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Introduction

It may seem intuitive to some observers as to what an international commercial contract is, yet it is difficult to find an accepted definition for the term. What is even more difficult is identifying the legal rules to which international commercial contracts are subject. Are international contracts subject to some sort of international law? What are the sources of this law and what is its scope of application? To the extent that international contracts are subject to national rules, which law's rules are applicable? These questions become even more pressing when the practice of international contracting is taken into consideration: contracts are often written as if their terms were the only source with which to regulate the parties' relationship and as if any sources of law were irrelevant. This self-sufficiency is attempted through drafting the contract in great detail, by writing clauses that attempt to exclude any interference from external sources and by stipulating that disputes between the parties shall be solved out of court via arbitration. Contracts tend to be drafted in the same way, irrespective of the legal system in which they will be implemented. Ambitions regarding self-sufficiency, standardisation and arbitration clauses make one wonder about the relationship between the contract and the governing law.

This book will analyse the interaction between international commercial contracts and the sources that govern them.

In the first chapter, I will present the practice of international contract drafting and will highlight how its peculiarities may fit with the applicable sources of law when the contract has to be interpreted and enforced.

In Chapter 2, I will go through the most important sources of non-national law and will analyse to what extent they may contribute to the harmonised interpretation and regulation of international contracts.

In Chapter 3, I will examine how international contracts may be influenced by the national governing law.

In Chapter 4, I will discuss how the governing law is chosen and what role the will of the parties has in this process.

In Chapter 5, I will analyse the extent to which the role of the parties' will is enhanced when the contract stipulates that any disputes arising between the parties out of the contract shall be solved by arbitration.

Before starting the analysis of the role played by the parties' will and by the applicable sources of law in the interpretation and enforcement of international

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contracts, however, it is necessary to define the starting point of the analysis; namely, international commercial contracts.

Two elements require explanation: the term 'commercial' and the term 'international'.

1 Explanation of the term 'commercial'

To explain the term 'commercial', it will be sufficient here to specify that it refers to transactions entered into between parties in the course of their business activities. This leaves consumer contracts outside of the scope of the subject, as well as other aspects of private law, such as family or inheritance law. It is not the intention here to contribute to the old and extensive debate, which particularly seems to characterise some civil law legal traditions, concerning the difference between private law and commercial law; the difficulty in precisely defining the term 'commercial' appears clearly in the explanation of the term provided by the Model Law on International Commercial Arbitration made by the United Nations Commission on International Trade Law (UNCITRAL), which, in footnote 2 relating to Article 1, uses a tautology; that is, it explains the term 'commercial' by referring to the same concept, without imparting any additional explanation other than a long, non-exclusive list of transactions that are deemed to be of a commercial nature:

> The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.[1]

As unsatisfactory as it may be to operate with a non-exhaustive list rather than with a clear definition of the scope of the content, we will follow the guidelines laid down by UNCITRAL, and will consider the kinds of transactions listed above as the objects for this book.

This seems to cover only private law matters and leave out questions of public law. However, this distinction is not clear cut. Leaving aside that the private–public law divide is not necessarily recognised in all legal systems

[1] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration 1985, as amended in 2006, (www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)

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(notably, not in the common law tradition), there are aspects of public international law that may well be relevant to commercial activity, as mentioned in Section 3 of this Introduction.

2 Explanation of the term 'international'

As far as the term 'international' in the name 'international commercial law' is concerned, there are two possible interpretations: (i) the law is international because it stems from international sources; or (ii) it is not the law that is international, but the object that the law regulates which is international. Although the former is not completely irrelevant, as mentioned in Section 3 of this Introduction, it is the latter construction that correctly describes the subject of this book. We will focus on the law that governs international commercial relationships; however, the definition of 'international' varies according to the criteria used by the interpreter. Different state laws and different international conventions have different definitions of what international is.

For example, the Vienna Convention on the International Sale of Goods of 1980 (also known as the CISG) specifies, in Article 1.1, that a sale falls within the scope of the Convention (and therefore is to be deemed as international) if the parties have their place of business in different states:

> This Convention applies to contracts of sale of goods between parties whose places of business are in different States.

Therefore, under the CISG, a contract between, for example, a French seller and a Norwegian buyer, is considered as an international contract. A contract between two companies based in France, however, would not be considered as international under the CISG, even if the contract requires one party to import certain goods from a foreign state to sell them to the other party.

The Hague Convention on the Law Applicable to the International Sale of Goods of 1955[2] does not define the term international, and simply states in Article 1 that the mere determination by the parties is not sufficient to give a sale international character (indirectly accepting that a sale may be international if there are some foreign elements to the transaction, but that this is not necessarily the place of business of the parties):

> The mere declaration of the parties, relative to the application of a law or the competence of a judge or arbitrator, shall not be sufficient to confer upon a sale the international character provided for in the first paragraph of this Article.

