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ARTICLES:

Mitigating Conflict in Arbitration Clauses Through Language

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1. Introduction

Within the literature of legal discourse, contracts have been mainly examined in terms of their socio-legal, rhetorical and pragmatic functions (Danet 1980, Kurzon 1986, Klinge 1995, Hancher 1979, Trosborg 1995 and 1997 and Frade 2000). In legal terms, contracts are difficult to be satisfactorily defined due to the diversity of what may be called a 'contract' and also from the "various perspectives from which their formation and consequences may be viewed" (Calamari and Perillo 1988:1). Assuming that every contract involves one promise which has legal consequences, we will use the term defined as "a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also the right to seek a remedy for the breach of those duties" (Black 1990:322). As a genre, contracts are formed out of specific functions and conditions of discoursal communication which turn them into instances of "assertions with relatively stable theme, composition and style". However, far from reflecting the individuality of the writer, as in any sphere of human activities and communication, contracts do not have an individual style but rather require a "standard form" (Bakhtin 1986:63-64). As LSP texts, contracts are reflections of the legal discourse community and are regulated by specific conventions for production and reception, by the role the parties are allowed to play and by the situational context they are inserted in. (see Gunnarsson 1990 for a broad sociolinguistic approach to LSP texts).

In general, the discourse of contracts evinces a preference for the use of certain linguistic forms and constructions and, correspondingly, a non-preference for other lexical and syntactic possibilities, which remain latent and are regarded as non-use. Moreover, as a highly institutionalized and conventional kind of discourse, it relies on a series of specific communicative interactions and tacit metacommunicative strategies to somehow ensure that the roles and relations of the parties have been

assigned, the rights, duties, obligations and commitments have been established and the information has been received adequately (Gläser 1995 and van Dijk 1977).

Contracts deal with conflict or dispute processing derived out of broken rules in arbitration agreements or in arbitration clauses. Danet (1980:491-492) puts forward three stages of dispute processing: claim, counterclaim and outcome. The claim takes the form of a "challenge" followed by the counterclaim, in which the parties pursue some "symbolic, expressive" mode of determining the outcome. The outcome, in turn, results in decision-taking, determining and, also, choosing a course of action. By focusing on arbitration clauses as a subtype of social interaction, our purpose is two-fold: to foreground language not only as the primary means of regulating the flow of events in case of conflict so as to reinforce the parties' commitment towards cooperation and consensus but also as the potential instrument of the settlement of conflicts.

For LSP practice, our concern is to make legal professionals aware of the conventional socio-interactional nature of contracts and the linguistic evidence for cooperative and face-saving strategies in arbitration clauses. We assume that the knowledge of these conventions will help such professionals to understand the invariably maintained "generic integrity" (Bhatia 1993:199) of contracts and also to negotiate conflicts successfully.

For the LSP researcher, this article can inspire further cross-linguistic investigations on evidence of other conventional (meta)communicative strategies in contracts or in specific contractual clauses across languages or under different legal systems.

Our point of departure is a short review of Goffman's (1967) interaction ritual and face-work behavior and Brown and Levinson's (1987) politeness theory. As this theoretical framework deals specifically with spoken interaction, we briefly address how it has been adapted to the written medium of contracts. In Section 3, we approach the social interaction nature of contracts through their prototypical interchange involving a sequence of moves and their corresponding metacommunicative strategies. In Section 4, we build up the 4-Move 'arbitration' interchange pattern involving the moves and their respective linguistic realization for cooperative and face-saving strategies. We conclude with a discussion of the findings of the study and its implications for LSP practice and research.

2. Theoretical framework

In a world of "social encounters", participants involved in face-to-face or mediated contact are supposed to "take a line", that is, to follow a pattern of acts to express their view of the situation (Goffman 1967:5). Once the line is chosen, it should be maintained and it tends to be of a "legitimate institutionalized kind" involving the immediate establishment of a *face* that should also be maintained throughout the interaction. Also, the participants are responsible for sustaining an "expressive

order" to regulate the flow of events so that anything expressed by them will be consistent with their faces.

Thomas (1995:168) explains that the term 'face' meaning 'reputation or 'good name' seems to have first been used in English in 1876 "as a translation of the Chinese term 'diu liãn' in the phrase 'Arrangements by which Chinese has lost face' ". The term was defined by Goffman himself (1967:5) as "the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact".

