

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

BOILERPLATE CLAUSES,
INTERNATIONAL COMMERCIAL
CONTRACTS AND
THE APPLICABLE LAW

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.

GIUDITTA CORDERO-MOSS is a professor at the Institute of Private Law, University of Oslo, where her main areas of expertise are international commercial law, comparative law and private international law. She is also an international arbitrator and has in the past practised as an international commercial lawyer in Italy, Norway and Russia.

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

BOILERPLATE CLAUSES,
INTERNATIONAL
COMMERCIAL CONTRACTS
AND THE APPLICABLE LAW

Edited by

GIUDITTA CORDERO-MOSS



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521197892

© Cambridge University Press 2011

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2011

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Boilerplate clauses, international commercial contracts and the applicable law / edited by Giuditta Cordero-Moss.

p. cm.

ISBN 978-0-521-19789-2 (hardback)

1. Standardized terms of contract. 2. Contracts – Language. 3. Foreign trade regulation. I. Cordero-Moss, Giuditta. II. Title.

K845.S7B65 2011

346.02'2–dc22

2010037106

ISBN 978-0-521-19789-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

CONTENTS

List of contributors page xvii
Preface xxi

Introduction 1
GIUDITTA CORDERO-MOSS

1 Overview of the book 1
2 The findings 3
3 Acknowledgments 4

PART 1 **How contracts are written in practice** 7
Introduction to Part 1 9

1. Negotiating international contracts: does the process
invite a review of standard contracts from the point
of view of national legal requirements? 11

DAVID ECHENBERG

1 How it all got started 12
 1.1 Not all contractual terms are created equal 12
 1.2 Imperfect information 15
 1.3 Non-negotiated contracts 17
2 The end result 18
 2.1 The contract as an imperfect compromise 18
 2.2 Consequences 18

2. Multinational companies and national contracts 20

MARIA CELESTE VETTESE

1 Introduction 20

Cambridge University Press
978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the
Applicable Law
Edited by Giuditta Cordero-Moss
Frontmatter
[More information](#)

2	Standard contractual structures, their impact on national legislations and the expectations of the parties	22
3	The in-house lawyer perspective	29
PART 2	Methodological challenges	33
	Introduction to Part 2	35
3.	Does the use of common law contract models give rise to a tacit choice of law or to a harmonised, transnational interpretation?	37
	GIUDITTA CORDERO-MOSS	
1	Does the drafting style imply a choice of the applicable law?	37
1.1	Tacit choice of law	39
1.2	Closest connection	41
1.3	Conclusion	43
2	Is a uniform interpretation of international contracts that is independent from the applicable law possible?	43
2.1	Transnational sources	52
2.2	Does transnational law have the force of law?	45
2.3	Does transnational law exclude the applicable law?	47
2.3.1	Specific contract regulations	47
2.3.2	General contract regulations	48
2.4	Does transnational law provide a uniform standard?	52
3	Conclusion	60
4.	Common law-based contracts under German law	62
	GERHARD DANNEMANN	
1	Introduction	62
2	Likely problems	64
3	Court practice	67
3.1	Shipping contracts, exclusion and penalty clauses	68
3.2	Financial securities and good faith	74
3.3	Brokerage and good faith	75
3.4	Construction contracts, warnings and fault	75
3.5	Control of standard terms and exclusion clauses	76
4	Conclusions	77

5. Comparing exculpatory clauses under Anglo-American law:
testing total legal convergence 80

EDWARD T. CANUEL

- 1 Introducing the comparative legal method: the first step
in evaluating total legal convergence 81
 - 1.1 Legal convergence theory: discussion points 83
- 2 Exculpatory clauses: background, interaction with
contractual theories and duties 85
 - 2.1 The role of unconscionability 86
 - 2.2 Assent, duty to read 87
- 3 Testing convergence within the Anglo-American
family: towage contracts and exculpatory
clauses 93
 - 3.1 The development of US law: *Bisso* and beyond 93
 - 3.2 The common law family comparison: English law 95
 - 3.3 The role of legal technicalities 98
- 4 Conclusion: a step away from total legal
convergence 101

6. Circulation of common law contract models in Europe: the
impact of the European Union system 104

JEAN-SYLVESTRE BERGÉ

- 1 The European Union system and circulation of common
law contract models 104
- 2 An almost perfect example: the *Courage* case 104
- 3 The context of the case in EU law 105
- 4 The three lessons drawn from the *Courage* case 106
- 5 First lesson: in contract law, the use of the principle
of procedural autonomy is rather exceptional and
of a subsidiary nature 107
- 6 Second lesson: the European framework governing the
principle of procedural autonomy aims at establishing a
correlation between partly autonomous and partly
hierarchised legal systems 108

