Introduction

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1 Overview of the book

This book addresses the question of whether the drafting style of international contracts may actually achieve rendering the contract self-sufficient. The drafting style, including the recurrence of boilerplate clauses in all types of contracts and irrespective of the governing law, seems to aim at detaching the contract from any elements external to the contract itself, including the applicable law. This drafting style is originally based on the common law approach to contracts, but is now adopted in most international contracts even when they are not subject to a law belonging to the common law family.The analysis follows three different stages, each dealt with in a different part of the book.

Part 1 of this book contains contributions by attorneys practising in international business, who explain the circumstances that lead to writing commercial contracts in a way that disregards the structure and tradition of the applicable law. This may be explained first of all in light of the fact that commercial contracts are often the result of an extensive process of negotiations. In Chapter 1, David Echenberg describes how the dynamics of negotiations contribute to the development of contracts that are not tailored to any specific state law. Lawyers drafting contracts for multinational companies will often be subject to the company's internal policy that tends to be standardised in order to facilitate internal risk assessment and knowledge management. An internal standardisation opposes adjustments of model contracts even though they might be necessary in order to comply with the applicable law. Maria Celeste Vettese reports in Chapter 2 on the internal standardisation and the impact that it has on contract drafting.

Part 2 of this book analyses some methodological questions that arise out of the described contract practice. If international contracts are written without giving much consideration to the applicable law, it

may seem legitimate to enquire whether they have to be interpreted under principles that do not belong to the applicable law. There are two possible approaches to this situation, each traditionally dealt with in a different branch of the law: private international law and international commercial law. The former makes it possible to verify whether adopting a contract model developed under a certain legal system may imply that that system's law governs the contract. The latter aims at giving a uniform interpretation to contracts, irrespective of the governing law. In Chapter 3, Giuditta Cordero-Moss analyses the implications that the style of contract drafting may have when choosing the governing law. The chapter then verifies whether, and if so to what extent, generally acknowledged rules, trade usages or transnational restatements of principles may contribute to overcome the tension between the style of the contract and the law governing it. Gerhard Dannemann reports in Chapter 4 how German courts have been coping with the methodological challenges of contracts modelled on a foreign legal tradition. In Chapter 5, Edward T. Canuel verifies whether convergence among different legal systems may be relied upon to such an extent that contracts may be drafted without needing to have regard to the governing law. He analyses how common law courts interpret and apply the contractual mechanism of exculpatory clauses and finds that these clauses have varying legal effects even within the same legal family. Jean-Sylvestre Bergé observes in Chapter 6 that the circulation of legal models is a phenomenon occurring on different levels and shows that the system of the European Union forces the acceptance of legal concepts belonging to different legal traditions.

The analysis undertaken in Part 2 shows that contracts have to be interpreted under the domestic law that is applicable to them. Hence, contract terms that were originally developed to meet the requirements and criteria of the common law often have to be interpreted under an applicable law belonging to the civil law family. As is well known, common law and civil law systems present various differences in respect of regulation and interpretation of contracts. Therefore, when an international contract governed by a civil law system is written in the common law style, a tension may arise between the different legal traditions.

Part 3 of this book thus analyses how the wording of the contract terms (inspired by the common law) reacts when it is subject to a civilian governing law: will it be interpreted literally or in the light of underlying principles of the governing law? Will it have legal effects comparable to those that it would have under the common law? Will the same wording

have different legal effects depending on the applicable law? The analysis is made on the basis of a series of so-called boilerplate clauses, common contract terms and recurring legal concepts that are frequently found in commercial contracts irrespective of the type of legal relationship regulated by the contract. These are listed in the introduction to Part 3. The criteria for the analysis, also listed in the introduction to Part 3, are intended to highlight the possible tension between the contract's language and the applicable law. In Chapter 7, Edwin Peel analyses the originally intended effects of the listed clauses and verifies to what extent these effects may actually be achieved under English law.

Because within the civil law there is no uniform approach to many aspects of contract law, the effects that the listed clauses may achieve under a civilian governing law will be analysed from the point of view of several legal systems deemed to represent the various sub-families of the civil law: the Germanic, Romanistic, Scandinavian and East European families. Thus, in Chapter 8, the analysis is made under German law by Ulrich Magnus; in Chapter 9, under French law by Xavier Lagarde, together with David Méheut and Jean-Michel Reversac; in Chapter 10, under Italian law by Giorgio De Nova; in Chapter 11, under Danish law by Peter Møgelvang-Hansen; in Chapter 12, under Finnish law by Gustaf Möller; in Chapter 13, under Norwegian law by Viggo Hagstrøm; in Chapter 14, under Swedish law by Lars Gorton; in Chapter 15, under Hungarian law by Attila Menyhárd; and in Chapter 16, under Russian law by Ivan S. Zykin.

