

Preparing for unconscious legal bias in international arbitration

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The legal background

- International commercial contracts
 - Mainly written in English
 - Relatively standardised language
 - Extensive and detailed
- International arbitration
 - Preferred method for solving commercial disputes
 - Out-of-court, private mechanism
 - Enjoys a certain autonomy from national courts

The issue

- According to a strong legal theory (“delocalisation”):
 - International contracts are self-sufficient
 - International arbitration interprets contracts in an autonomous and uniform way
- Delocalisation inspires how arbitration is taught

Need to verify empirically

1. Does the standardisation of contract language produce one single meaning?
2. Does the autonomy of arbitration create a uniform way of understanding contract language?

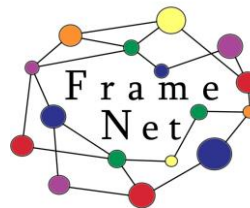
Frame Semantics:

some basic ideas

Fillmore 1985



**Charles J.
Fillmore**
1929-2014



CHARLES J. FILLMORE
FRAMES AND THE SEMANTICS OF UNDERSTANDING

Introduction

In this paper¹ I draw a comparison between semantic theories based on language understanding (broadly conceived) and semantic theories founded on judgments of (relative) truth. For convenience I shall refer to these as the semantics of understanding (U-semantic) and the semantics of truth (T-semantics).

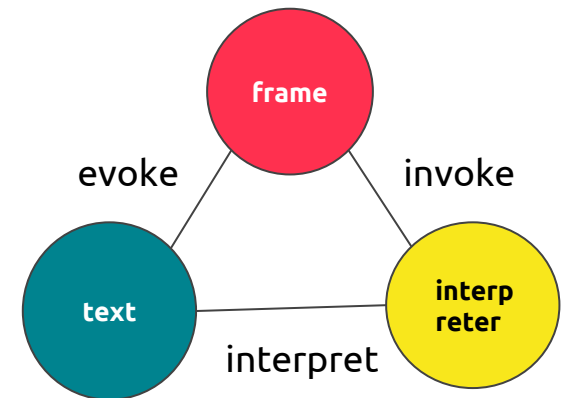
Fillmore 1985

- U-semantics (Semantics of Understanding)

- "... providing a general account of the relation between linguistic texts, the context in which they are instanced, and the process and products of their interpretation"
 - <> T-semantics (truth-theoretical semantics)
- Interpretative frames: "*the particular organization of knowledge which stands as a prerequisite to understand the meaning of the associated words*"
 - Classic examples: *mother, brother, daughter* -> can't understand meaning without concepts of «family relations»
 - "Frame semantics sees the set of interpretative frames provided by a language as offering alternative 'ways of seeing things' ..."

Interpretative frames

- An **interpreter** invokes a **frame**
 - When trying to interpret a **segment of text**
 - Linking the **content of the text** to **independently known semantic patterns**
 - *"We never open the presents until the morning"* → Christmas
 - *«He killed his wife and shot himself"* → femicide
- A **text** evokes a **frame**
 - Starting from a **specific linguistic form or pattern**
 - **Conventional association** between form and meaning
 - «Conventional» = **agreed upon within a specific language and culture**



Frames and inference

Interpreter processing a text will implicitly ask:

- Why does the language have the **category** which the **form** represents?
 - Needs access to "abstract frame": background information
 - Why does English have a word for "mother"?
⇒ must be some concept that plays a role in the culture
 - **Frames also depend on the background culture ⇒ including the legal one**
- Why did the **speaker** select this **form** in this **context**?
 - Depends on **interpretation construction** of the whole text: which frames are already **active in the text world**, how can the new frame be **integrated**?
 - Similar to **Gricean implicatures**: infer intended meaning of speaker by comparing different possible forms that they could have chosen
 - BUT: this happens at the **conventional meaning** level, not on the pragmatic level

Frames and perspectives

- Physical/geographical perspective



coast → "Land Travel" frame
shore → "Sea Travel" frame

Frames & interpretation:

⇐ Interpretation **requires concepts** (geography, travel) to make sense of the word

⇒ Word **evokes a scene** imagined by the reader

Think of inference: why would speaker choose one or the other? ⇒ reveals something about the scene that they had in mind

Frames and perspectives

- Social perspective



buy → "Commerce-Buy" frame
sell → "Commerce-Sell" frame

Frames & interpretation:
⇐ Interpretation **requires** **concepts** (transaction, participants) to make sense of the word

⇒ Word **evokes scene** imagined by the reader, takes perspective of a specific participant

Frames and legal perspective

- **Why does a language/culture have a particular frame?**
 - What does this say about what concepts "exist" in the culture?
 - Ex. frame of the «PRINCIPLE OF GOOD FAITH»
- **How can we relate this to salient legal issues?**
 - Ex. «termination of a contract»
- **Can legal language be interpreted independently from every-day speech?**
(Mortara Garavelli 2001 answers «no!»)

