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Commentary

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Arbitration is built on party autonomy. Parties choose arbitration because they want a private, enforceable, and commercially reliable method of resolving disputes. They also choose the law governing their contract, the seat of arbitration, the arbitral rules, and often the arbitrators themselves. Unlike litigants, however, parties who arbitrate a case have little opportunity to correct legal or interpretive errors through appellate review. The promise of party choice and commercial certainty is therefore weakened when arbitral tribunals allow considerations of commercial fairness, contextual expectations, or equitable balancing to displace—or unduly dilute—contractual text. As more high-value commercial disputes are resolved in arbitration rather than the courts, the interpretive methodology adopted by arbitral tribunals becomes increasingly consequential. Concerns about

interpretive drift are not merely theoretical. Studies show that disputes regarding contract interpretation are the largest source of contract litigation between businesses¹ and that the volume of arbitrations (especially international arbitrations) is on the rise.² The amounts in dispute are increasing³ as well, making the consequences of interpretive error more significant than ever.

The U.S. Supreme Court has repeatedly recognized the narrow scope of judicial review of arbitral awards. In *Oxford Health Plans LLC v. Sutter*, it explained that a court can vacate an arbitral decision “only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.”⁴ The D.C. Circuit’s affirmation of a NAFTA award in *United Mexican States v. Lion Mexico Consolidated* provides a useful modern illustration. There, Mexico argued that the tribunal ignored the plain meaning of NAFTA Article 1105(1), but the D.C. Circuit held that the arbitral tribunal started with the text and interpreted it in light of binding interpretive materials, prior awards, context, object, and purpose, and thereafter affirmed the award.⁵

These cases highlight the core questions of this article: When is a tribunal engaged in disciplined interpretation, and when has it departed from text in the name of broader arbitral judgment?

To be clear, a serious textualist approach⁶—and the one advanced in this article—is not a demand for wooden literalism. Rather, it requires that the contract’s words remain the primary evidence of the bargain the parties

actually made, even when a tribunal is bombarded with additional evidence of context, commercial reality, and trade usage. In other words, our advocated approach is text first, not text only. Further, this article does not suggest that tribunals should disregard context where the governing law requires or permits; rather, it argues that context should be used in a disciplined way to interpret the parties' text, not to replace it. Adopting such a textualist approach will provide discipline, predictability, and respect for the parties' allocation of risk in a system with limited appellate review, especially with tribunals from different legal traditions and interpretive instincts.

This article thus proceeds in two parts. First, we discuss the benefits of a textualist approach (contrasted with approaches that give greater weight to surrounding context, commercial purpose, and evidence of the parties' intent). Second, we outline practical recommendations for parties to implement textualism when framing and litigating their respective disputes.

Why Textualism?

Textualism Protects Party Autonomy

The principal virtue of textualism is that it gives primacy to the parties' chosen legal relationship as expressed in their written agreement. Parties negotiate contractual language because it allocates risk, prices uncertainty, defines performance, and determines remedies. When a tribunal moves too quickly beyond those words, it risks substituting its own view of "commercial reasonableness" for the bargain that the parties actually struck. Moreover, sophisticated parties often prefer textualism because broader contextual inquiries increase litigation costs and uncertainty.⁷ These concerns are amplified in international arbitration, where tribunals often comprise arbitrators who are trained in different legal traditions and interpretive methodologies.

Those differences matter because legal systems do not all approach contract interpretation in the same way. Many common-law jurisdictions, including the United States (and in particular, the state of New York) and the United Kingdom, generally give primacy to the plain meaning of the words in the agreement as "the best evidence of what parties to a written agreement intend is what they say in their writing."⁸ The U.S. Supreme Court has specifically instructed that written agreements are interpreted according to

ordinary principles of contract law, that the parties' intentions control, and that where the words of a written contract are clear and unambiguous, its meaning is ascertained from its plainly expressed intent rather than from judicial assumptions about what the parties might have intended.⁹

These propositions are not formalism for formalism's sake. Rather, they reflect the commercial reality that sophisticated parties draft with precision because they want the text to control.

By contrast, civil law jurisdictions often place greater emphasis on the parties' intention, good faith, and surrounding conduct. Take France, for example. Article 1188 of the French Civil Code provides that a contract is interpreted according to the parties' common intention rather than stopping at the literal meaning of the terms and, if that intention cannot be discerned, according to the meaning a reasonable person in the same situation would give it.¹⁰ Spanish law reflects the same hierarchy: Where contractual terms are clear and leave no doubt about the parties' intention, the literal meaning controls, but where the words appear contrary to the parties' evident intention, that intention prevails over the words. The parties' contemporaneous and subsequent acts are especially relevant to discerning intent.¹¹

There is, of course, some appeal to considering subjective intent, party knowledge, drafting history, and the like. This "contextualism" is attractive because it can reduce false clarity (*i.e.*, a term may mean different things to different arbitrators in different settings), prevent opportunism that departs from the parties' actual bargain, and address human errors in imperfect drafting. And in some legal systems and factual settings, contextual evidence is not a departure from party autonomy but a method of identifying the bargain the parties actually made.

