges can take into account some extrinsic evidence in order to interpret the will of the parties in the contract.

Within the common law tradition, authors studying comparative law can find different levels of objective approach regarding contractual interpretation. These different levels result in different meanings of the term 'objective'. An 'objective' approach of contractual interpretation can mean that the provisions of a contract shall be interpreted 'objectively' "whether (the parties) intended them to carry that meaning or not".[20] This means that the words in the contract have to be interpreted literally, with no consideration of what was the intent of the parties. With this definition of 'objective', the opposite ('subjective') approach would imply to consider the parties' intention. A more common definition of an 'objec-

11 *See eg.* FAUVARQUE COSSON Bénédicte, L'interprétation du contrat: observations comparatives, *Revue des Contrats*, April 2007, n°2 p. 481.

12 COLE Tony, The Parol Evidence Rule: A Comparative Analysis and Proposal, *UNSW Law Journal* Volume 26–3, 2003, p. 681.

13 STEINER Eva, *French Law, a comparative approach*, Oxford University Press, 2010, p. 316.

14 KARTON Joshua D. H., The Arbitral Role in Contractual Interpretation, *Queens' University Faculty of Law, Research Paper Series*, 2015-012, March 2015, page 4, [online]. Available at: https://ssrn.com/abstract=2535160 (Accessed: 05.04.2018).

15 BEELEY M.J., The Little Differences: A Comparative Analysis of Contractual Interpretation Under the Laws of England, India and New York, *Transnational Dispute Management*, Vol. 2, issue 5; November 2005.

16 FERRERI Silvia, Le juge national et l'interprétation des contrats internationaux, *Revue internationale de droit comparé*, Vol. 53 no. 1, 2001. pp. 42–43.

17 Expression commonly used to describe the PER. *See eg.* CORBIN Arthur L., The Parol Evidence Rule, *The Yale Law Journal*, Volume 53, Number 4, September 1944, p. 603.

18 ROSENGREN Jonas, *supra* note 9 at p. 6.

19 KARTON Joshua D. H., *supra* note 14, at p. 4.

20 *Ibid*.

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tive' approach to contractual interpretation, however, implies that the intention of the parties must be only ascertained from the words of the contract and not from their "unexpressed intentions".[21] This latter definition means that the provisions of the contract must be interpreted looking for the intention of the parties, but only within the words of the contract. With this definition of 'objective', the opposite ('subjective') approach allows the admission of extrinsic evidence to prove the parties' intentions. This latter definition is the one used for this article.

It is also interesting to note that some commentators use the balance between 'certainty' and 'accuracy' as a way of comparing how different legal systems interpret contracts. When favoring certainty, the interpretation of the intent of the parties shall take base only on what is written in the contract.[22] When favoring accuracy, some elements outside of the contract, such as the above-mentioned extrinsic evidence, can be used to interpret the intent of the parties.[23] Indeed, as a contract is supposed to be the representation of the intention of the parties, an interpretation is more 'accurate' when the intention of the parties prevails the written sense of the contract. In contrast, when only the content of the contract is taken into account, parties better know on what they have to rely on, and this favors certainty. We can also speak about an 'objective' or 'subjective' approach of the contract. As a consequence of its 'objectivity', a legal system will usually include a rule such as the PER that will limit the admission of extrinsic evidence for the contractual interpretation.

Currently, this opposition between objective common law and subjective civil law has few consequences in practice, mainly because of the numerous exceptions in the common law systems and the application of the objective default rule in the civil law systems as we will see hereafter.[24]

2.1.2 Different applications of these approaches in the national systems

The different jurisdictions belonging to the common law tradition make different applications of the PER. In the majority of the common law jurisdictions, extrinsic evidence still is admitted only to precise the terms of the contract as long as it doesn't contradict or vary it. For some others, the PER will avoid any extrinsic evidence if the contract is not "incomplete, ambiguous, or the product of fraud, mistake or a similar bargaining defect".[25] Less frequently, other common law countries such as Australia adopt very strict approach towards contrac-

21 PERILLO Joseph M., The Origins of the Objective theory of Contract Formation and Interpretation, *Fordham Law Review*, Volume 69, Issue 2, 2000; p. 427.