Activity_stop

Definition:

An **Agent** ceases an **Activity** without completing it.

After the lawsuit, the company STOPPED producing the once very profitable toy.

The rugby club TERMINATED negotiations with Argyll in September 1988.

FEs:

Core:

Agent [Agent]
Semantic Type: Sentient
Core Unexpressed:

This FE identifies **Agent** that stops the **Activity**.

Activity [Act]

This FE identifies the **Activity** that the **Agent** stops.

Non-Core:

Circumstances [Cir]

Circumstances describe the state of the world (at a particular time and place) which is specifically independent of the event itself and any of its participants.

Co-timed_event [Co-t]

This FE identifies the last **Co-timed_event** of the stopped **Activity**.
With the arrival of the bishop, everyone STOPPED working.

Containing_event [Con]

This FE identifies an event during which the **Agent** stops the **Activity**.

Degree [Deg]

Semantic Type: Degree
Depictive [Depict]

This FE describes the completeness of stopping.

This FE is used for a **Depictive** phrase describing the actor or undergoer of an action.

Duration [Dur]

Semantic Type: Duration
Event_description [Eve]

This FE identifies the length of **Time** during which the **Activity** is stopped.

In general, this FE is used for phrases that describe the clause of the target as a whole.

Explanation [Exp]

Semantic Type: State_of_affairs
Frequency [Fre]

The reason the **Agent** stops the **Activity**.

This frame element is defined as the number of times an event occurs per some unit of time. A Frequency expression answers the question how often. It is to be distinguished from Iteration, which pertains simply to the number of times an event occurs-Iteration expressions answer the question how many times.

Manner [Manr]

Semantic Type: Manner

This FE identifies the **Manner** in which the **Agent** stops the **Activity**.

Means [Mns]

Semantic Type: State_of_affairs
Particular_iteration [Par]

This FE identifies the **Means** by which the **Agent** stops the **Activity**.

Expressions marked with this extra-thematic FE modify a non-iterative use of the target, and indicate that it is conceived as embedded within an iterated series of similar events or states.

Place [Place]

Semantic Type: Locative_relation

This FE identifies the **Place** where the **Agent** stops the **Activity**.

Purpose [Purpose]

Semantic Type: State_of_affairs

This FE identifies the **Purpose** for which an **Agent** stopped the **Activity**.

Re-encoding [re-e]

This FE presents the current frame as an integral part of a larger conceptualization expressed by another frame.

Result [Result]

This FE identifies the **Result** of the stopped **Activity**.

Time [Time]

Semantic Type: Time

This FE identifies the **Time** when the **Agent** stops the **Activity**.

Frame for *terminate*

Need for ad hoc additions in
the legal domain
(Venturi et al. 2009)

Commerce_pay

Definition:

This frame involves **Buyers** paying **Money** for **Goods**. In this frame the **Money** is the direct object, and is mapped to the theme of the transfer.
I **PAID** her \$50 for a video game.

FEs:

Core:

Buyer [Byr]

The **Buyer** has the **Money** and wants the **Goods**.
Gem **PAID** fifty dollars for a shirt

Goods [Gds]

The FE **Goods** is anything (including labor or time, for example) which is exchanged for **Money** in a transaction.
Kim **PAID** fifty dollars for the shirt

Money [Mny]

Money is the thing given in exchange for **Goods** in a transaction.
Pat **PAID** 14 dollars for a movie ticket.

Rate [Rate]

In some cases, price or payment is described per unit of **Goods**.
The manager **PAYS** the paper boys five dollars an hour.

Seller [Slr]

The **Seller** has the **Goods** and wants the **Money**.
The landlord is **PAID** \$700 a month by the tenants for the apartment.

Non-Core:

Circumstances [Cir]

Circumstances describe the state of the world (at a particular time and place) which is specifically independent of the event itself and any of its participants.
Worker 's compensation **PAYMENTS** alone in cases involving falls , now average more than \$8500 per incident in North America .

Explanation [Exp]

The **Explanation** for which an event occurs.

Semantic Type: State_of_affairs

Frequency [Fre]

This frame element is defined as the number of times an event occurs per some unit of time.
A good tenant **PAYS** her rent regularly

Manner [M]

Semantic Type: Manner

Any description of the paying event which is not covered by more specific FEs, including secondary effects (quietly, loudly), and general descriptions comparing events (the same way). It may also indicate salient characteristics of the **Buyer** that affect the action (presumptuously, coldly, deliberately, eagerly, carefully).
She quietly **PAID** the bill and left.

Means [Mns]

Semantic Type: State_of_affairs

Place [Place]

Semantic Type: Locative_relation

Purpose [Purp]

Semantic Type: State_of_affairs

Time [Time]

Semantic Type: Time

Unit [Unit]

The **Means** by which a commercial transaction occurs. Abby **BOUGHT** the car with cash. Robin **PAID** for the car by check.