The difficulty arises, however, when those considerations cease to illuminate contractual language and instead displace it. If arbitrators—who are there in the first place due to party choice—dilute the parties' agreed-to text by resorting to broad notions of fairness, good faith, or commercial sensibility, untethered to the governing law, they undermine the very autonomy that arbitration is designed to protect. Though a tribunal's flat move from interpretation

to policymaking has been rejected by U.S. courts overseeing recognition and/or vacatur proceedings of such awards,¹² most instances of arbitral drift are far more subtle and therefore much harder to identify or correct.

Textualism Promotes Predictability

International arbitration routinely brings together parties, counsel, and arbitrators from different legal traditions. As stated, common-law lawyers may expect close attention to be given to contractual text, merger clauses, limitation provisions, and negotiated remedies, whereas civil law lawyers may be more accustomed to interpretive principles grounded in good faith, common intent, reasonableness, or equitable adjustment.

Of course, neither legal tradition is inherently better than the other. The problem arises when parties choose a governing law expecting one interpretive methodology but the tribunal imports another through the exercise of arbitral discretion.

A textualist, text-first approach to interpreting not only contractual language but also other governing texts—such as the applicable evidentiary rules and procedural rules governing the arbitration—can help ensure that outcomes turn on the chosen law rather than “the vicissitudes of how an arbitrator reads a contract.”¹³ Indeed, such an approach creates a common starting point: Begin with the words, read them in the context of the agreement as a whole, give effect to the allocation the parties made, and resort to extrinsic considerations only where the governing law permits and the text is genuinely ambiguous or incomplete.

This approach does not erase differences among legal systems, but it helps ensure that those differences are applied transparently and consciously rather than smuggled into the award. In that way, textualism promotes predictability—not by eliminating arbitral discretion altogether but by channeling that discretion through the interpretive rules the parties selected when they chose the governing law.

Textualism Makes Commercial Sense

Contracts are not merely records of cooperation—they are legal instruments of risk allocation. A termination clause, earnout formula, indemnity cap, limitation of liability, payment milestone, notice

requirement, or exclusive remedy provision may appear harsh when applied after the fact. But that harshness may be the product of price, leverage, risk appetite, or negotiated compromise.

A tribunal that softens clear language because the result seems commercially unattractive years after the fact does more than interpret the contract; it rewrites the bargain.

That concern is especially acute when commercial common sense is invoked retrospectively. Commercial sense, to the extent relevant under the governing law, should be assessed by reference to what the parties knew or reasonably could have understood at the time the contract was concluded—not by reference to how the bargain appears after market conditions, enterprise value, performance costs, or party incentives have changed. As the UK Supreme Court explained in *Arnold v Britton*, commercial common sense “is not to be invoked retrospectively”: The fact that a contractual arrangement “has worked out badly, or even disastrously” for one party is not a reason to depart from the natural language, because commercial common sense is relevant only to how matters would or could have been perceived on the date the contract was made.¹⁴ The same discipline is essential in arbitration. A tribunal that relies on hindsight to soften clear contractual language risks converting interpretation into reallocation of risk.

Textualism resists that tendency. It recognizes that commercial parties frequently agree to asymmetric, conditional, or unforgiving provisions precisely because certainty has value. For instance, a party may choose to accept a strict payment obligation in exchange for a lower price, a limited remedy in exchange for faster execution, or a narrow termination right in exchange for other protections elsewhere in the contract. Those provisions may appear inefficient or inequitable in hindsight, but they often reflect deliberate allocations of risk made at the bargaining table.

This is why textualism is not anti-commercial. Properly understood, it is deeply commercial. It respects the commercial deal as expressed rather than the commercial deal a tribunal might later consider more balanced. In arbitration, where enforceability and finality are central virtues, that discipline is essential.

Arbitration Magnifies the Consequences of Interpretive Discretion

Interpretive discretion exists in every adjudicative system. In arbitration, however, the consequences are magnified. Unlike litigation before a court, arbitration generally provides little or no meaningful merits appeal. If a tribunal misconstrues the contract or applies an interpretive method inconsistent with the governing law, the losing party usually has limited recourse unless the error rises to the level of a serious procedural defect, excess of authority, or public policy problem. Interpretative philosophy therefore matters most before an award is rendered, because judicial review is ordinarily too narrow to correct interpretive errors after the fact. Recent construction-award review decisions reinforce the point. U.S. courts confirmed awards even when the losing party argued that the tribunal ignored the contract's plain meaning or adopted an erroneous reading.¹⁵

Textualism helps reduce that risk. By anchoring the interpretive exercise in the words the parties chose, tribunals can limit the range of outcomes driven by individual arbitral philosophy, legal culture, or after-the-fact impressions of what would be fair. This is especially important in high-value commercial, founder, venture, and equity disputes, where hindsight and later changes in enterprise value can create pressure to recast the original bargain.