Following Goffman, Brown and Levinson (1987:61), in their politeness theory, extend the definition of *face* "as something that is emotionally invested, and that can be lost, maintained, or enhanced, and must constantly attended to interaction". For them, there are two aspects of face which are treated like "basic wants" and which interest each member to partially satisfy in interaction: negative face and positive face. The former, more obvious, deals with the want of every person that his or her actions be unimpeded and free from imposition by others; the latter, less obvious, concerns a person's personality in what that "personality requires of other interactants", which includes, among others, the desire to be ratified and understood. This desire is represented as "the want to have one's goals thought of as desirable" by others (1987:63)

To say that a person *has*, or *is in*, or *maintains face* means that: (1) his or her presented image is internally consistent with the line taken; (2) this image is supported by "judgments and evidence conveyed by other participants" and (3) it is confirmed by evidence conveyed through impersonal agencies in the situation" (Goffman 1967:6-7). In this case, the person typically reacts with feelings of confidence and assurance as he or she knows the line is being firmly taken. Cooperation is thus also involved in the process as long as "people cooperate (and assumes each other's cooperation) in maintaining face in interaction, such cooperation being based on mutual vulnerability of face" (Brown and Levinson 1987:61)

On the other hand, to say that a person *lost, or is in wrong*, or *is out of face* or *is shamefaced*, as to Goffman, means that either he or she cannot "be integrated into the line that is being sustained" for them or that he or she does not have a line ready of the kind "participants in such situations are expected to take". The process of sustaining an impression that a person or persons have not lost face and, consequently, allowing them to maintain face in an interaction is called *saving one's face.*

There are certain acts which intrinsically threaten both the negative and the positive face, that is, acts that "by their nature run contrary to the face wants" of the interactants. The authors call these acts "face-threatening acts" (FTAs) which include, for instance, disagreements and challenges or "blatant bon-cooperation in an activity" in case of positive face's threats. (Brown and Levinson 1987:65-66). In

case FTAs cannot be avoided and the line is altered, for whatever reason, then *face-work* is needed to minimize the threat in order to maintain face to any degree and to restore the equilibrium of the interaction.

Goffman defines *face-work* as "the actions taken place by a person to make whatever he is doing consistent with face". *Face-work* serves to counteract "incidents- that is, events whose effective symbolic implications threaten face". The repertoire of face-saving actions vary from each person, culture, social or professional group and can be drawn from a "coherent framework of possible practices".

The two basic kinds of face-work are: the avoidance process and the corrective process. The avoidance process is used to prevent threats to one's face by avoiding contacts in which these threats are likely to occur and it includes protective maneuvers, neutralization of potentially offensive acts and tactful blindness. The corrective process takes place when participants fail to prevent the occurrence of an event which is incompatible with the line taken and which is "difficult to overlook" and then it is given accredited status as "an incident" (Goffman (1967:19). In this case, the participants' faces are threatened and they proceed, trying to correct for its effects by re-establishing a "satisfactory ritual state for them". The author uses the term *ritual* because one's face is "a sacred thing", and therefore the expressive order required to sustain it is also a ritual one.

From the moment face is threatened, a sequence of acts involving some moves and participants– an interchange - starts and ends with the "re-establishment of ritual equilibrium. The four classical moves in an interpersonal ritual behavior are: the challenge, by which participants take on the responsibility of calling attention to the misconduct; the offering, whereby the offender is given a chance to correct for the offense and re-establish the expressive order; the acceptance of the offering and, finally, the thanks. These phases of the corrective process, which does not necessarily follow that sequence, provide a model for an "interpersonal ritual behavior" and a natural empirical way to study interactions of all kinds.

Politeness phenomena, as stated above, have faced some criticism for not involving cross-cultural comparisons in different speech communities. Meier (1995:381), for instance, rejects the "anglocentricity" approach of the concept and claims that politeness can only be judged in relation to a specific context and to specific addressee's expectations and, consequently, its concomitant interpretation. He adds that, if there is a universal character of politeness, it is in the sense that every society has, in a way or another, "some sort of norms for appropriate behavior, although these norms will vary" (Meier 1995:388). The author prefers to define 'politeness', within a particular speech community, in terms of being appropriate (polite) or inappropriate (impolite) for a given situation or a point within it.