Where the event takes place.

The **Purpose** for which an intentional act is performed.

When the event occurs.

This FE is any unit in which goods or services can be measured. Generally, it occurs in a by-PP.
Bob **PAYS** for peppers by the pound.

Frame for *pay*,
payment

Frame for *agree*, *agreement*

Make_agreement_on_action

Definition:

Two (or more) people (the **Parties**, also encodable as **Party_1** and **Party_2**) negotiate an agreement. Both sides are construed as making a commitment to assume an **Obligation** - the process is understood to be symmetrical or reciprocal. Instead of a specific mention of the **Obligation**, a **Topic** expression may be used to indicate the domain covered.

So far, **we** have **AGREED** to cede 100km of coastline to Kiribati. **DNI**

At common law, **the parties** could make an **oral AGREEMENT** to submit a dispute to arbitration and such oral agreement would be valid.

FEs:

Core:

Obligation [obl]

An expression of the commitment made by the **Parties**.

The US and Russia have **AGREED** to share early warning data on missile launches.

Parties [pars]

The group of individuals portrayed as equally involved in making an agreement.

The US and Russia have **AGREED** to cooperate in destroying surplus portable anti-aircraft missiles.

Party_1 [par1]

Semantic Type: Sentient

Excludes: Parties

The individual or individuals that form the more prominent (i.e. agentive) party of the agreement, as compared with **Party_2**. That is, **Party_1** is generally encoded as the External Argument of verbs, and peripheral FEs that do not make reference to the event itself generally make reference to **Party_1**. Thus **Manner** is construed to be that of **Party_1**, not necessarily that of **Party_2** or the group of **Parties** as a whole.

On Monday, **the airline** reached a **DEAL** with the Canadian Auto Workers.

Party_2 [par2]

Semantic Type: Sentient

Excludes: Parties

The semantically (and grammatically) less prominent participant (or group of participants) in the agreement. It is generally encoded within a prepositional phrase (e.g. headed by with).

Mozilla Foundation has finally reached an **AGREEMENT** with America Online.

Topic [top]

Topic is a description of the domain covered.

Some types of alloy steel have been covered in the expiring **trade AGREEMENT**.

Non-Core:

Descriptor [d]

This FE describes a characteristic of the **Obligation**.

Manner [man]

Semantic Type: Manner

Any description of the act of making an agreement which is not covered by more specific FEs, including secondary effects (quietly, loudly), and general descriptions comparing events (the same way). In addition, it may indicate salient characteristics of either **Party_1** or **Parties** that also affect the action (presumptuously, coldly, deliberately, eagerly, carefully).

I **readily** **AGREED** with her to end our wrestling match.

Medium [med]

As with other frames in the Communication domain, the **Medium** of communication may be expressed. **Medium** is the physical entity or channel used to record or negotiate the **Obligation**.

The parties made a **written AGREEMENT** to arbitrate disputes arising in connection with the contract.

Place [P]

Semantic Type: Locative_relation

This FE identifies the **Place** where the Agreement occurs.

The town council members reached an **AGREEMENT** at the City Hall plenary session.

Time [T]

Semantic Type: Time

This FE identifies the **Time** where the Agreement occurs.

The town council members finally reached an **AGREEMENT** at midnight.

Relations among frames in FrameNet

Frame-frame Relations:

Inherits from:

Is Inherited by: [Make_compromise](#)

Perspective on:

Is Perspectivized in:

Uses: [Commitment](#)

Is Used by: [Be_in_agreement_on_action](#)

Subframe of:

Has Subframe(s):

Precedes:

Is Preceded by:

Is Inchoative of:

Is Causative of:

See also:

Make_compromise

[Lexical Unit Inde](#)

Definition:

Two (or more) people (the **Parties**, also encodable as **Party_1** and **Party_2**) come to an agreement committing them to carrying out an **Obligation**. The agreement is construed as non-ideal for both parties but necessary to end a dispute. The process is understood to be symmetrical or reciprocal. Instead of a specific mention of the **Obligation**, a **Topic** expression may be used to indicate the domain covered.

No **arms** **COMPROMISE** **between the two parties** is expected before the end of 2012.