Textualism Does Not Mean Blind Literalism

The textualist approach advanced in this article should not be confused with crude literalism. Contracts are meant to be read as a whole. Words derive meaning from syntax, structure, defined terms, commercial setting, and the relationship among provisions. Likewise, statutes and treaties should be read in context. And a textualist tribunal may consider a contract's purpose, the transaction's architecture, and applicable trade usages where the governing law permits. But those considerations should illuminate the text, not displace it.

Simply put, a robust textualist approach does not disregard the potential for ambiguity or the need for context or subjective nuance. Rather, it orders such considerations appropriately and permits resort to them only when there is a genuine ambiguity or an omission in the text.¹⁶ Gap-filling should be treated as a distinct exercise requiring a genuine omission and a legally authorized basis for supplying a term.

The Real Risk: Arbitral Overreach

In our view, the concern is not contextualism as a framework but the risk that contextual reasoning, if untethered from the governing law and contractual text, can become a form of arbitral paternalism, *i.e.*, an overreach from the tribunal in order to protect a party from the consequences of its bargain or to supply a rule the tribunal considers fairer, more efficient, or more commercially sensible than the rule the parties chose.

*Stolt-Nielsen*¹⁷ is the most striking example from the United States. There, the tribunal imposed class arbitration based purely on policy rationale rather than the parties' agreement. *Anheuser-Busch*¹⁸ illustrates the same danger in the contractual context, where the tribunal's concerns about fairness and past practice displaced the clear written terms of the agreement.

The tribunal in the award underpinning the *Benihana*¹⁹ decision shows the gray area: When parties add open-ended standards like "reasonableness" into their contracts, they may authorize the equitable balancing they later condemn. Specifically, in *Benihana*, a tribunal found material breaches and good cause to terminate but nevertheless held termination unreasonable after conducting a broad fairness inquiry. The award survived review because the contract itself invited this reasonableness determination by requiring the tribunal to assess whether the termination was reasonable.

Textualism as a Check on Equitable Drift

Arbitration values flexibility, and rightly so. Flexibility permits efficient procedure, practical case management, and sensitivity to cross-border commercial realities. But flexibility can become problematic when it migrates from procedure to merits decision-making and allows tribunals to decide disputes according to what appears fair rather than what the parties agreed.

For example, *ex aequo et bono* is a legal concept that confers on arbitrators the power to decide a dispute in accordance with their sense of fairness and good conscience instead of rigorously applying the terms of the governing law. Article 28(3) of the UNCITRAL Model Law states, however, that "[t]he arbitral tribunal shall decide *ex aequo et bono* only if the parties have expressly authorized it to do so."

In other words, arbitrators may not rely on their own notions of fairness without the parties' clear authorization.

The Model Law's limitation reflects a broader principle: Arbitrators derive their authority from the parties. If the parties authorize equity-based decision-making, the tribunal may use it within the limits of the applicable law and arbitral mandate. If they do not, the tribunal should not reach the same result indirectly by recasting clear contractual language in the name of fairness, reasonableness, or commercial balance.

Implementing Textualism in Arbitral Practice

A commitment to textualism has practical consequences for counsel at every stage of the arbitral process.

Drafting the Arbitration Agreement and Governing Law Clause

Parties that want textual discipline should say so clearly. They should choose a governing law known for enforcing commercial contracts according to their terms (such as New York law), use integration clauses, define key terms carefully, and specify whether trade usage, course of dealing, or pre-contractual negotiations may be considered. Where appropriate, parties should also include language directing the tribunal to apply the contract according to its plain meaning and not to decide disputes *ex aequo et bono* or as *amiable compositeur*.²⁰ Conversely, if parties want trade usage, course of dealing, pre-contractual negotiations, or broader equitable considerations to play a defined role, they should say so expressly and choose governing law and arbitral language consistent with that objective.

Selecting Arbitrators

Arbitrator selection should include serious attention to interpretive philosophy. Arbitrator diligence is every bit as important as the governing law clause itself. Counsel should review candidates' writings, speeches, prior awards where available, and professional background. The issue is not whether a candidate is "pro contract" in the abstract but whether they will faithfully apply the interpretive methodology prescribed by the parties' chosen governing law.

Framing and Reviewing the Merits Case

Parties advocating textualism should structure submissions around the contractual architecture. They should show how defined terms, cross-references, remedies, conditions, and exclusions work together. They should resist the temptation to rely on broad fairness themes and instead demonstrate why the requested outcome follows from the bargain's language under the governing law.