Cambridge University Press
978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the
Applicable Law
Edited by Giuditta Cordero-Moss
Frontmatter
[More information](#)

7	Third lesson: the intervention of EU law leads to a rereading of national laws, which is rather nuanced and has a broad meaning	110
8	Conclusion	112
PART 3	The applicable law's effects on boilerplate clauses	113
	Introduction to Part 3	115
1	Clauses analysed in Part 3	118
1.1	Entire agreement	119
1.2	No waiver	119
1.3	No oral amendments	119
1.4	Severability	119
1.5	Conditions/essential terms	119
1.6	Sole remedy	119
1.7	Subject to contract	120
1.8	Material adverse change	120
1.9	Liquidated damages	120
1.10	Indemnity	121
1.11	Representations and warranties	122
1.12	Hardship	122
1.13	<i>Force majeure</i>	123
2	Cases illustrating the need for coordination with the applicable law	125
2.1	Clauses aiming at fully detaching the contract from the applicable law	125
2.2	Clauses using a terminology with legal effects not known to the applicable law	127
2.3	Clauses regulating matters already regulated in the applicable law	127
7.	The common law tradition: application of boilerplate clauses under English law	129

EDWIN PEEL

1	Introduction	129
1.1	Content	129
1.2	Interpretation	132
1.3	Good faith	134
1.4	Conclusion and methodology	135

2	The clauses	136
2.1	Entire agreement	136
2.2	No waiver	144
2.3	No oral amendments	146
2.4	Conditions	148
2.5	Sole remedy	152
2.6	Subject to contract	154
2.7	Liquidated damages	160
2.8	Indemnity	165
2.9	Representations and warranties	170
2.10	Hardship/ <i>force majeure</i>	175
3	Conclusion	178
8.	The Germanic tradition: application of boilerplate clauses under German law	179
ULRICH MAGNUS		
1	Introduction	179
2	General method of interpretation of contracts	180
3	Law applicable to the interpretation of international commercial contracts	182
3.1	Generally applicable law	182
3.1.1	Applicability of the <i>lex contractus</i>	182
3.1.2	Choice of law	183
3.1.3	Construction clauses	184
3.1.4	Applicable law in the absence of a choice of law	184
3.2	Contract interpretation under international conventions	184
3.3	Use of international trade terms	186
3.4	Use of international standard contracts	187
3.5	Terms specific for a certain law	187
3.6	Mid-summary	188
4	‘Acting under wrong law’	188
4.1	A well-known phenomenon	188
4.2	The courts’ view	189
4.3	Critique and solution	190

X	CONTENTS
5	Discussion of specific clauses 192
5.1	Clauses aiming at fully detaching the contract from the applicable law 192
5.1.1	Entire agreement clauses 192
5.1.2	No oral amendments clauses 197
5.2	Clauses that use a terminology with legal effects not known to the applicable law 199
5.2.1	Indemnity clauses 200
5.2.2	Liquidated damages clauses 202
5.2.3	Conclusion 203
5.3.	Contract clauses that regulate matters already regulated in the applicable law 203
5.3.1	<i>Force majeure</i> clauses 204
5.3.2	Hardship clauses 206
6.	Final conclusions 207
9.	The Romanistic tradition: application of boilerplate clauses under French law 210
XAVIER LAGARDE, DAVID MÉHEUT AND JEAN-MICHEL REVERSAC	
1	Preliminary observations 210
2	Entire agreement ('clause d'intégralité') 214
3	No waiver 215
4	No oral amendments 216
5	Severability 216
6	Conditions 217
7	Sole remedy 218
8	Subject to contract 220
9	Material adverse change 221
10	Liquidated damages 222
11	Indemnity 222
12	Representations and warranties 223