[2] This Convention has been ratified by eleven European states, and is largely absorbed, as between EU member states, by the EU Rome I Regulation on the Law Applicable to Contractual Obligations (Regulation EC 593/2008 of 17 June 2008). The Convention is applicable when one of the parties belongs to a signatory state, which is not an EU member state, notably, Norway. The Hague Conference in 1986 drafted a more modern convention on the same subject; this convention, however, never entered into force.

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Therefore, a contract between two Italian parties for the sale of a product manufactured in Italy according to which both delivery and payment will be made in Italy, will not qualify as international under The Hague Convention, even if the contract has a clause choosing German law as the law governing the transaction. However, the above-mentioned contract between two French companies for the import and successive domestic sale of certain goods might be considered as international for the purpose of The Hague Convention because there is a foreign element involved in the import of the goods.

The EU Rome I Regulation on the Law Applicable to Contractual Obligations (Regulation EC 593/2008 of 17 June 2008), which is the European Union's (EU's) instrument regulating the choice of law for contracts, speaks in Article 1.1 of any situation involving a conflict between the laws of different states; thus, indirectly, it opens the door even for the eventuality that the only foreign element to a transaction is the choice made by the parties of a foreign law – although, in such situations, the applicability of party autonomy, which is the most important conflict rule contained in the Convention, is limited by Article 3.3 thereof:

> 3.3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

Therefore, the above-mentioned import and subsequent domestic sale between two companies based in France would fall within the scope of Article 1.1 of the Rome I Regulation and allow for a wide choice of law, as regulated for in Article 3.1, because the import of the goods is an element that connects the situation with more than one state. The domestic contract between the two Italian companies mentioned above, however, even though it falls within the scope of Article 1.1, would be subject to Article 3.3 of the Rome I Regulation, and would allow a more restricted party autonomy.

The UNCITRAL Model Law on International Arbitration defines, in Article 1.3, an arbitration as international if one or more conditions are met, also including the mere determination by the parties that the subject matter of the dispute relates to more than one state:

An arbitration is international if:

> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
> (b) one of the following places is situated outside the state in which the parties have their places of business:
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

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(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

Therefore, a dispute arising out of the above-mentioned domestic agreement between two Italian companies would qualify as international for the purpose of the UNCITRAL Model Law, if the parties have chosen a foreign governing law or a foreign state as a venue for the arbitration.

Bearing in mind these discrepancies, and that it is therefore necessary to verify in each specific case (on the basis of the applicable law) whether the transaction is international or not, it will suffice for the purpose of this book to define a transaction as international whenever there is a foreign element to it that connects it with at least two different states.

The most evident example would be a contract entered into by two parties that are resident in different states: for example, an Italian clothes producer entering into an agency contract with a Norwegian agent for the promotion and sale of the products in the Norwegian territory, or a Russian aluminium producer entering into a contract for the export of its products to Norway.

There might be, however, less evident cases, where an inquiry is necessary before the transaction may be defined as either international or domestic. Where a contract is entered into between a company located in a certain state and the local, wholly owned subsidiary of a foreign company, for example, some state laws will permit disputes connected therewith to be defined as international,[3] whereas others focus on the formal aspect of the common nationality of the parties and consider the disputes as domestic.[4]

3 The public international law dimension

Public international law is the branch of the law that regulates the relationship between states. States are sovereign, and are therefore free to regulate their internal affairs through legislation, administrative regulation and the exercise of the judicial function; their sovereignty, however, does not extend beyond their respective territory. In terms of their relationship with other states, when states act as sovereign states and need to determine their respective positions towards each other, they are subject to the principles and rules of public international law.

A state does not act as a sovereign when it engages in commercial activity, and public international law, therefore, is not relevant. Commercial transactions will be subject to commercial and private law, even when one of the parties involved is a state. Generally, there is no overlap between these branches of the law.

[3] For example, the Russian Law on International Commercial Arbitration of 1993 provides, in Article 1.2, that disputes arising out of contracts between two Russian companies may be submitted to international arbitration if one of the Russian companies is (wholly or even partially) owned by a foreign entity.

[4] For example, the Swiss Private International Law Act, Article 176.1.

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In some situations, however, there is interference. This happens mainly when an investor engages in a business activity in a foreign country. The investor will enter into a series of contracts of a commercial nature with other private parties, or even with the host state, and these contracts will be subject to private or commercial law in accordance with the rules of private international law. The investor's activity will, in addition, have a series of implications in terms of administrative or public law, and these will be regulated by the law of the host country – for example, the enterprise will generate income that is subject to the local tax law, it will perhaps involve production activities, with implications for the local environmental law, it will have employees who are subject to the local labour law, it will have access to natural resources or infrastructure subject to administrative concessions, it will have export activity subject to licensing, etc. All these regulations to which the investor is subject are part of the legal system of the host country, and the host country, in its sovereignty, legislates and administrates within these fields as it deems fit and in accordance with its evaluation of what is in the public interest. This regulatory activity is within the sovereignty of the state, and, as a general rule, it is not subject to any other constraints other than the rule of law and the constitutional principles of the state itself.