22 SPIGELMAN James, Contractual Interpretation: A Comparative Perspective, *Paper presented at the third Judicial Seminar On Commercial Litigation,* Sydney 23 March 2011, p. 3, [online]. Available at: http://ssrn.com/abstract=1809331 (Accessed 05.04.2018).

23 *Ibid.*

24 *See infra* notes 66 ; 67 and 68.

25 POSNER Eric A., The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation, *University of Pennsylvania Law Review*, 1998, Vol. 146 p. 533.

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tual interpretation: in this system, the words of the contracts must be interpreted literally, with no consideration of what the parties had in mind when they wrote it.[26] Thus, every word must be interpreted in accordance with the usual norms of language with no further consideration of what was the meaning intended by the parties.[27] Also, as extrinsic evidence is useful in contractual interpretation only when the contract is ambiguous, jurisdictions can have different approaches regarding the ambiguity of the contract: in some cases a contract can be clear *prima facie* but ambiguous if we take into account the prior negotiations.[28] Some courts will look at extrinsic evidence with the only purpose of determining if the contract is ambiguous or not, while other courts will only look at the contract to determine its ambiguity.[29] Thus, the admission of extrinsic evidence can lead to the observation that the contract is ambiguous and so could be interpreted with the light of extrinsic evidence.

In the United States, the case law regarding contractual interpretation has to be analyzed state by state. Depending on each state, the application of the PER can be tempered, partially because of the influence of the subjective approach toward contractual interpretation in the mid nineteenth century.[30] Thus, it is common to divide states jurisdictions in the United States between the 'hard PER' states and the 'soft PER' states.[31] For instance the New York and Delaware states, whose laws are chosen in the majority of SPA for domestic M&A operations,[32] are considered being 'hard PER' states. If we take the example of the New York State jurisdiction, if the written contract is clear enough, judges shouldn't look any further for its interpretation, as the contract is "the best evidence of what parties to a written agreement intend".[33] Furthermore, the judges can't look at extrinsic evidence in order to determine if the contract is ambiguous or not, and this ambiguity is regarded restrictively.[34] Regardless of these differences between states, the application of the PER is never absolute and a lot of exceptions apply. Eventually, in function of the cases, the distinction between 'hard PER' and 'soft PER' is not always that clear, and can lead to "irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair".[35]

In English law, which is traditionally seen as the most attached to the 'objective' contractual interpretation, the PER is now controversial, and international

26 COLE Tony, *supra* note 12, at p. 690.
27 *Ibid.*
28 POSNER Eric A., *supra* note 25 at pp. 533–577.
29 *Id* at p. 535.
30 PERILLO Joseph M., *supra* note 21, at p. 427. Note ICCnational rules. This is even stated in an ICC note from ...pendant f extrinsic evidence in an ICA context.e procedure a
31 POSNER Eric A., *supra* note 25 at p. 533.
32 John C. Coates, "Managing Disputes Through Contract: Evidence from M&A", 2 Harv. Bus. L. Rev. 295, 2012, p. 322.
33 *Greenfield v. Philles Records*, 98 n. Y.2d 562 (N.Y. 2002).
34 *South Rd. Assocs., LLC v. IBM*, 826 n. E.2d 806, 809 (N.Y.2005).
35 POSNER Eric A., *supra* note 25 at p. 540.

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law instruments influenced in favor of more subjectivity.[36] In addition to the numerous exceptions to the PER, judges even sometime admit extrinsic evidence by arguing that the contract was not entirely written, and thus refer to its 'implied terms'.[37]

Despite all these differences in its application, the PER is always, and more and more, combined with numerous exceptions.[38] Consequently, in a general way in the practice of the common law systems, there are so many exceptions to the PER that the situations where extrinsic evidence are not admitted are very limited.[39]