2 The findings

The expectation that the contract is a self-sufficient unit independent of the applicable law, upon which the drafting of international contracts seems to rely, does not necessarily correspond to the legal effects of the contract. Many recurrent clauses have the function of exhaustively regulating the contract's interpretation and application, thus detaching it from the influence of any external elements, such as the applicable law. This apparent expectation of the drafters may originally have been based on the drafting technique developed under English contract law, which delegates most of the regulation to the parties in the contract and features a low degree of interference by the courts. However, these clauses may not be expected to achieve a full detachment from the applicable law when this belongs to a civil law system, where the general contract law and the courts have a much more active role. Chapter 7 shows that even

under English law, the expectation of total detachment may not always be fulfilled.

In brief, the drafters of international contracts seem to have an excessive trust in the self-sufficiency of the instruments that they write. In reality, the sophisticated contract drafter is aware of this assumption's fallacy. Contracts are nevertheless written in this way because the drafters consider it too burdensome to adjust all clauses of every single contract model to the circumstances of the specific case. Based on a cost-benefit evaluation of the resources needed to adjust the contract to the applicable law, the drafters accept a calculated legal risk.

The less aware drafter will rely on a literal and full implementation of the contract's wording, and this reliance will be enhanced by the use of boilerplate clauses aiming at regulating interpretation and application irrespective of the applicable legal tradition. To the extent that the contract's wording turns out not to be literally and fully enforceable under the applicable law, its presence may nevertheless be useful: not all differences of interpretation end up in court, and in the process leading to the settlement of the dispute, a harsh clause may give a stronger negotiating position even though it may on closer inspection be recognised as unenforceable.

3 Acknowledgments

This book is the result of the research project 'Anglo-American Contract Models and Norwegian or other Civil Law Governing Law' (www.jus.uio.no/ifp/english/research/projects/anglo/index.html) that I ran from 2004 to 2010 at the Department of Private Law of the Law Faculty at the University of Oslo. The project was financed by this Department and the Research Council of Norway. Research assistant positions were also financed by the Norwegian office of the law firm DLA Piper. Some research on specific maritime law topics was financed by the Nordic Institute of Maritime Law.

The aim of the project was to achieve a systematic overview of the frictions that might run counter to the expectations of each of the parties when a common law-inspired contract is governed by a civilian law: this includes the party that had relied on the effects of the (common law-inspired) contractual formulation, as well as the party that had relied on the applicability of the (Norwegian or other civilian) governing law.

Research was done by research assistants at the Department of Private Law of the Law Faculty at the University of Oslo, who each wrote a paper

on selected clauses or contract practices that form the origin of these frictions. The papers assessed the specific function of each clause or contract practice in the contract model under the original common law system and verified the extent to which the clause is capable of exercising the same function once the contract is inserted into the context of a different governing law (primarily Norwegian law). These papers are published in the Publication Series of the Department of Private Law, in a separate series called 'Anglo-American Contract Models'. Eight issues belong to this series: No. 1, Introduction and Method (No. 169/2007, by Giuditta Cordero-Moss); No. 2, No Waiver (No. 176/2009, by Fredrik Skribeland); No. 3, Entire Agreement (No. 177/2009, by Henrik Wærsted Bjørnstad); No. 4, No Oral Amendments (No. 178/2009, by Jens Christian Westly); No. 5, Conditions, Warranties, Representations, Covenants (No. 179/2009, by Tor Sandsbraaten); No. 6, Liquidated Damages (No. 180/2010, by Kyrre Kielland); No. 7, Indemnity (No. 181/2010, by André Bjerketveit); and No. 8, Material Adverse Change (No. 183/2010, by Lars Ole Sikkeland).

In addition, three PhD theses were written in the framework of the project: on liquidated damages under the US and Norwegian law, by Edward T. Canuel; on hardship clauses, by Herman Bruserud; and on *force majeure* clauses, by Anders Mikelsen.

The project enjoyed the permanent cooperation of English and American academics and practitioners, who participated in the project's workshops, commented on each paper and contributed with their knowledge and insight: Edwin Peel, Fellow and Tutor in Law, Keble College, University of Oxford, Mr Jim Percival, at that time Head of Dispute Resolution, British Nuclear Fuels plc, and Mr Edward T. Canuel, at that time Energy and Economic Officer at the US Embassy in Oslo. Mr Peel contributes to this book with the chapter on the interpretation and application of contract clauses under English law and Mr Canuel with the chapter on the diverging interpretation of certain contract clauses within the common law legal family.