So **you'll** **COMPROMISE** **with us** **to continue the project for at least another year?**

Commitment

[Lexical Unit Ind](#)

Definition:

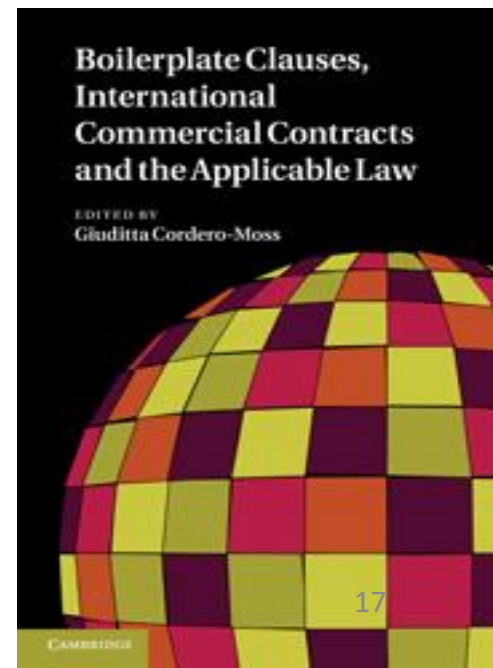
A **Speaker** makes a commitment to an **Addressee** to carry out some future action. This may be an action desirable (as with promise) or not desirable (as with threaten) to the **Addressee**. Some of the words in this frame allow an **Addressee** to be expressed.

You **PROMISED** **me** **you'd come to my graduation.**

Other words cannot normally occur with an **Addressee**.

Kim **UNDERTOOK** **to finish the project by June.**

Standardised contract language and plurality of meanings



“If the borrower fails to perform an obligation, the bank can terminate this loan agreement.”

What if the breach is immaterial?

Common law:
If contract clearly permits it,
bank can terminate

Civil law:
Even though contract clearly permits it,
bank cannot terminate
if against good faith

Autonomy of arbitration and plurality of interpretation

- Arbitrators are not necessarily bound to apply a certain national law accurately
 - Award is valid and enforceable even though it did not apply the law accurately
- Does this create a uniform legal frame for international contracts?

Three possible approaches

- Self-sufficient contract
 - Contract speaks for itself, no need to look for a frame
- Applicable law
 - Contract is to be read in the frame of the applicable law
- Transnational law
 - Contract is to be read in the frame of a uniform, transnational law

Two possible mentalities

(six possible ways to two possible solutions)

Self-sufficient contract
Result inspired by civil law

Self-sufficient contract
Result inspired by common law

Depends on the applicable law

Common law:
If contract clearly permits it,
bank can terminate

Civil law:
Even though contract clearly permits it,
bank cannot terminate
if against good faith

Transnational law
Result inspired by civil law

Transnational law
Result inspired by common law

The pilot study

The survey

1 – Consent form

2 – Personal information
(anonymised later)

- name
- age
- place of birth
- gender
- mother tongue(s) & other languages
- law background
- country of residence
- number of cases as an arbitrator
- number of cases as counsel

3 – Cases

A. termination

B. entire agreement

C. payment of a fee

4 – Feedback

5 – ‘Thank you’

Distributed via *Jisc Online Surveys*, using participants’ emails



1. Termination

The facts:

MechPro AG is a multinational company active in the market of mechanical products. In 2017, the German parent company entered into a long-term loan agreement with InterBank Ltd, a London based bank with activity in the entire world. The loan has a duration of 15 years and a fixed interest rate of 1.25% per annum.

The loan agreement contains a series of covenants (in article 15) meant to ensure that MechPro does not act in a manner that may negatively affect its ability to repay its debt.

The loan agreement also contains, in article 16, an early termination clause, that reads as follows:

“The Bank may, at its own discretion, terminate the Agreement with immediate effect, if the Borrower breaches any of the commitments contained in article 15.”

Among the covenants in article 15, there is one that reads as follows:

“The Borrower shall submit to the Bank its annual financial statements not later than two days after they have been approved by the auditors.”

In the time after 2017, MechPro rationalizes its production and increases its market shares, so that its financial position becomes very solid and its prospects for the subsequent years are more promising than ever. However, the bank is not happy with the loan agreement: since 2017 interest rates have considerably increased, and a long-term loan at 1.25% per annum is not profitable any more. The bank wishes to renegotiate the loan, but has no basis to require negotiations: MechPro has good internal governance and properly complies with all its obligations, including the covenants.

After the end of 2021, because of some internal misunderstanding the financial statements are submitted to the bank not two, but three days after their approval. This is a breach of article 15, and the bank invokes article 16 to terminate the agreement.

As an arbitrator, would you find that the bank is entitled to terminate under these circumstances? * *Required*

- ☐ Yes. The agreement is clear: upon any breach of article 15, the bank is entitled to terminate. The bank's ability to terminate is not qualified by any requirement that the breach be material or that the breach have serious consequences. If the parties had intended that early termination be subject to requirements such as good faith or proportionality, they would have written so.
- ☐ No. A clause on early termination has dramatic effects for the borrower, who needs to finance overnight a considerable sum of money to repay the loan. It cannot be intended to apply to immaterial breaches that did not have serious consequences for the bank. Article 16 cannot be read as being applicable under these circumstances.
- ☐ It depends on the governing law: the agreement alone does not give a clear answer.
- ☐ Yes. The agreement must be interpreted in the light of internationally recognized principles. It is generally recognized in international contract practice that detailed agreements between professional parties must be interpreted literally. If the parties had intended that early termination be subject to requirements such as good faith or proportionality, they would have written so.
- ☐ No. The agreement must be interpreted in the light of internationally recognized principles. The principle of good faith is generally recognized, and it prevents abuse of contract rights. Article 16 cannot be read as being applicable under these circumstances.
- ☐ Other