13	Hardship	225
14	<i>Force majeure</i>	226
10.	The Romanistic tradition: application of boilerplate clauses under Italian law	227
GIORGIO DE NOVA		
1	Entire agreement clauses and no oral amendments clauses as clauses provided in alien contracts	227
2	Entire agreement clauses and no oral amendments clauses as ‘stylistic clauses’?	228
3	No oral amendments clauses under Italian law	228
4	Entire agreement clauses under Italian law	229
5	Entire agreement clauses under the CISG	230
6	Articles 2722 and 2723 of the Italian Civil Code with respect to interpreting the contract	231
7	Entire agreement clauses and implied conditions	232
11.	The Nordic tradition: application of boilerplate clauses under Danish law	233
PETER MØGELVANG-HANSEN		
1	Danish contract law in general	233
2	Clauses aimed at fully detaching the contract from the applicable law	236
2.1	Entire agreement	236
2.2	No oral amendments	237
2.3	No waiver	238
2.4	Severability	239
2.5	Conditions	239
2.6	Sole remedy	241
2.7	Subject to contract	242
2.8	Material adverse change	244
3	Clauses that use a terminology with legal effects not known to the applicable law	245
3.1	Liquidated damages	246

4	Clauses that regulate matters already regulated in the applicable law	247
4.1	Representations and warranties	247
4.2	Hardship and <i>force majeure</i>	248
4.3	Clauses on contractual liability and/or product liability	249
12.	The Nordic tradition: application of boilerplate clauses under Finnish law	254
GUSTAF MÖLLER		
1	Introduction	254
2	Clauses aiming at fully detaching the contract from the applicable law	256
2.1	Entire agreement	256
2.2	No waiver	257
2.3	No oral amendments	257
2.4	Severability	258
2.5	Conditions	258
2.6	Sole remedy	259
2.7	Subject to contract	259
2.8	Material adverse change	260
3	Clauses that use a terminology with legal effects not known to the applicable law	260
3.1	Liquidated damages	260
3.2	Indemnity	261
4	Clauses that regulate matters already regulated in the applicable law	262
4.1	Representations and warranties	262
4.2	Hardship	263
4.3	<i>Force majeure</i>	263
13.	The Nordic tradition: application of boilerplate clauses under Norwegian law	265
VIGGO HAGSTRØM		
1	The Scandinavian law of obligations – and of contracts – is a part of the law with old traditions	265

2	The way commercial contracts are drafted in Norway has changed considerably during the past twenty to thirty years	266
3	Clauses aimed at fully detaching the contract from the applicable law	268
3.1	Entire agreement	268
3.2	No waiver	269
3.3	No oral amendments	269
3.4	Severability	270
3.5	Conditions	270
3.6	Sole remedy	271
3.7	Subject to contract	271
3.8	Material adverse change	272
4	Clauses with legal effects not known to the applicable law	272
4.1	Liquidated damages	272
4.2	Indemnity	273
5	Clauses that regulate matters already regulated in the applicable law and how these interact with each other	273
5.1	Representations and warranties	273
5.2	Hardship	274
5.3	<i>Force majeure</i>	274
14.	The Nordic tradition: application of boilerplate clauses under Swedish law	276
LARS GORTON		
1	General background	276
2	Contractual principles and contractual considerations	278
3	Different parameters	280
4	The organisational/agency aspect – the use of representatives	281
5	Contract phases	282
5.1	Some general points	282
5.2	Negotiation phase	283

5.2.1	General remarks	283
5.2.2	Conditions precedent and subject to approval	284
5.2.3	No oral contracts	284
5.2.4	Entire agreement	285
5.3	Performance phase	289
5.3.1	Some general remarks	289
5.3.2	No oral amendments	290
5.3.3	Change of circumstances	290
6	Compensation clauses	294
6.1	General background	294
6.2	Liquidated damages and penalties	295
6.3	The use of compensation clauses	295
6.4	Delay interest	298
7	Conclusion	299
15.	The East European tradition: application of boilerplate clauses under Hungarian law	302
ATTILA MENYHÁRD		
1	Introduction	302
2	Entire agreement	306
3	No waiver	307
4	No oral amendments	308
5	Severability	309
6	Conditions	309
7	Sole remedy	311
8	Subject to contract	314
9	Material adverse change	319
10	Liquidated damages	319
11	Indemnity	321
12	Representations and warranties	322
13	Hardship	326
14	<i>Force majeure</i>	327

16. The East European tradition: application of boilerplate clauses
under Russian law 329

IVAN S. ZYKIN

- 1 Introductory remarks 329
- 2 Some particular contract clauses 333
 - 2.1 Entire agreement 333
 - 2.2 No waiver 334
 - 2.3 No oral amendments 335
 - 2.4 Conditions 335
 - 2.5 Liquidated damages 336
 - 2.6 Sole remedy 338
 - 2.7 Subject to contract 338
 - 2.8 Representations and warranties 339
 - 2.9 *Force majeure* and hardship 341