Regarding civil law, most of the systems provide guidelines for the judges that reflect the above mentioned subjective approach. The Spanish civil code provides that the intention of the parties must be determined with their acts, "contemporary and subsequent" to the contract;[40] and that in case of contradiction between the intention of the parties and the words of the contract, the intention of the parties prevails.[41] The Italian Civil Code provides that the contract shall be interpreted regarding the intention of the parties, rather than the literal meaning of the words,[42] and that this intention of the parties must be determined in function of their conduct, "contemporary and subsequent to the conclusion of the contract".[43] The French civil code provides that judges must interpret the common intention of the parties in the contract "rather than stop at the literal meaning of the words".[44] Thus, someone who interprets a contract will try to determine what was the intent of the parties when they negotiated, including their "implied agreement",[45] and it is well rooted in the French law tradition that the judge is supposed to interpret a contract in function of the circumstances of its formation and how it might have been executed.[46] It's not what is written that

36 FAUVARQUE COSSON Bénédicte, *supra* note 11, at p. 481.

37 *Id.*

38 *See eg.* ROSENGREN Jonas, *supra* note 9 at p. 6 ; KARTON Joshua D. H., *supra* note 14, at p. 2.

39 ROSENGREN Jonas, *supra* note 9 at p. 5.

40 Codigo Civil Español [Spanish Civil Code], art. 1282: (Sp.) ("Para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato") ["In order to judge the intention of the contracting parties, their acts at the time of andsubsequently to the contract shall be mainly taken into account"].

41 Codigo Civil Español [Spanish Civil Code] art. 1281 (Sp.) (" […] Si las palabras parecieren contrarias a la intención evidente de los contratantes, prevalecerá ésta sobre aquéllas") ["If the words seem to contradict the obvious intention of the parties, the latter prevails over them"].

42 Italian Codice Civile [Italian Civil Code], art. 1362.

43 *Id.*

44 Code Civil [French civil code] art. 1188.

45 BELL John, BOYRON Sophie, WHITTAKER Simon, *Principles of French Law*, Oxford University Press, 2007, p. 329.

46 AUBRY Charles, RAU Charles, *Cours de droit Civil Français. D'après la méthode de Zachariae.* 4th ed., Paris 1869, Tome IV, p. 328.

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matters but what has been wanted by the parties.[47] Besides, as stated in France both by the judges and by the French doctrine since the very beginning of the Napoleonic Code, these rules are not obligatory for the judge.[48]

It is however important to note that, despite this general approach in the tradition of the civil law, lot of differences exist in the application within the different civil law systems. For instance, some of them prohibit the judge to interpret some provisions that are clear enough (from the Latin maxim: *in claris non fit interpretatio*) while it doesn't seem that radical in other systems.[49] Furthermore, the general approach generally also considers that, when the intent of the parties cannot be established in an ambiguous provision, the judges have to interpret the provision "according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances" which is, in fact, an objective approach.[50] Also, in most of the civil law systems, a judge can't misrepresent the provisions of a contract if these provisions are clear enough and thus don't require any interpretation.[51]

In the end, in a civil law system, the subjective approach is not radical at all, and only applies with certain limits, produced by the available facts or by the respect of the binding force of the contract.

2.2 The practical cause: different legal cultures regarding evidence

It is frequently commented that the PER is rather a substantial rule than a procedural rule,[52] even if some commentators consider that one can hesitate between procedure and substance.[53] Still, its existence is also explained by the traditional culture toward evidence in the common law system. Indeed, even if the distinction between these two legal systems sometime can be subject to question,[54] "there is just enough uniformity"[55] regarding the global regime of evi-

47 FLOUR Jacques, AUBERT Jean-Luc, SAVAUX Eric, *Les obligations, 1. L'acte juridique,* Dalloz editions, 2014, p. 414.

48 MERLIN, *Répertoire universel et raisonné de Jurisprudence*, 4th ed., 1812, Vol. 3, pp 164–165.

49 LÉVY Laurent, ROBERT-TISSOT Fabrice, L'interprétation arbitrale, *Revue de l'Arbitrage*, 2013–4, p. 895.

50 ROSENGREN Jonas, *supra* note 9 at p. 3.

51 BESSON Sébastien, DUPEYRON Carine, L'interprétation du contrat et l'arbitrage, à la lumière de la réforme du droit français des obligations, *Revue de l'Arbitrage*, 2017-1, p. 122, no. 27 and 28.