A different approach for politeness is proposed by Fraser (1990:232) - the "conversational-contract view" - in that he also rejects the universality encoded in

the concept in Goffman's and Brown and Levinson's view. When engaged in a conversation, each party understands that "some initial set of rights and obligations" will determine the first stages and what they can expect from each other. During the course of the conversation, or in a change in context, the parties may renegotiate the contract, that is, they may "readjust just what rights and what obligations they hold towards each other" (Fraser 1990:232). These rights and obligations vary greatly: they may be imposed through convention or by the social institutions applicable to the interaction; they may be determined by previous encounters or the "particulars of the situation" or they may even not be negotiable at all.

Thus bearing in mind that politeness and face-work are universal phenomena *not* restricted to oral interaction and to the English language and further that vary according to contexts, cultures and professional communities, we want now to consider how they are used in written interactions and, more specifically, in contractual arbitration clauses.

2.1. Politeness and face-work in written interaction

The first consideration in establishing correspondence across spoken and written media has to do with a "change *in the manner* in which communication is carried out" in the interaction (Widdowson 1984:49). Spoken interactions are reciprocal exchanges in which meanings are overtly negotiated, whereas written interactions are non-reciprocal exchanges and require that negotiation be also carried out covertly. On the other hand, for the effectiveness of written communication, there must be a congruence between the writer intention and the reader interpretation in that the latter can reconstitute the former's original intention from the textual clues provided. This reconstitution will depend mainly on the writer and the reader sharing knowledge of using linguistic rules "in the interests of social acceptability" and of particular conventions of communication of certain specific types of discourse" (Widdowson 1984:48-52).

Social acceptability has to do with rules of politeness and face-work and, in writing, these rules can be manifested linguistically through two processes: integration and detachment. Integration refers to "the packing of more information into an idea unit" than allowable in spoken language; and detachment between writer and his audience is manifested in devices "which serve to distance language from specific concrete states and events" (Chafe 1982:39-45).

Written genres are associated with conventionalized integration and detachment linguistic devices. Contracts, for instance, are types of genre that follow a kind of contextually controlled linguistic formula with specialized terminology and an extremely "dense" information structure, which reflect "the structure of the professional community as a social and cultural entity" (Valle 1998:115). And, in contracts, arbitration clauses pose as best instances of how politeness and face-work are to be construed, used and understood through linguistic cues in order to settle conflict and to guide the parties towards cooperation.

3. Contracts as social interactions

Apart from its generic and legal definitions, a contract is also an instance of social communicative interaction. The circumstances of contractual interactions involve a "unique" type of communication which comprises the intention of the parties expressed in written form assisted by "an intermediate filter"- the lawyer; the submittal to legislative limitations – the "contractual basis", and with a view to a dispute-settling institution – the courts of justice or, alternatively, the arbitral tribunal (Trosborg 1997:59).

In commercial contracts, the parties hold a symmetric relation in terms of social distance and relative power (even when conflict arises, we believe) in that they are both senders and receivers. There is also a set of imposition of restrictions on the parties to conform with the external legal framework, including "subtle allusions to remedies and sanctions" (Trosborg 1997:60).

In the 'contract interchange', the flow of events is regulated by an expressive order which presents a sequence of actions or moves that are combined with other actions to "form compound and complex actions and sequences of actions". As a highly conventionalized type of discourse, contractual actions are no longer planned but "automatized in a fixed ROUTINE". Only in specific circumstances, such as when conflict arises or "when normal initial conditions are not satisfied", this routine is consciously executed (van Dijk 1977:233-234). In these cases, the parties are forced to turn to politeness strategies to reduce FTAs of the speech acts involved and also "the incorporated intentions of the law" regarding sanction and penalties, should they fail to comply with the contractual commitment (Trosborg 1997:60).

The contractual interchange is realized discursively through: (1) meta-communicative strategies of textual organization; (2) the constant reinforcement of tacit cooperation between the parties and (3) face-saving strategies to counteract incidents.

Headings, sub-headings or enumeration of items are the prototypical metacommunicative disposition signals used to alleviate "the reader's orientation in the progression of the text and the reception of the information conveyed" (Gläser 1995:87). Cooperation is prototypically realized by the repetition of cooperative commissive directive verbs, such as *agree*, (see as Searle 1976 and Hancher 1979 for details), and other selected 'cooperative' terms and expressions, such as *jointly* and *make their best efforts*.

After Swales's move approach (1990), we suggest a 6-move contractual interchange pattern in Table 1, comparing its moves and the general textual organization of contracts outlined in Trosborg (1997).