Conclusion: the self-sufficient contract, uniformly
interpreted on the basis of its own terms: an illusion,
but not fully useless 344

GIUDITTA CORDERO-MOSS

- 1 International commerce fosters self-sufficient
contracts 344
- 2 Detailed drafting as an attempt to enhance the
self-sufficiency of contracts 346
- 3 No real alternative to the applicable law 350
- 4 The differing legal effects of boilerplate
clauses 353
 - 4.1 Clauses aiming at fully detaching the contract from
the applicable law 353
 - 4.1.1 Entire agreement 353
 - 4.1.2 No waiver 355
 - 4.1.3 No oral amendments 356
 - 4.1.4 Severability 358
 - 4.1.5 Conditions/essential terms 358
 - 4.1.6 Sole remedy 359
 - 4.1.7 Subject to contract 361
 - 4.1.8 Material adverse change 362

Cambridge University Press
978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the
Applicable Law
Edited by Giuditta Cordero-Moss
Frontmatter
[More information](#)

4.2	Clauses using terminology with legal effects not known to the applicable law	362
4.2.1	Liquidated damages	362
4.2.2	Indemnity	365
4.3	Clauses regulating matters already regulated in the applicable law	365
4.3.1	Representations and warranties	365
4.3.2	Hardship	367
4.3.3	<i>Force majeure</i>	368
5	The drafting style does not achieve self-sufficiency, but has a certain merit	370
6	Conclusion	372
	<i>Bibliography</i>	374
	<i>Index</i>	388

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

CONTRIBUTORS

JEAN-SYLVESTRE BERGÉ is a professor at Université Paris Ouest Nanterre La Défense. He specialises in European law, international law and private law, and co-directs the Centre for European and Comparative Law (CEJEC) and the PhD programme at Paris Ouest. He has written several books in French on international and European protection of intellectual property (1996), European law and national private law (2003) and an introduction to European law (2008).

EDWARD T. CANUEL holds the position of European Liaison in the US State Department's climate office and is Regional Hub Officer in Copenhagen. Previously he served, inter alia, as Energy and Economic Officer in Oslo, leading the US Embassy's energy, finance, trade, economic, trade and commercial issues. Prior to joining the US Foreign Service, he practised commercial and government relations law at the international law firm McDermott, Will & Emery.

GIUDITTA CORDERO-MOSS, J.D. (Rome), PhD (Moscow), D. Jur. (Oslo), is a professor at the Institute of Private Law, University of Oslo and is Principal Research Fellow at the Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, Scotland. She teaches and publishes within international commercial law, arbitration, comparative law and private international law. A former corporate lawyer, she acts as arbitrator in international commercial and investment disputes.

GERHARD DANNEMANN is a professor at the Humboldt University of Berlin. He is active in the field of comparative law and is, among other things, Fellow of the Institute of European and Comparative Law at the University of Oxford, where he has been a lecturer for several years and eventually became a reader in comparative law. He is general editor and founder of the Oxford University Comparative Law Forum and publishes actively. Since 2005, he has held the position of Chair of

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

xviii

LIST OF CONTRIBUTORS

the Redaction Committee and Chair of the Terminology Group of the European Research Group on Existing EU Private Law (Acquis Group). He is also Door Tenant at 3 Pump Court Chambers, London.

GIORGIO DE NOVA is a professor at the University of Milan. He is the author of numerous publications on Italian private and contract law, many of which are generally recognised as fundamental works in their respective fields. He is the editor of various prestigious legal reviews in Italy. In addition, he is a practising lawyer with wide experience of commercial contracts, and he is often appointed as arbitrator in international and domestic arbitrations.

DAVID ECHENBERG is Senior Contract Risk Manager, Energy Infrastructure, General Electric, Milan. He is a qualified attorney-at-law in New York and a solicitor in England and Wales, and has worked in private practice in Sao Paulo, Brussels and Washington DC, as well as in-house in Florence, Italy. In addition, he previously acted as an expert legal consultant evaluating the body of law developed by UNCITRAL at the United Nations in New York. His areas of specialisation include international contract and commercial law, M&A and international dispute resolution.

LARS GORTON is a professor emeritus at the University of Lund, is presently a visiting professor at the Center for Kreditret og kapitalmarkedsret (Copenhagen Business School) and is tied to the Stockholm Center for Commercial Law at the Faculty of Law, Stockholm University. He is active in the fields of contract law, maritime law and banking law. In addition to publishing mainly in these areas of law, he has also been a corporate lawyer. He is also presently a board member of the Scandinavian Institute of Maritime law.