52 ROSENGREN Jonas, *supra* note 9 at p. 7; *see also* FAUVARQUE COSSON Bénédicte, *supra* note 11, BESSON Sébastien, DUPEYRON Carine, *supra* note 51 at p. 128.

53 POUDRET Jean François, BESSON Sébastien, *Droit comparé de l'arbitrage international*, LGDJ, 2002, p. 582; LEW Julian D.M., MISTELIS Loukas A., KRÖLL Stefan, *Comparative International Commercial Arbitration*, Kluwer Law International, n°22–21 p. 561; p. 559.

54 BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER Martin, *supra* note 7 at no. 6.80, p. 377.

55 *Id*, at no. 6.78 p. 376.

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dence in each of these system to compare one with another, and such difference is reflected by the existence of the PER.

Firstly, one of the consequences of the PER is to limit the amount of potential evidence in legal systems where the discovery mechanism can lead to important delays and cost increases given the amount of document to manage.[56] This specific benefit is an important argument in favor of the PER in the debates that have risen in the English doctrine.[57] Indeed, if we imagine the combination of the common law discovery with the civil law admission of extrinsic evidence for contractual interpretation would lead to considerably increase the amount of documents to be analyzed by the judge.[58]

Furthermore, unlike it is the case in any common law tradition system, it is difficult to imagine the existence of an exclusionary rule such as the PER in a civil law system, even with the hypothesis of an objective contractual interpretation approach. It would be easier to imagine new contractual interpretation guidelines instead of an exclusionary rule such as the PER. This distinction could be explained by the well-known difference between the common law tradition and the civil law culture regarding collection of evidence and that is mainly based on two aspects:

- First, commentators traditionally say that the common law procedure is controversial, while the civil law procedure is inquisitorial.[59] Indeed, in common law countries, the collection and use of evidence belong almost entirely to the parties.[60] The judge will let the parties collect evidence, present it and he will take a decision in function of what is presented to him. In the civil law tradition, however, this initiative will be shared with the judge who will take an active part in the search for the facts.[61] A natural consequence is that the rules governing collection and presentation of evidence in the common law systems are more technical, and include a lot of conditions of admissibility that lead to set aside certain types of evidence.[62]
- Also, common law procedures traditionally imply a strong involvement of the juries. This leads to technical rules of admissibility, designed to avoid any influence that could distract the jury from the objective truth

56 LÉVY Laurent, ROBERT-TISSOT Fabrice, *supra* note 49 at p. 888 ; FAUVARQUE COSSON Bénédicte, *supra* note 11, at p. 481; ROSENGREN Jonas, *supra* note 9 at p. 6.

57 FAUVARQUE COSSON Bénédicte, *supra* note 11.

58 MENON Sundaresh, Transnational Commercial Law: Realities, Challenges And A Call For Meaningful Convergence, *Singapore Journal Of Legal Studies*, 2013, p. 247.

59 LEW Julian D.M., MISTELIS Loukas A., KRÖLL Stefan, *supra* note 53 at p. 533, no. 21–33.

60 BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER Martin, *supra* note 7 at no. 6.77, p. 376.

61 *Id.*

62 SANDIFER Durward V., *Evidence Before International Tribunals*, University Press of Virginia, 1975, pp. 2–3.

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> of the case,[63] as juries are not trained professional like judges usually are. These rules generally tend to reject the admissibility of certain types of evidence, and are frequently attached with numerous exceptions. This results in a certain complexity, specially for a civil law practitioner.[64] In the civil law tradition, indeed, only judges will have to analyze the evidence. As they are not supposed to be distracted from the objective truth of the case, the rules of admissibility are less strict, and the main idea is to avoid any interference with the search for the truth.[65]

Consequently, while exclusionary rules of procedure are fully integrated in the legal culture of the common law tradition, that is not the case in the civil law tradition. Thus, independently from the substantial debate on contractual interpretation, the mere question of the admissibility of extrinsic evidence doesn't fit with the legal culture in a civil law tradition system.