	MOVES	METACOMMUNICATIVE STRATEGIES
MOVE 1	*Taking the line*	The title and/or the introduction
MOVE 2 *(optional)*	*The background*	Recitals
MOVE 3	*The definitions*	Definition section (alphabethical order)
MOVE 4	*The substance*	Headings and sub-headings and/or enumeration of items by numbers or letters
MOVE 5	*The managing*	'Miscellaneous' clauses

Table 1: *The 6-Move contractual interchange pattern.*

In Move 1, the title and the introduction express the nature of the document and the identification of the parties involved in the transaction. They take the line of entering into a tacit agreement to "attain their shared but differently motivated objectives" (Goffman 1967:29). Also, in this move, the parties implicitly avail themselves of establishing and maintaining a face to all the remainder of the contract.

In Move 2, the background is optional because it is not part of the operational part of contracts and gives information that forms the 'foundation" for the document before its existence and which serve as the basis for the contract (Trosborg 1997). Recitals are usually introduced by *whereas* and have an immediate purpose: to serve as preamble to establish the conditions of the commitment between the parties.

Move 3 defines technical terms, legal or otherwise that may be unfamiliar to the user and stipulates definitions when words are used in a narrow way for the purposes of the document (Trosborg 1997 and Ray and Ramsfield 1993).

Move 4 represents the operational part of the contract and contains the "regulative acts to come in force by means of the document" (Trosborg 1997:65). It is divided into articles, paragraphs or clauses containing headings, subheadings and enumeration of items which divides and highlights the segments of the contract.

Move 5 attends to the "business of managing the document itself" (Trosborg 1997:66).

And, finally, Move 6 accounts for the validity and the enforcement of the contract through varied formalities, such as the parties' and the witnesses' signatures, the date and the notary public's validation.

As pointed out earlier, arbitration clauses constitute sub-types of communicative interactions within contractual transactions. Thus, they also present a conventional interchange involving moves and the parties. In this case, the interchange is realized linguistically through cooperative and face-saving strategies in the phases of conflictual events.

3.1. The data

The main data of investigation have been drawn from *International Petroleum Agreement* compiled by Barnes (undated). The book contains the following eight models of international petroleum agreements or contracts: Peruvian License Agreement, Egyptian Concession Agreement, Angola Production Sharing Agreement, Trinidadian Production Sharing Contract, Venezuelan Operating Service Contract, Colombian Association Contract, Chinese Enhanced Oil Recovery (EOR) Contract and Hungarian Concession Agreement.

Our examples were drawn from arbitrations clauses inserted in seven corpora: the Peruvian License Agreement (77 pages), the Egyptian Concession Agreement (97 pages), the Angola Production Sharing Agreement (134 pages), the Trinidadian Production Sharing Contract (120 pages), the Venezuelan Operating Service Contract (58 pages), the Chinese EOR Contract (115 pages) and the Hungarian Concession Agreement (15 pages). The Colombian Association Contract does not have an arbitration clause. We have also looked into the UNCITRAL Model Law (UML) on International Commercial Arbitration.

After selecting arbitration clauses in our corpora, we analyzed the linguistic evidence which revealed, both explicitly and implicitly, cooperative and face-saving strategies through prototypical devices of manifestation of integration and detachment. Then we were concerned with a classification of the various 'moves' regularly used to write arbitration clauses in the data under investigation, involving the strategies and the regularity of their linguistic realization. Finally, we built up a 4-Move 'arbitration' interchange pattern for the phenomenon in question.

The UML was included in our data because it is considered a model for the production of arbitration agreements and clauses. As an independent agreement,

not inserted as a clause in contracts, it has a different typical sequence of moves but we found it worth being briefly analyzed.

Assuming that arbitration clauses belong to the substance of contracts regardless of which language they are written in, our 'one-language analysis' of English contracts should not be viewed as an *ad hoc* one. On the contrary, linguistic manifestations of mitigating conflict in arbitration clauses seem also to be found in contracts across languages.

4. Mitigating conflict in arbitration agreement clauses

According to the UNCITRAL Model Law (UML) on International Commercial Arbitration, Chapter II, Article 7 (1), an "arbitration agreement" is an agreement in which the parties submit to arbitration "all or certain disputes which have arisen or which may arise between them" in a contractual relationship or others. Arbitration agreements must be in writing and may be either inserted as a clause in contracts or may be presented as an independent contract. A prototypical opening arbitration clause reads as follows:

> Any dispute, controversy or claim arising out of or in relation to or in connection with this Agreement or the operation carried out under this Agreement, including without limitation any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement, shall be exclusively and finally settled by arbitration, and any Party may submit such a dispute, controversy or claim to arbitration.