The survey

Loan cannot be terminated against good faith even though it says so

Loan can be terminated because it says so

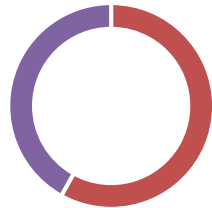
Solution depends on the applicable law

Loan cannot be terminated because transnational law requires good faith interpretation of contracts

Loan can be terminated because transnational law requires literal reading of contracts

Participants (32-1)

Gender



■ Man ■ Woman

Law background



■ common law ■ civil law ■ dual

Cases as arbitrator



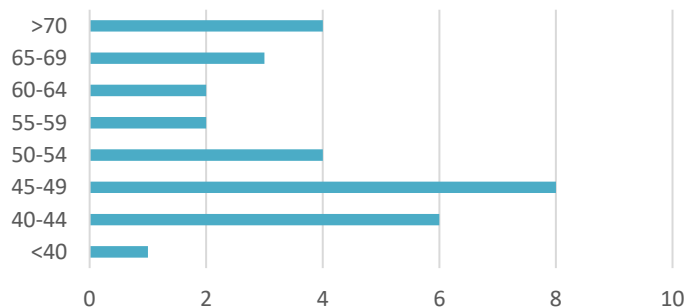
■ 50 or more ■ <50

Cases as counsel



■ 50 or more ■ <50

Age



First language representation

English	Russian	
Portuguese	Greek	Dutch
Finnish	Italian	Hindi
Spanish	French	German
Swedish	Hikuyu	



Responses

Termination



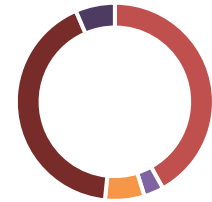
- Depends on governing law
- No - transnational law
- Yes - transnational law
- No - contract language
- Yes - contract language

Entire Agreement



- Depends on governing law
- No - transnational law
- Yes - transnational law
- No - contract language
- Yes - contract language

Payment of a fee



- Depends on governing law
- No - transnational law
- Yes - transnational law
- No - contract language
- Yes - contract language

Analysis

Responses grouped according to

- Legal Approach (transnational law, self-sufficient contract, depends governing law)
- Legal Mentality (Civil Law, Common Law, no mentality - depends on governing law)

Analysis

Responses grouped according to

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Effect of respondents' law background on their Approach & Mentality