The interaction of contract models and governing law is a topic of interest for the academy and for the legislator (in view of possible reforms to enhance the unification of the contract law), as it has a considerable amount of relevance to the practice of international business. Practising lawyers, both those in private practice and in-house company lawyers, are confronted with this matter on a daily basis, and the project's research is of immediate and direct relevance to their practice. To take advantage of this common interest, a users' group was

established, with representatives from the main Norwegian law firms and legal departments of Norwegian companies who are active in the field of international contracts. A list may be found at www.jus.uio.no/ifp/forskning/prosjekter/anglo/usergroup.html. The users' group has worked as an advisory forum, providing input on the identification and formulation of research themes, as well as contributing practical insight to ensure the relevance of the perspectives chosen for the research.

The practice of adopting common law-inspired contract models is not limited to Norway, and the tension that may arise between the common law system of origin of the contract and the law governing the contract becomes relevant whenever the latter belongs to the civil law family. Numerous academics and practitioners from a number of civilian countries have contributed to the project's seminars and workshops. Their papers are collected in this book.

The copy-editing of the material collected in this book was made by Miriam Hatoum of Boston University.

A special acknowledgement goes to Cambridge University Press and, particularly, to Finola O'Sullivan, Editorial Director, Law, whose understanding of the subject matter and farsightedness have made this book possible and whose friendly support has made it a pleasant enterprise.

All those mentioned above, as well as those who are not specifically mentioned here but contributed to the smooth performance of the project, are deeply thanked.

PART 1

How contracts are written in practice

Introduction to Part 1

Using a certain language to write a contract does not necessarily mean that the legal system that is expressed in that idiom is applied. This is clearly shown by the fact that often the parties to a contract that is written in the English language expressly choose a governing law that is not expressed in English, be it the law of the state to which one of the parties belongs, the law of the state where the contract shall be performed or the law of a third state, which is deemed to be neutral and therefore preferred by both parties. Therefore, it should not be surprising to see commercial contracts written in English, but structured in the same way as a contract would be structured under the law that the parties have chosen to govern their relationship. These contracts would be developed and written according to the legal technique and legal tradition of the governing law, and only from a linguistic point of view would they be expressed in English. The process of drafting would not necessarily have to take place in two tiers, first writing the contract in the original language and then translating it into English. It could very well be possible to think and structure the contract according to the criteria of the governing law and write it directly in English, although the difficulties of expressing legal concepts in a foreign language are well known, that is, of separating the means of expression from the object that is expressed.

However, international commercial contract practice does not seem to follow this path. Not only does the drafter of the contract use the English language, it also applies contract models that are developed in England, the USA or other common law jurisdictions. Separating the use of the English language from the adoption of the underlying legal structures would assume: (i) a thorough knowledge of the English or other common law system under which the model has been developed; (ii) an understanding of the function of the various contract clauses in that legal system; (iii) a systematic comparison with the governing legal system; and (iv) an exclusion or correction of the contract clauses that turn out to be tailored to the legal system under which the model was developed

and not to the governing legal system. Such an extensive process cannot always be expected in the framework of a commercial case and, as a result, contract models are often simply adopted as they are. Hence, contracts often reflect the requirements and structure of a contract law that will not govern them.

It may apparently seem unreasonable to disregard the legal tradition under which the contract will be interpreted and applied. Experienced practitioners who are active in the drafting of international commercial contracts have been asked to explain the rationale behind this commercial practice. In Part 1, David Echenberg and Maria Celeste Vettese show how the dynamics of negotiations, considerations of efficiency and organisational matters affect the process of drafting contracts and lead to contracts that are not tailored to any specific state law.

1

Negotiating international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements?

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The range of legal entities contracting internationally, as well as the range of types of agreements entered into by companies, is very broad indeed. This introductory chapter will focus generally on companies transacting internationally for one-off contracts for the sale and purchase of goods and services.[1]

Business is about assuming and managing risks, including legal risk. This reality is mirrored in the negotiation process. Contracts can be viewed as the final result of a dynamic process seeking to take into consideration all the imponderabilities of transnational business. Of course, the negotiation process contemplates the enforceability of contractual provisions under the relevant applicable law. That said, the reality is that not all contractual provisions are created equal and there are factors that will impede a complete review, including time restraints and budgetary concerns. There are also the 'unknown' factors, stemming from cultural gaps or linguistic limitations in some cases, or simply from the state of the law in others, to mention only a few. Finally, there are contracts that can be considered as the 'unseen unknowns'.

Section 1 of this chapter outlines the starting point and some of the elements of the negotiation process, seeking to explain why, in practice,

* The views and opinions in this chapter are solely those of the author and should in no way be construed to represent in whole or in part those of General Electric or any other person or legal entity. The author would like to thank Kai-Uwe Karl, whose suggestions and edits were invaluable.

[1] While there are different 'processes' for different types of contracts, this chapter will focus on one-off transactions and will only touch upon others, be they public tenders, frame agreements or other forms of contractual arrangements.