Likewise contractual interaction, arbitration agreements are also units of social activity conveying a standardized interchange involving moves and the parties. We will call it 'the arbitration interchange'. When arbitration agreements are presented as independent contracts, as the UML, they convey a larger number of moves - the challenge, the acceptance, the offering, the settlement, the termination and the enforcement – in a rigid sequential order in which the progression of the moves are mainly signalized by headings and sub-headings. The moves are thus presented: "Definition and form of arbitration agreement" ('challenge' and 'acceptance' moves); "Composition of arbitral tribunal", "Jurisdiction of arbitral tribunal" and "Conduct of arbitral tribunal" ('offering' and 'acceptance' move) "Making of award" ('settlement' move) '"Termination of proceedings" ('termination'move) and "Recognition and enforcement of awards" ('enforcement'move).

On the other hand, when arbitration agreements are presented as clauses, paragraphs or articles inserted in contracts, as per our main data, the interchange involves fewer moves with a more flexible sequential order, which are signalized by the enumeration of the clauses. The UML also suggests a single model arbitration clause to be inserted in contracts:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

The move analysis which follows indicates the cooperative and face-saving strategic use of language to avail the parties of sustaining cooperation during the arbitral proceedings and to attenuate responsibilities in case they do not comply with their contractual commitment respectively.

4.1. Move 1: The challenge

The opening arbitration clause comprises the challenge move. In this initial stage, the process of "mitigating responsibilities for wrongdoing" (Danet 1980:524) is immediately foregrounded by two main linguistic devices of face-saving strategies: the selection of the terms that compound binomial and multinomial expressions and passivization. Both are instances of "off record" strategies, that is, formal types of indirectness in context (Brown and Levinson 1987:212).

Binomial and multinomial expressions are typically integrative devices in legal terminology for the sake of technical accuracy and to make the legal document precise and all-inclusive (Gustafsson 1975, Bhatia 1993). Generally speaking, binomials or word pairs are sequences of two words or phrases that belong to the same grammatical category, are related semantically and connected by a lexical link such as *and* or *or* (Gustafsson 1984 and Bhatia 1993). Examples of typical legal binomials drawn from our data are: *controversies or claims, rights and liabilities;* and *dispute or controversy*. On the other hand, a multinomial can be regarded as an extended binomial and is meant to express the linguistic device of "an enumerative sequence [which] may contain several members, according to the varying situation in the topic that we are talking about" (Gustafsson 1975:17). Examples of typical legal multinomials are: *dispute, controversy or claim; breach termination or invalidity; construction, compliance, termination, rescission, efficiency or validity*. Binomial and multinomial expressions realize indirectness either by carefully selecting the terms in the sequence or by replacing the actors in the initial position in passive constructions. In the prototypical morphological variation of arbitration binomials and multinomials, the terms hold a complementary semantic relation, sometimes expressed by "an additional semantic feature, sometimes by the exclusion or suppression of a feature" (Gustafsson 1975:86). The strategy used here is one of Goffman's (1967) types of face-work, the avoidance process: nouns denoting 'stronger' conflict, such as *litigation* and *conflict*, are avoided and replaced by 'less harsh' ones, such as *dispute, controversy, claim, dissatisfaction, discrepancy, contradiction, difference and disagreement* in order to neutralize "the potentially offensive act". In other words, they integrate two or more items within the idea unit of 'litigation'.

Finally, the over-generalization of the binomial and multinomial expressions, by the use of *any*, deliberately violates Grice's maxim of Manner because it leaves the

"object of the FTA vaguely off record" and is specified nowhere in the document (Danet 1980 and Brown and Levinson 1987).

Passivization accounts for strategically placing conflicting terms in the initial position in arbitration clauses. When an element that is typically a predicator is placed in a marked position, it is emphasized or given "temporary prominence within the clause" (Trosborg 1997:100). The parties are suppressed - although they can be retrieved from the context - thus providing a "protective orientation" (Goffman 1967:14) toward saving the parties' faces. However, when the parties are not suppressed, they are typically impersonalized and are either given a title or identified as the corporations they represent (*contractor/government*, for instance).