Analysis

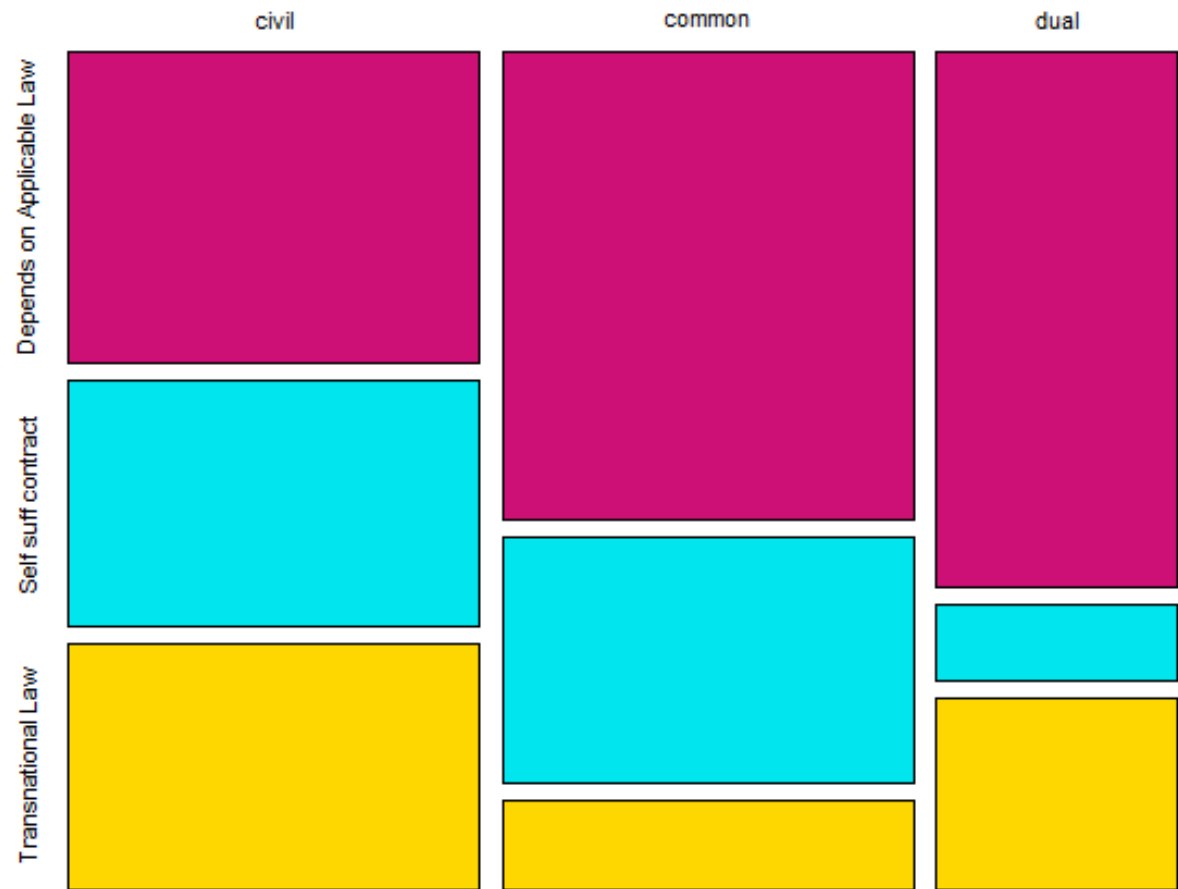
Responses grouped according to

- Legal Approach (transnational law, self-sufficient contract, depends governing law)

Do participants respond based on their law background?
Do participants respond uniformly to our mock international arbitration cases?

Effect of respondents' law background on their Approach & Mentality

Legal approach



Contingency tables: Approach

Law background	Approach			Total
	Depends on Applicable Law	Self suff contract	Transnational Law	
civil	14	11	11	36
common	21	11	4	36
dual	14	2	5	21
Total	49	24	20	93