VIGGO HAGSTRØM is a professor at the University of Oslo. He is the author of numerous publications on Norwegian private and contract law that are recognised as fundamental in Norwegian legal doctrine. He is the general editor of the most recognised Scandinavian legal doctrinal review and has significant commercial experience, among other things, as a commercial arbitrator.

XAVIER LAGARDE is a professor at Université Paris Ouest Nanterre La Défense. He specialises in contract law, civil procedure and alternative dispute resolution, as well as in law and economics. He has written

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

LIST OF CONTRIBUTORS

xix

numerous books in his fields of interest. As a partner in the law firm of Puisse-Dupichot-Zirah and Co (Paris Bar), he pleads before court on commercial matters.

ULRICH MAGNUS is a professor at the University of Hamburg. He is active, among other things, in the fields of private and contract law, private international law and comparative law. He is editor of a number of recognised legal reviews and publications series and, until 2009, also acted as a Court of Appeal judge. He participates in a number of international working groups and commissions, including UNCITRAL.

DAVID MÉHEUT is an attorney-at-law at Clyde and Co, Paris. He received an LLB in French and English law from King's College London and the University of Paris I – Panthéon-Sorbonne and an LLM in European Union Law from the University of Paris II – Panthéon-Assas. He specialises in international arbitration and advises clients on multi-jurisdictional issues in relation to insurance, reinsurance and shipping disputes and operations.

ATTILA MENYHÁRD is an associate professor at the ELTE Faculty of Law, Budapest. He is Head of the Civil Law Department in the Faculty of Law at Eötvös Loránd University (Budapest) and is active in the fields of contract law, tort law, property law and company law. He is the author of various books and has contributed to the project for a new Hungarian Civil Code. He participates in several international research projects and programmes and is a listed member of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Budapest.

PETER MØGELVANG-HANSEN is a professor at the Copenhagen Business School. He is active within the fields of contract, marketing and civil enforcement law, and has participated actively in the legislative process in respect of numerous acts within these areas. He is co-editor on the most important Danish law commentary.

GUSTAF MÖLLER is counsel at Krogerus, Finland. He is a former Justice at the Supreme Court of Finland and has been actively contributing to international work in fields relating to, among other things, international contracts – acting as the Finnish delegate to the Hague Conference on Private International Law and UNCITRAL. He is the author of

numerous publications and is often invited to present papers at international conferences. He is also the Chairman of the Board of Arbitration of the Finnish Chamber of Commerce.

EDWIN PEEL is Fellow and Tutor in Law at Keble College, University of Oxford. He publishes actively in the field of contract law and conflict of laws and is, among other things, the author of the revised editions of *Treitel on the Law of Contract* and the editor of various Oxford University Press books on contracts, including, most recently, *Contract Terms* (2007). He is a qualified solicitor and acts as a consultant to Clifford Chance LLP.

JEAN-MICHEL REVERSAC is an attorney-at-Law at Clyde and Co, Paris, where he is in charge of the Corporate and Commercial Team. He is active in advising foreign investors in France regarding the acquisition of share capital and mergers or acquisitions of ongoing businesses. He also pleads before court on commercial matters, including insurance and banking litigations.

MARIA CELESTE VETTESE holds the position of Senior Legal Counsel at Group Function Legal and Compliance ABB S.p.A. She has been practising for over a decade in the fields of international arbitration, private international law and commercial law. She has been actively involved in the closing of several project financing projects in the power generation business, and for the past ten years she has been lecturing on contract law for the Project Management Institute in Italy.

IVAN S. ZYKIN, Dr. Sc. (Law), is a professor and is Head of the Centre for Legal Problems of International Economic Relations at the Institute of State and Law, Russian Academy of Sciences. He has published extensively within the fields of commercial law, private international law and arbitration. He has been actively involved in drafting the legislation of the Russian Federation and has represented Russia in several international negotiations and conferences, inter alia, in the frame of UNCTAD, UNCITRAL and UNIDROIT. He is also Vice-President of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation and is Partner of Andrey Gorodissky & Partners.

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

PREFACE

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

Cambridge University Press

978-0-521-19789-2 - Boilerplate Clauses, International Commercial Contracts and the Applicable Law

Edited by Giuditta Cordero-Moss

Frontmatter

[More information](#)

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.

Giuditta Cordero-Moss