For Brown and Levinson (1987:274) the passive is an impersonalization mechanism that serves basic politeness ends in that it "demotes the subject to a superficial locus where it may be deleted", thus reducing the importance of the agent and becoming a means of "shifting responsibility off a subject".

Also for Chafe (1982:45-46), the passive voice accounts for the "detached quality of written language" to distance the language from specific events in that it suppresses the "direct involvement of an agent in an action". The same holds for nominalization, very frequent in contractual language, which suppresses involvement in actions in favor of "abstract reification".

As an instance of non-conventional indirectness, passivization here also deviates from Grice's Cooperative Principle (1975) in that it "flouts" the Maxim of Quantity by deliberately providing less information than required, omitting who the actors are and generating the implicature that the responsibility for initiating the conflict belongs to the parties.

Examples of the passive (italicized), and binomial and multinomial expressions (underlined) in our data are:

(1) Any <u>dispute, controversy or claim</u> arising out of or relating to this Agreement or the breach termination or invalidity thereof, between the Government and the parties *shall be referred* to the jurisdiction of the appropriate A.R.E. Courts and *shall be finally settled by* such Courts. (Egyptian Concession Agreement, Article XXIII: Dispute and Arbitration. (a) p.142).

(2) Any <u>disputes, differences, or claims</u> arising out of this Agreement or relating thereto, or relating to the breach, termination, or invalidation of the same, which it *has not been possible to resolve* amicably *shall be* finally and exclusively *settled by* arbitration, in accordance with the UNCITRAL Rules of Arbitration of 1976 as existing on the Effective Date. (Angola Production Sharing Agreement, Article 42: Arbitration. p. 174.84).

(3) Any controversies or claims arising out of this agreement *shall be settled* by the …. Arbitration Court. (Hungarian Concession Agreement. Article 16.1: Arbitration, p. 462).

(4) Any dispute or controversy related to this Agreement that the Parties cannot settle, *shall be submitted* to arbitration in the city of Caracas, Venezuela. (Venezuelan Operating Service Contract 12.1.: Arbitration, p. 338).

The main payoffs of the strategies illustrated above are that both parties can avoid responsibility for "the potentially face-damaging interpretation" and get credit for being "tactful and non-coercive" (Brown and Levinson 1987:71).

4.2. Move 2: The acceptance

The acceptance move also makes use of face-saving strategies both at the syntactic and lexical levels. In the former, where the references to the parties occur in the unmarked initial position, the active voice signals explicitly that the responsibility for a consensus and understanding is to be shared between them.

On the level of lexical choices, direct orientation towards the parties' cooperation after and during the course of arbitration is realized through the selection of 'cooperative' commissive verbs (*agree, settle, attempt, cooperate, bind*) and 'cooperative' nouns (*negotiation, agreement*) as well as adverbs (*jointly, amicably, equally, mutually*) and formulaic phrases (*by mutual agreement, by agreement between the Parties, make their best efforts, in accordance with*).

Following Austin's (1962), Searle (1976:11) redefines commisives as illocutionary acts "whose point is to commit the speaker /…/ to some future course of action" and where the sincerity condition is "Intention". And for Hancher (1979), following Searle, contracts can be regarded as "cooperative commissives", that is, types of "hybrid speech acts" combining directive with commissive illocutionary force which looks towards completion in some response to the parties. Typical examples of the active voice and 'cooperative' lexicon in our data are underlined below:

(4) The Parties shall make their best efforts to settle amicably through consultation any dispute arising in connection with the performance or interpretation of any provision thereof. (Chinese Enhanced Oil Recovery Contract, Article 25.1: Consultation and Arbitration, p. 425).

(5) If agreed upon the Parties, such dispute shall be referred to arbitration conducted by the China International Economic and Trade Arbitration Commission in accordance with the arbitration proceeding rules thereof. (Chinese Enhanced Oil Recovery Contract, Article 25.2.1: Consultation and Arbitration, p. 425).

(6) During the course of arbitration, the Parties shall continue with the performance of their contractual obligations, including those that are subject matter of

arbitration. /…/ (Peruvian License Agreement. Clause Twenty-One – Submission to Peruvian Laws, Arbitration and Jurisdiction, 21.2: Arbitration, p. 56).

According to Brown and Levinson's classification, both strategies used in this move are considered "on record" because they unambiguously express the intention of committing themselves to cooperation "with redressive action". They demonstrate clearly that such offensive act is not desired and also entail "positive politeness" since the parties are expected to comply with the same rights, duties and "expectations of reciprocity" (Brown and Levinson 1987:69-70).