Contingency tables: Approach

Approach

Chi-Squared Tests

	Value	df	p
χ^2	8.316	4	0.08
Cramer's V: 0.2			
Total	45	24	20

Contingency tables: Approach

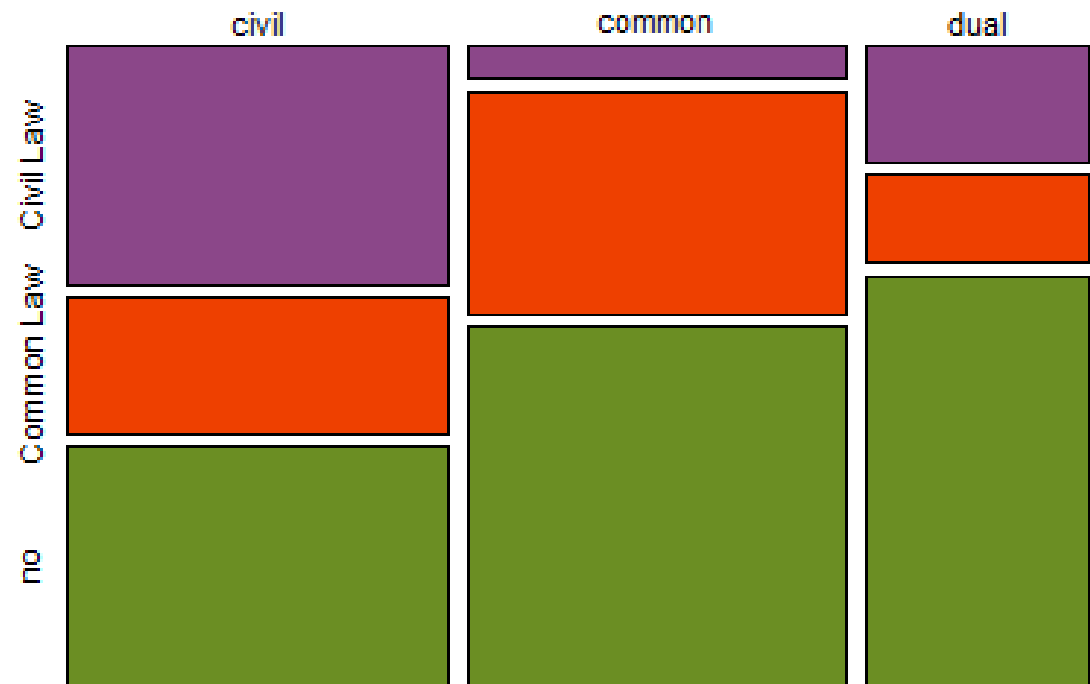
Approach

Chi-Squared Tests

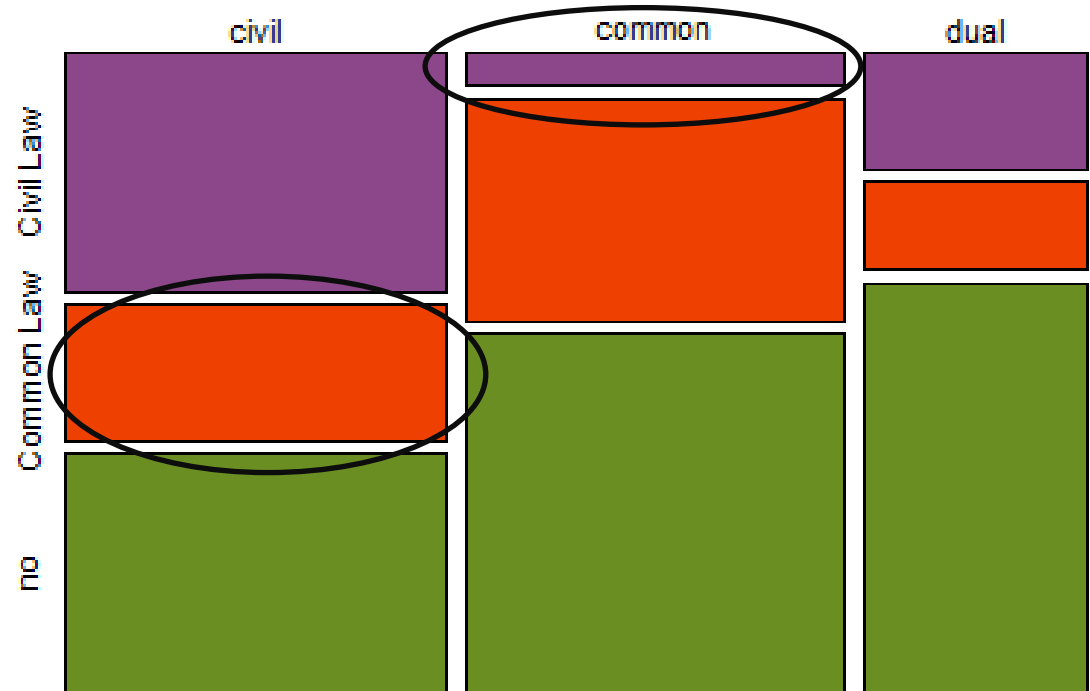
	Value	df	p
χ^2	8.316	4	0.08
Cramer's V: 0.2			
Total	45	24	20

Lack of data???

Legal Mentality



Legal Mentality



Contingency tables: Mentality

Contingency Tables

Law background	Mentality			Total
	Civil Law	Common Law	no	
civil	14	8	14	36
common	2	13	21	36
dual	4	3	14	21
Total	20	24	49	93