In practice, given these legal mechanisms between exceptions in common law and default rule in civil law, there are few cases where the contractual interpretation work by the judges will result in a radically different outcome between these two legal systems.[66] It is even difficult to predict the cases where an interpretation work would lead to a different outcome with the application of one and the other of these two approaches.[67] The goal always remains the same, and these approaches "represent little more than two different facets of the same interpretation process".[68] Still, "the underlying doctrines remain irreconcilable"[69], and the exclusionary effect of the PER can lead to the eviction of some evidence that would be admitted in a civil law system.[70]

3. International arbitration: an autonomous culture that favors the admission of extrinsic evidence

When the applicable law contains PER dispositions, the question of whether international arbitrators should apply it sometimes raises complexity.[71] Indeed, both substantial and procedural explanations of the existence of such rule in the national systems don't necessarily apply in an ICA context. As a result, the current practice in ICA tends to favor the admission of extrinsic evidence.[72] This

63 VERGÈS Etienne, VIAL Géraldine, LECLERC Olivier, *Droit de la preuve*, PUF, 2015, pp. 80–82, no. 80–81.

64 *Id*, p. 76, no. 76.

65 *Id*, pp. 80–82, no. 80–81.

66 *See*, ROSENGREN Jonas, *supra* note 9 at p. 2, and p. 6. *See also*, BESSON Sébastien, DUPEYRON Carine, *supra* note 51, at p. 128, KARTON Joshua D. H., *supra* note 14 at p. 3.

67 ROSENGREN Jonas, *supra* note 9 at p. 5; KARTON Joshua D. H., *supra* note 14 at p. 3.

68 ROSENGREN Jonas, *supra* note 9 at p. 3.

69 KARTON Joshua D. H., *supra* note 14 at p. 3.

70 *Id.* at p. 6; KARTON Joshua D. H., *International Commercial Arbitrators' Approaches To Contractual Interpretation* ; Int'l Bus. LJ, 2012, p. 383.

71 LEW Julian D.M., MISTELIS Loukas A., KRÖLL Stefan, *supra* note 53 at p. 559.

72 KARTON Joshua D. H., *supra* note 14; LÉVY Laurent and ROBERT-TISSOT Fabrice,

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happens not only when arbitrators have to apply a law from a civil law system, but also when they don't have to apply any specific law, or rely on general principles of law.[73] It is also common to see international arbitrators admit extrinsic evidence for contractual interpretation, even when they apply some national laws that would have rejected such evidence.[74] This tendency however doesn't reflect any overtaking from one legal culture over another but rather an adaptable regime that overcome these distinctions. This is due some specificities of ICA, that can be divided between the international and multicultural context (3.1) and the prevalence of the will of the parties (3.2).

3.1 International and multicultural context

3.1.1 International law tools favor a subjective approach

Several international law instruments favor a subjective approach regarding contractual interpretation. For instance, the international rules established by the UNIDROIT Principles clearly imply the admission of extrinsic evidence. From the first edition (2010) to the latest (2016), these principles provide that contracts shall be interpreted in accordance with the intention of the parties,[75] and that such intention of the parties can be determined with elements such as the "preliminary negotiations",[76] or the "conduct of the parties subsequent to the conclusion of the contract".[77] Also, the United Nations convention on contracts for the international sale of goods ('CISG'), includes in its article 8 that "due consideration" has 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".[78] In the United States, this same article has been interpreted in different ways by different circuit courts. First, the Fifth Circuit said that the PER should be applied to contracts under CISG, in the decision *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc*.[79] Then the Eleventh Circuit, in *MCC Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A*.[80] said that the PER couldn't be applied

supra note 49 p. 888.

73 KARTON Joshua D. H., International Commercial Arbitrators' Approaches To Contractual Interpretation, Int'l Bus. LJ, 2012, p. 383.

74 KARTON Joshua D. H., *supra* note 14 at p. 9, *with examples of* ICC cases no. 5946 ; 4555 and 12172.

75 UNIDROIT Principles (2016), Art. 4.1 (1); available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf (last visited: April 5th 2018).