4.3. Move 3: The offering

The offering move is mainly characterized by the use of conditionals on the level of syntactic strategies. Legal conditionals are prototypically all-inclusive and discontinued due to the excess of qualifications inserted in their syntactic structure. The initial if-clause expresses a condition that applies to what is stated in the main clause (Bhatia 1993 and Hiltunen 1990).

The formula *if X, then Y shall be/do Z* represents the basic conditional construction in contracts with the use of the present simple in the protases (see Crystal and Davy 1969 for further details). It confirms the cooperative and volitional nature of contracts in which the parties are committed or are obliged to perform (or not) some actions in the future mentioned earlier.

As Dancygier (1998) points out, the form of verbs phrases used in the construction of conditionals are considered "surface devices" encoding all type of conditions and the speaker's (or correspondingly the author's) beliefs. Under this interpretation, the successive 'arbitration' conditionals are contextually bound and provide the parties with as many alternatives and chances as possible to reach an understanding before finally making use of arbitration or other further instances of dispute settlements. The selection of verb form in the construction of conditionals also deviates from the prototypical one, presenting more varied and less rigid forms, such as *would* and present perfect in the protases and *may* in the apodoses.

In general, 'arbitration' conditionals present "desirable developments" towards the settlement of conflicts and can be interpreted as follows: although the situations described in *p* are predictable but not desirable, "they result in and allow the conditional prediction of other desirable situations" (Dancygier 1998:117). The following are examples of 'arbitration' conditionals:

(7) If any dispute referred to under this Article has not been settled through consultation within ninety (90) days after the dispute arises either Party may by notice to the other Party propose that the dispute be referred either for determination by a sole expert or to arbitration in accordance with the provisions of Article 33. (Trinidadian Production Sharing Contract, Article 33.2: Consultation, Expert Determination and Arbitration, p. 253).

(8) If for whatever reason arbitration in accordance with the above procedure would likely to fail, then the parties agree that all disputes, controversies or claims arising out of or relating to this Agreement or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Rules. (Egyptian Concession Agreement. Article XXIII: Disputes and Arbitration (h), p. 143)

(9) As an alternative, to the procedure described in Article 33.3 and if agreed upon by the Parties, such dispute shall be referred to arbitration by an agreed sole arbitration. (Trinidadian Production Sharing Contract, Article 33.4: Consultation, Expert Determination and Arbitration, p. 253).

The conditionals exemplified in the clauses above constitute instances of typical redressive act strategies in that the parties may choose to "stress their cooperation in another way" (Brown and Levinson 1987:125).

4.4. Move 4: The settlement and the enforcement

In this last move, cooperation is once again foregrounded and unambiguously expressed linguistically by the terms underlined below:

(10) The Parties agree that this arbitration clause is an explicit waiver of immunity against validity and enforcement of the award or any judgment thereon and that the award or judgment thereon, if unsatisfied, shall be enforceable against any Litigant in any court having jurisdiction in accordance with its laws. (Angola Production Sharing Agreement. Article 42: Arbitration. 5., pg. 174.84).

(11) The Parties hereby waive any right of appeal, annulment or any other challenge against the arbitration award, which shall be binding and final for the Parties /…/. (Peruvian License Agreement. Clause Twenty-one- Submission to Peruvian Laws, Arbitration and Jurisdiction, 21.2., p. 56).

(12) The Parties bind themselves to perform all the acts that may be necessary so that, once litigation, controversy, discrepancy or claim has been filed, all those acts which may be required for the development of the arbitration proceedings shall be performed until they have been concluded and enforced. (Peruvian License Agreement. Clause Twenty-one- Submission to Peruvian Laws, Arbitration and Jurisdiction, 21.2., p. 56).

To finalize our analysis, it is worth pointing out the role of the modal *shall* in arbitration clauses. In clauses where cooperation between the parties is emphasized, *shall* (and *may* as well) expresses the speech act of commitment or guarantee that the proposed action be undertaken by the parties (Kurzon 1986). However, in clauses where face-saving strategies are used to mitigate responsibility for conflict, *shall* assumes the illocutionary force of obligation or duty.

The proposed 4-Move arbitration interchange pattern is displayed in Table 2.