Contingency tables: Mentality

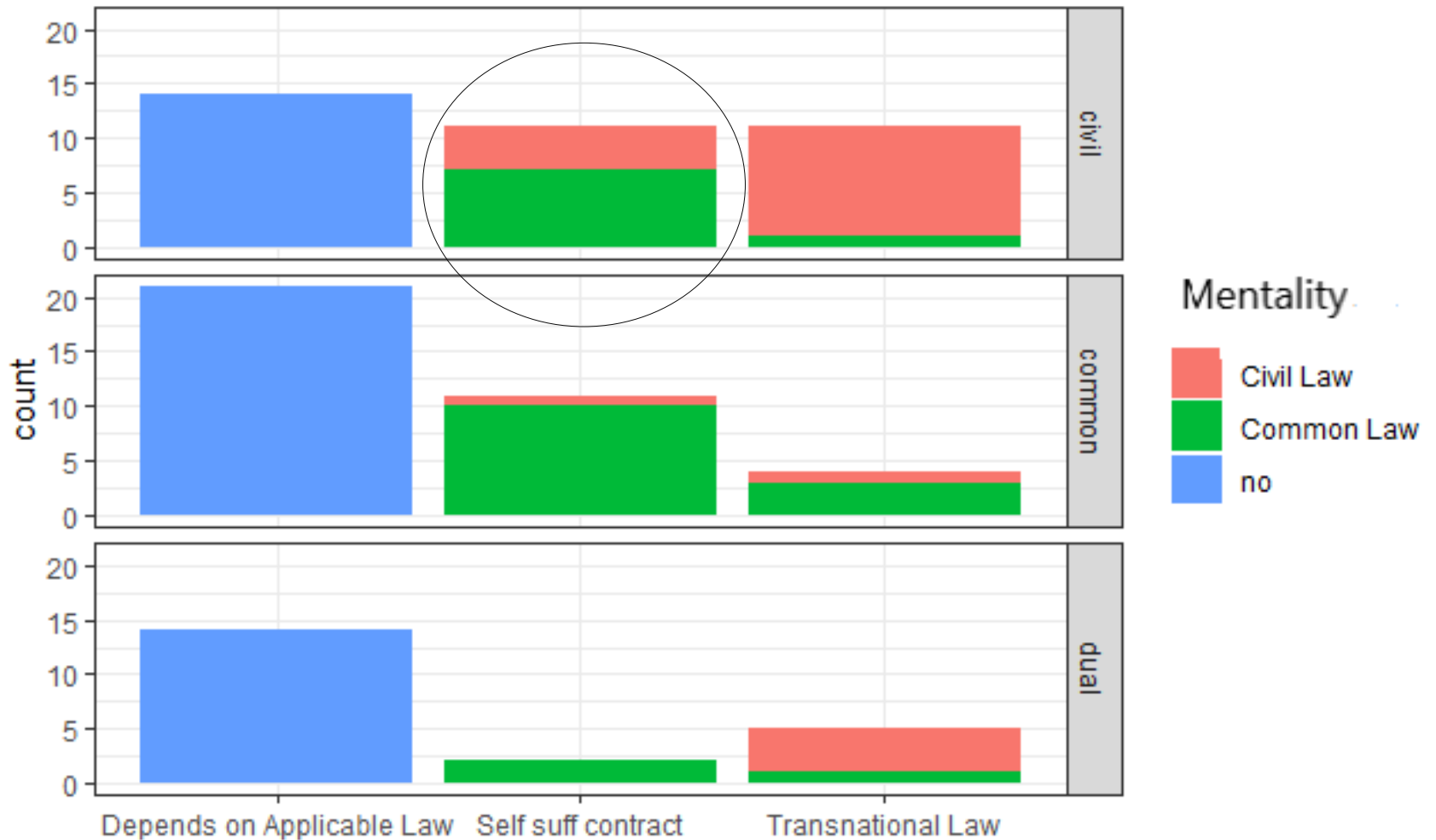
Contingency Tables

Mentality

Chi-Squared Tests

	Value	df	p
χ^2	14.414	4	0.006**
Cramer's V: 0.3	93		
Total	20	24	49
			93

Approach + Mentality



Approach + Mentality

Law background	Mentality	Approach			Total
		Depends on Applicable Law	Self suff contract	Transnational Law	
civil	Civil Law	0	4	10	14
	Common Law	0	7	1	8
	no	14	0	0	14
	Total	14	11	11	36
common	Civil Law	0	1	1	2
	Common Law	0	10	3	13
	no	21	0	0	21
	Total	21	11	4	36
dual	Civil Law	0	0	4	4
	Common Law	0	2	1	3
	no	14	0	0	14
	Total	14	2	5	21
Total	Civil Law	0	5	15	20
	Common Law	0	19	5	24
	no	49	0	0	49
	Total	49	24	20	93

Approach + Mentality

Law background Mentality Approach
 Depends on Self suff contract Transnational Total

Chi-Squared Tests

Law background		Value	df	p
civil	X ²	47.57	4	< .001***
common	X ²	37.54	4	< .001***
dual	X ²	32.2	4	< .001***
Total	X ²	120.3	4	< .001***

Cramer's V: 0.8

Common Law	0	19	5	24
no	49	0	0	49
Total	49	24	20	93

Preliminary conclusions

- Responses not uniform
- Marginally significant and low association between respondents' law background and the legal approach that they use
→ lack of data?
- Low significant association between respondents' law background and legal mentality they apply
→ **countertendencies in the data**
- Strong significant association across variables

Preliminary conclusions

- There is **no uniform legal frame** for interpreting international commercial contracts
 - Each of the five possible answers has received some support
- International commercial arbitration is **not delocalised**
 - According to the majority of answers, contracts depend on the applicable law
- The language of international contracts is **vague and ambiguous** (cf. no uniform responses)
 - Underspecified meanings must be filled by the interpreter
 - The inferential processes at need to interpret the language of international commercial contracts depend upon culture-specific frames

...and now?

- More participants (statistical power)
- Survey to be designed based on feedback received and results of the pilot
- More variables to be taken into consideration

Thank you...

thanks.n

Frame: Judgment_direct_address

Definition:

COD: an expression of gratitude.

Semantic Type: Positive_judgment

Support(s): give, say

...and thanks to our participants!

Alexandro Garro, Anna Mantakou, Bas van Zelst, Carine Dupeyron, Caroline Kleiner, Chiann Bao, Christer Danielsson, Edna Sussman, Francisco Paulo De Crescenzo Marino, Frederico Singarajah, Galina Zukova, George A Bermann, James E. Castello, José Antonio Moreno Rodríguez, Jose F. Sanchez, Joshua Karton, Kabir Duggal, Kiran Gore, Lawrence Collins, Louis B. Kimmelman, Maria Chiara Malaguti, Massimo V. Benedettelli, Melanie van Leeuwen, Melida Hodgson, Monique Sasson, Nadia Darwazeh, Ndanga Kamau, Paul Arrighi, Petri Taivalkoski, Rafael Francisco Alves, Ricardo Aprigliano, Stavros Brekoulakis