76 *Ibid*, Art. 4.3 (a).

77 *Ibid*, Art. 4.3 (c).

78 CISG, Article 8 (3), available at: http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (last visited: April 5th 2018).

79 *Beijing Metals & Minerals Import/ Export Corp. v. American Business Center,Inc.*, 993 F2d 1178 (5th Cir. 1993).

80 *MCC-Marble Ceramic* Ctr., *Inc. v. Ceramica Nuovad'Agostino, S.p.A*., 144. F.3d 1384, 1389 (11th Cir. 1998).

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to contracts under the CISG. Eventually, a majority of authors concludes that this article necessarily implies a subjective approach and leads to the inapplicability of the PER to interpret contract under the CISG.[81]

These international law tools influence the evolution of national systems, like it is the case regarding the admission of extrinsic evidence in English law,[82] but also allow arbitrators to justify their decisions.[83] It is furthermore interesting to note that these tools also favor contractual solutions, like the UNIDROIT principles for instance that promote the use of a merger clause.[84]

3.1.2 The multicultural context that favors a subjective approach

The multi-cultural environment of ICA also plays in favor of the admission of extrinsic evidence for contractual interpretation. Indeed, the different social and legal culture, but also the mix of languages and need for translation increase the risk of misinterpretation by the arbitrators. We can mention for instance the so-called 'false consensus bias' in contractual interpretation. For psychologists, 'false consensus bias' is "the propensity to believe that one's views are the predominant views, when in fact they are not".[85] Some authors showed that judges could exhibit 'false consensus bias' by interpreting a contract in a specific way, while thinking it would be the usual interpretation.[86] They also showed that such phenomenon was more likely to happen regarding "unusual circumstances",[87] and "nonprototypical situations".[88] Thus, by limiting the admission of extrinsic evidence that could show – in a different way that the contract does – the real intent of the parties, the application of the PER increases the risk of 'false consensus bias'. This is all the more the case in ICA where more contractual approaches are in play in cases involving parties from different systems.

81 CALLEO Peter J., The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods, *Hofstra Law Review*, 2000, Vol. 28–3, Article 8.

82 FAUVARQUE COSSON Bénédicte, *supra* note 11.ernational Arbitration ('LCIA'): last edition (2017) The Parol Evidence Rule in International Arbitration"

83 LÉVY Laurent, ROBERT-TISSOT Fabrice, *supra* note 49 at p. 887.

84 UNIDROIT Principles (2016) art.2.1.17, available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf (last visited: April 5th 2018).

85 SOLAN Lawrence, ROSENBLATT Terri, OSHERSON Daniel, False Consensus Bias In Contract Interpretation, *Columbia Law Review* Vol. 107 November 2007 no. 7, p. 1268–1300.

86 *Id*.

87 *Id*. at p. 1278.

88 *Id*. at p. 1276.

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3.2 Prevalence of the will of the parties

3.2.1 In the legitimacy of the decision making process

As stated by some authors, the legitimacy of the arbitrators comes from the will of the parties, and their main objective is to give effect to the parties' intent.[89] This is fundamentally different from the judge's role. As a result, one can wonder if it makes sense to limit the seek of such intent with some exclusionary rules of evidence, and if the arbitrators should avoid extrinsic evidence to interpret such intent in a contract.[90] Indeed, arbitrators create their own interpretation rules, by favoring overall the real intent of the parties,[91] and as a well-known arbitrator says: "the interpretation of contracts is one of the areas in which international commercial arbitrators are most inclined to disengage from national laws in order to resort to general principles of law".[92] This is specially true as arbitrators always have to decide on a case by case basis,[93] even if some commentators tend to criticize the lack of legal grounds regarding contractual interpretation in international awards.[94] As a result, the current practice frequently leads to the application of interpretation rules that remain independent from any national rules. This is even stated in an ICC note from 2014, introducing the presentation of some awards related to contractual interpretation.[95]