MOVES	COOPERATIVE WRITTEN STRATEGIES	FACE-SAVING WRITTEN STRATEGIES
MOVE 1 *The challenge*		- Passivization - Impersonality of the actors - Multinomials replacing the actors: 'less harsh' conflictual terms & over-generalization - *Shall (*obligation/duty)
MOVE 2 *The acceptance*	- Active voice - 'Cooperative' commisssive verbs - 'Cooperative' nouns and adverbs - *Shall* (commitment) - *May*	
MOVE 3 *The offering*	- Contextually bound conditionals	
MOVE 4 *The settlement and the enforcement of the contract*	- 'Cooperative' commisssive verbs - 'Cooperative' nouns and adverbs - *Shall* (obligation/duty)	

Table 2: *The 4-Move arbitration interchange pattern.*

5. Conclusion

In this paper we have analyzed how language is used to mitigate the illocutionary force of conflicting assertions in arbitration clauses and also to guide the parties towards cooperation after and during the arbitral process.

The theoretical framework was based upon Goffman's theory of interaction ritual and face-work behavior (1967) and Brown and Levinson's politeness theory (1987) adapted to the written medium of contracts. It was assumed that contracts constitute instances of social interaction in which the parties share common purposes and tacitly agree on: a) taking a line during all the course of the interaction and

b) maintaining an internally consistent face to the line take throughout the interaction. These two assumptions are structured in a series of established moves and realized by means of metacommunicative and strategies.

Arbitration agreements deal with conflicts arisen out of broken contractual rules previously agreed on. They must be in written form and can be presented as independent documents or inserted as clauses in contracts.

The main data employed in the analysis was drawn from a compilation of international petroleum agreements in English. We also employed the UNCITRAL Model Law. The findings have shown that arbitration clauses are sub-types of social interactions and present a 4-Move interchange pattern on the basis of explicit and implicit linguistic evidence for cooperative and face-saving strategies. By assuming that arbitration clauses belong to the substance of contracts and that they all deal with mitigation of conflict, we believe that the findings can be confidently generalized to contracts across languages.

For the LSP practice and research, some implications can be drawn. Legal professionals were made aware of the socio-interactional nature of commercial contracts and, more strictly, of arbitration clauses. We also intended to arise the awareness of the role that language plays in conveying not only explicit propositional messages but implicit strategic ones as well in arbitration clauses. The concern with the maintenance of cooperation throughout the phases of conflict (cooperation strategies) and the mitigation of responsibility for the party that initiates the conflict (face-saving strategies) are realized through conventionalized lexical and syntactic clues. As practical consequences of these two implications, knowledge of arbitration clause strategic conventions can help legal professionals to understand and write arbitration clauses and also to succeed in the negotiation of conflicts. In the first case, contract drafters are provided with the guidelines for maintaining the generic integrity of arbitration clauses. In the second case, negotiators are likely to ensure success in the negotiation of conflicts since they are made aware of the interactional moves they are expected to follow.

Finally, for the LSP researcher, this paper leaves room for investigating further cross-linguistic evidence of (meta)communicative strategies conventionally used in contracts under different legal systems.

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ABSTRACT

Mitigating Conflict in Arbitration Clauses through Language

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Keywords:
language - mitigation – conflict – arbitration clauses

The aim of this paper is to analyze how language is used to sustain cooperation and mitigate the illocutionary force of conflicting assertions in contractual arbitration clauses. On the one hand, 'cooperative' terms and expressions are manipulated in an attempt to reinforce explicitly the binding commitment between the parties to submit to arbitration in case of conflict. On the other hand, other linguistic strategies are used to somewhat attenuate the responsibility of the party that initiates the conflict. The main theoretical framework of the analysis is Goffman's (1967) theory of oral interaction ritual and Brown and Levinson's politeness theory (1987) which have been adapted to the written medium of contracts. The data of the investigation is drawn from a compilation of genuine international petroleum agreements in English. We claim that arbitration clauses constitute subtypes of social interaction inserted in contracts whereby the parties are engaged in a 4-Move interchange to regulate the flow of events until the successful completion of the arbitral process. For LSP practice, the aim of this paper is twofold: to make legal professionals aware of the socio-interactional nature of arbitration clauses and of the conventional use of linguistic strategies for their writing and for a successful negotiation of conflicts. Moreover, the LSP researcher may find inspiration to investigate further cross-linguistic evidence of (meta)communicative strategies in contracts under different legal systems.

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