Managing Evidence

Tribunals should distinguish evidence that helps interpret contractual language from evidence that attempts to vary, contradict, or improve it. This is especially important because arbitral evidence rules often give tribunals broad discretion over relevance, materiality, and weight without specifying how interpretive evidence should be evaluated or when extrinsic evidence should be considered in the first place.²¹

Conclusion

Textualism is not a rejection of context, fairness, or commercial common sense. It is a hierarchy of interpretive discipline. It begins with the words because the words are the parties' chosen expression of their bargain. It treats context as a tool for understanding the text, not as a license to escape it. It respects party autonomy by enforcing the allocation of risk the parties made, even when that allocation appears unattractive after the fact.

In international arbitration, that discipline is especially important. The international arbitral process brings together diverse legal cultures, broad procedural discretion, and limited merits review. Those features are strengths when properly managed but they also create room for interpretive drift. A textualist approach helps preserve arbitration's legitimacy by ensuring that awards are grounded in the contract, the governing law, and the mandate the parties actually conferred.

For commercial parties, the lesson is clear: If arbitration is chosen to secure a reliable forum for enforcing a bargain, the bargain's text should ordinarily remain central, subject to the interpretive rules of the governing law. The more final the forum, the greater the need for arbitrators to remain faithful to the words the parties chose and the interpretive methodology embodied in the governing law they selected.

Endnotes

1. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 930 (2010) (internal citations omitted).
2. See, e.g., *Global Demand for Arbitration Rises Sharply*, JAMS Reports, THE CIMA (May 19, 2026), <https://thecima.org/global-demand-for-arbitration-rises-sharply-jams-reports/>; see also ICC Releases Preliminary 2025 Dispute Resolution Statistics, Int'l Chamber of Com. (Feb. 12, 2026), <https://iccwbo.org/news-publications/news/icc-releases-preliminary-2025-dispute-resolution-statistics/>; see also Tiffany Lam, *Where the Arbitration Market Is Heading: Key Patterns from 2024/2025 Institutional Statistics*, DAILY JUS (Apr. 23 2026), <https://dailyjus.com/in-conversation-with/2026/04/where-the-arbitration-market-is-heading-key-patterns-from-2024-2025-institutional-statistics>.
3. See ICC Releases Preliminary 2025 Dispute Resolution Statistics, *supra* note 2 (noting that newly registered ICC cases in 2025 involved an average amount in dispute of approximately US\$50 million, while pending cases involved an average of approximately US\$172 million).
4. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013).
5. *United Mexican States v. Lion Mexico Consolidated*, Nos. 24-7185, 24-7186 (D.C. Cir. Apr. 7, 2026).
6. A textualist approach, adopted by the majority of common-law jurisdictions, focuses on the plain meaning of terms within the four corners of a contract. See *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569, 780 N.E.2d 16 (2002); *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015).
7. See, e.g., Schwartz & Scott, *supra* note 1.
8. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002); see also *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029; [2008] SGCA 27 (contractual language should be understood in its objective context).
9. *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435–36 (2015).
10. Code civil [C. civ.] [Civil Code] art. 1188 (Fr.).
11. Código Civil [C.C.] [Civil Code], arts. 1281–82 (Spain).
12. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
13. Kabin A.N. Duggal, Michael A. Fernandez & Justin M. Loveland, *Textual, Contextual, Good Faith, or Common Intent*, Kluwer Arb. Blog (June 6, 2022).
14. *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, ¶ 19.
15. See, e.g., *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panamá*, No. 20-24867-Civ-Scola (S.D. Fla. Dec. 9, 2021); *Chi. Bridge & Iron Co. N.V. v. Refinería de Cartagena S.A.S.*, No. 1:23-cv-4825-GHW (S.D.N.Y. Jan. 10, 2025).
16. See generally Charles H. Brower II, *Authority & Execution: Contractual Gap-Filling in International Commercial Arbitration*, 80 BUS. LAW. 27 (2025).
17. See generally *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
18. *Anheuser-Busch, Inc. v. Beer, Soft Drink, Water, et al.*, 280 F.3d 1133 (7th Cir. 2002).
19. *Benihana Inc. v. Benihana of Tokyo, LLC*, No. 14 Civ. 792 (PAE), 2016 WL 11948886 (S.D.N.Y. July 15, 2016).
20. An *amiable compositeur* is an arbitrator empowered by the parties to decide a dispute according to equity and fairness rather than strictly applying rules of law. See generally *Trout v. Organización Mundial de Boxeo, Inc.*, 965 F.3d 71 (1st Cir. 2020).
21. See, e.g., Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in Int'l Arb.* art. 9 (2010) (providing that the arbitral tribunal shall determine the “admissibility, relevance, materiality and weight of evidence” and setting forth grounds for exclusion, privilege, and production). ■

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