Of course, when it appears that the parties have agreed on the application of the PER, it should necessarily be applied.[96] This happens in practice when the parties have included in their contract some provisions such as an 'Entire Agreement clause', a 'Merger clause' or a 'Written Modification clause'. These provisions determinate that no other material than the contract should be taken into account for its interpretation.[97] In the cases where there is uncertainty on the admissibility of extrinsic evidence, these clauses become very useful.[98] They are thus common in practice.[99]

89 LÉVY Laurent, ROBERT-TISSOT Fabrice, *supra* note 49 at p. 867.
90 *Id.* at p. 887.
91 *Id.* at p. 871.
92 DERAINS Yves, notes under ICC Case no. 2291 of 1975 JDI 1976, at 989.
93 *Id.* at p. 872 ; MARILD Erik, Oral Presentation of Evidence and The Application of the Parol Evidence Rule in International Arbitration, *The American Review of International Arbitration*, 2013, Vol. 4, no. 2, p. 332.
94 KARTON Joshua D. H., *supra* note 14 ; ROSENGREN Jonas, *supra* note 9 at p. 13.
95 "ICC arbitral awards on the interpretation of contracts", *ICC Bulletin*, 25–1 2014, p. 39.
96 MARILD Erik, *supra* note 93 at p. 332.
97 LÉVY Laurent, ROBERT-TISSOT Fabrice, *supra* note 49 at p. 889.
98 FAUVARQUE COSSON Bénédicte, *supra* note 11.
99 ROSENGREN Jonas, *supra* note 9 at p. 8.

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3.2.2 In the rules of procedure and evidence

Even if it was not always the case a few decades ago,[100] it is now generally admitted that the rule applicable to the procedure does not have to be the one of the seat of the arbitration but depends of the will of the parties.[101] The parties can refer to institutional rules[102] or to some 'soft law' instruments[103] such as the rules on the taking of evidence established by the International Bar Association ('IBA') that are well known and used.[104] The parties also have the faculty to directly determine some material rules, but this barely happens in practice. They can likewise refer to one or several national rules, but this faculty is not very used either because of national rules are generally inappropriate for international proceedings, and that's one of the reasons of the choice for ICA.[105] When the parties remain silent, the applicable rule generally provides that the arbitrators will have to choose which rules of procedure shall apply.[106] Of course, this autonomy is limited by some well-recognized basic principles of procedure that the parties or the arbitrators have to comply with.[107] These principles are usually at least: due process; equality; the right to be heard, to know the arguments and evidence from the other party, and to participate in the administration of evidence.[108]

Regarding the rule governing evidence, the tendency in ICA attaches to it an autonomous regime that will entirely depend on the decisions of the arbitrators, as long as the parties didn't refer to any specific rule.[109] Some national laws even mention that international arbitrators have the power to determine the admissibility of the evidence.[110] Yet, it is well known that arbitrators tend to disengage from any procedural law when gathering evidence, as they don't want to have

100 RACINE Jean Baptiste, *Droit de l'arbitrage*, PUF 2016, p. 384, no. 573.

101 AUDIT Mathias, BOLLÉE Sylvain, CALLÉ Pierre, *Droit du Commerce International et des investissements étrangers*, LGDJ, 2016, p. 712.

102 Such as the one of the International Chamber of Commerce ('ICC'): last edition (2017) available at http://www.icc-france.fr/document-1338.pdf (last visited: April 5th 2018), or the one of the London Court of International Arbitration ('LCIA'): last edition (2014) available at : http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx (last visited: April 5th 2018).

103 RACINE Jean Baptiste, *supra* note 100 at p. 386.

104 BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER Martin, *supra* note 7 at no. 6.95, p. 381.

105 LEW Julian D.M., MISTELIS Loukas A., KRÖLL Stefan, *supra* note 53 at p. 524, no. 21–1 ; p. 558, no. 22–15 ; BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER Martin, *supra* note 7 at no. 6.01, p. 353.

106 As reflected by some institutional rules. *See eg.* ICC rules *supra* note 102 at art.19.

107 AUDIT Mathias, BOLLÉE Sylvain, CALLÉ Pierre, *supra* note 101 at p. 710.

108 SERAGLINI Christophe; ORTSCHEIDT Jérôme: *Droit de l'arbitrage interne et international*, Montchrestien 2013, p. 728; LOQUIN Eric, *L'arbitrage du commerce international*, Lextenso éditions 2015, pp. 254–272.

