With the aim of creating an autonomous regime for the interpretation and application of the contract, boilerplate clauses are often inserted into international commercial contracts without negotiations or regard for their legal effects. The assumption that sufficiently detailed and clear language will ensure that the legal effects of the contract will only be based on the contract, as opposed to the applicable law, was originally encouraged by English courts, and today most international contracts have these clauses, irrespective of the governing law.

This collection of essays demonstrates that this assumption is not fully applicable under systems of civil law, because these systems are based on principles, such as good faith and loyalty, which contradict this approach.

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BOILERPLATE CLAUSES,
INTERNATIONAL
COMMERCIAL CONTRACTS
AND THE APPLICABLE LAW

Edited by
GIUDITTA CORDERO-MOSS
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This book applies the method of comparative law to the practice of international commercial contract drafting and therefore gives a quite unusual combination of theory and practice. The underlying idea reflects my own path in the world of international commercial contracts.

For the first part of my career I was, for more than a decade, an in-house lawyer of multinational companies, first in Italy and then in Norway. For all those years I have been drafting and negotiating financial and commercial contracts that were meant to be operative in a variety of countries, from various continental European countries to Russia and what has become the former Soviet Union. It struck me that all contracts were written mainly on the basis of the same models, quite irrespective of the law to which they would be subject. The models were obviously inspired by the common law contract practice, even though the contracts were not meant to be governed by English law. Queries arising out of this observation would be quickly dismissed on account of the expectation by the other contractual party, and even more by involved financial institutions, that recognisable models would be used. Also, these models were deemed to have proven successful in the past. Any ambition to verify the compatibility of the models with the applicable law would be limited to asking local lawyers to render a legal opinion on the enforceability of the contract. These legal opinions would focus on the absence of conflict with mandatory rules of the applicable law, but would normally not consider the drafting style. Any attempt to adjust the drafting style to the applicable legal tradition would be to no avail – in part because contracts are, most of the time, written under time pressure and in part due to the reluctance to modify proven models. Therefore, I went on drafting and negotiating clauses that I suspected would not always be enforceable according to their terms.

As soon as I started working full time in academia, I took up all the unanswered questions that had accumulated during my years as a
corporate lawyer. The result was a research project financed by the Norwegian Research Council that, in turn, resulted in this book.

The just-mentioned practice of structuring international contracts according to the common law legal tradition, and not according to the applicable law, is analysed here according to the following lines. First, it is explained how international contracts are written, and why the drafters often disregard the applicable law. This shows that the drafter does not necessarily intend to subject the contract to English law: rather, the drafter adopts the style typical for English contracts because, with its high degree of detail and apparent exhaustiveness, it suggests that the contract may be interpreted on the basis of its own terms and without having to take into consideration the applicable law. This impression of self-sufficiency is enhanced by the use of boilerplate clauses, contract regulations that recur in all types of contract and aim at creating an autonomous regime for the interpretation and application of the contract.

Secondly, some methodological questions are addressed: should the inspiring common law also be given a central role in the interpretation of international contracts? Should contracts be governed by general principles that do not belong to a specific national law, since national laws are not taken into particular consideration when contracts are drafted? The analysis will show that these alternatives are not feasible and that, therefore, international contracts have to be governed by the national law that is applicable according to the general conflict rules. This may lead to the applicability of a law not belonging to the common law tradition.

The third issue addressed is: will the governing law influence the interpretation and application of the contract? A series of boilerplate clauses often recurring in international contracts will be analysed first from the point of view of English law, which is the system underlying the original drafting style, and then from the point of view of a number of laws, representing various sub-families of the civilian tradition. The analysis will show how contract clauses may be affected by the governing law.

The material contained in this book is updated as of June 2010.

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