109 LEW Julian D.M., MISTELIS Loukas A., KRÖLL Stefan, *supra* note 53 at n° 22–22 p. 561.

110 *See eg.* in Belgium Law : Code Judiciaire Belge [Belgium Judicial Code] art. 1700 § 3, in German law: Zivilprozessordnung [German Code of Civil Procedure] § 1042 al.4.

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limited access to the facts of the case.[111] Of course, as there are no juries in ICA, there is no need of strict rules of admission shaped with the purpose of avoiding any distraction from the objective truth, as it is the case in common law.

In practice, arbitrators and parties usually agree at the beginning of the procedure on how will they gather and manage evidence in function of the case,[112] and some agreed principles in the ICA community.[113] Some common practices are now clearly established and widely applied, and some commentators even speak about a *lex mercatoria* of the procedure.[114] The above mentioned IBA rules reflect these commonly accepted practices, such as institutional rules like the ICC. Regarding collection of evidence within these rules, there is no "U.S. type" discovery process, but rather a "light" version of the discovery threw the request of document process, that regards only the production of documents clearly established and determined. The consequence is a very lighter amount of documents to produce, that best fits the international trade culture and needs.[115]

Eventually, as above mentioned, despite the substantial cause of the PER one of the reason often invoked in the debate around its existence is the fact that it avoids incrementing the cost and amount of work of the discovery phase.[116] Given that the ICA practice usually avoid any full discovery, there is no such need of the PER in ICA from the practical point of view.

4. Conclusion

Many disputes can lead to contractual interpretation issues. For instance, the interpretation of the representations provisions in a transnational M&A context can be challenging because of their specificity. To interpret them, evidence of the intention of the parties such as prior negotiations can be crucial. Yet, the important due-diligence and investigation works prior to the closing in M&A operations can create a high volume of such extrinsic evidence. Furthermore, contractual interpretation rules can be different from one system to another, including between the two systems mainly present in ICA: civil law and common law. Specially, the PER and its consequences on the admission of extrinsic evidence can lead to admit or set aside evidences such as prior negotiations in

111 POUDRET Jean François, BESSON Sébastien *supra* note 53, at p. 582; BLACKABY Nigel, PARTASIDES Constantine, REDFERN Alan, HUNTER Martin, *supra* note 7 at no. 6.81 p. 377 ; MARILD Erik, *supra* note 93 at pp. 325–333; LEW Julian D.M., MISTELIS Loukas A., KRÖLL Stefan, *supra* note 53 at p. 561, no. 22–29. The same tendency has been highlighted in the traditional approach of international tribunals, *see.* SANDIFER Durward V. *supra* note 62 at p. 3.

112 GAILLARD Emmanuel, *supra* note 8 at no. 93 p. 141.

113 LEW Julian D.M., MISTELIS Loukas A., KRÖLL Stefan, *supra* note 53 at p. 559.

114 RACINE Jean Baptiste, *supra* note 100 at pp. 384–387.

115 EPSTEIN David and BALDWIN Charles S., IV, *International Litigation A guide to Jurisdiction, Practice and Strategy*, Martinus Nijhoff Publishers, 2010, p. 400.

116 *See supra* notes 56 and 58.

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order to interpret the intention of the parties, and thus change the outcome in a case. By analyzing the PER, we can detect some practical reasons as well as substantial reasons to explain its existence. These reasons don't necessarily survive when put in an ICA perspective. As adaptability is mostly favored in ICA proceedings, the application of the PER is mainly decided on a case by case basis by arbitrators, even if the tendency is to avoid any restriction of evidence and thus to widely admit extrinsic evidence. Such choice, in one way or another, can be surprising for the parties, and can change totally the outcome of an award. In the redaction of the contract, as well as at the moment of appointing an arbitrator[117] and defending a case, this issue has to be taken into account by parties' counsels.

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117 *Id* at p. 5; p. 15.

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