Should the host country regulate these matters in a way that violates fundamental principles, for example, because it engages in discriminatory behaviour or because it confiscates property without paying compensation, it may encounter limitations being placed on it through public international law.

Public international law, particularly through treaties entered into on a bilateral or multilateral basis for the protection of investments made by nationals of one state in the territory of the other state, contains some principles that may be invoked by the foreign investor who is affected by the state's conduct. Traditionally, individuals are not considered to be subjects of public international law, and must present their claims against the host country via their respective country of origin, mainly through diplomatic protection. This gives the process a political, rather than a legal dimension, and is not necessarily favourable to the investor. The Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) established a legal proceeding in which foreign investors could pursue their claims directly against the host country in a special arbitration proceeding – the so-called investment arbitration. This arbitration largely resembles the procedure for commercial disputes, but permits the investor to raise claims based on alleged violations by the host country of its public international law obligations regarding the treatment of foreign investors, mainly based on treaties on investment protection. In the past decades, bilateral investment treaties (BITs) have proliferated, as well as some multinational treaties, giving investors the possibility of being able to directly bring an action against the host country in an arbitration form known as investment arbitration. Many of these treaties allow for the possibility of being able to choose not only a dedicated ICSID arbitration, but also forms of arbitration that are designed

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for commercial disputes, such as arbitration under the UNCITRAL Arbitration Rules or under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). In the past few decades, investment arbitration has been frequently used by investors and it has become a significant instrument in foreign business activity. Investment arbitration does not fall within the scope of this book, but will be mentioned occasionally when it is relevant.

The great number of international treaties on investment protection has led in the past decade or two to a boom in so-called investment disputes, in which foreign investors initiate an arbitration procedure against the host country by claiming that the public international law rules protecting foreign investment have been violated. This public international law protection may be wrongly interpreted as encouraging international transactions to be considered as detached from national law and subject to international law instead.[5]

In reality, investment protection does not replace national law; it adds a corrective dimension to national law, without, however, excluding its applicability. If a certain activity qualifies as an investment and enjoys the relevant protection, it will still be subject to the applicable state law, with corrections available through the fundamental principles of public international law such as non-discrimination, compensation upon expropriation, fair and equitable treatment, full protection and security. Any rules and regulations of national law that do not violate these fundamental principles will still be applicable to the investment.

However, the borderline between public international law and international commercial law is somewhat blurred, particularly in the context of transnational sources. This book will, therefore, discuss the public international law dimension when examining transnational sources that may be applicable to international contracts. In addition, the question of courts' international jurisdiction will be seen in the context of public international law. Questions specifically related to investment arbitration will be touched upon only marginally, mainly in respect of investment proceedings that are carried out under commercial arbitration rules.

[5] See Giuditta Cordero-Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?', in Christina Binder, Ursula Kriebaum, August Reinisch, and Wittich Stephan (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), pp. 782–97, Section 2.

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1

Contract practice and its expectations in terms of the governing law

1 The rationale of contract drafting

International contracts are often written on the basis of rather standardised models that are mainly drafted in English and, therefore, they employ a common law drafting style. This does not mean, however, that the parties intend the contract to be subject to English law. Often, contracts are governed by a law that does not belong to the common law family, and this may create tensions between the contractual provisions and the governing law. To minimise the risk of the governing law interfering with the agreed terms, international contracts are drafted in a style that aims to create an exhaustive, and as precise as possible, regulation of the underlying contractual relationship, thus attempting to render redundant any interference from external elements such as the interpreter's discretion or the rules and principles of the governing law.

To a large extent, this degree of detail may achieve the goal of rendering the contract a self-sufficient system, thus enhancing the impression that, if only they are sufficiently detailed and clear, contracts will be interpreted on the basis of their own terms and without being influenced by any governing law. This impression, however, has been proven to be illusionary, and not only because governing laws may contain mandatory rules that may not be derogated from by the contract. As a matter of fact, not many mandatory rules affect international commercial contracts, although there are important mandatory rules, for example, in the field of the limitation of liability, that are also relevant in the commercial context.[1] Perhaps more importantly, the governing law, which may vary from contract to contract, will affect consciously or not the way in which the contract is interpreted and applied. Notwithstanding any efforts by the parties to include as many details as possible in the contract in order to minimise the need for interpretation, the governing law will necessarily project its own principles regarding the function of a contract, the advisability of ensuring a fair balance between the parties' interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally towards each other and the existence and extent of a general

[1] Some examples are discussed in Chapter 3, Section 6. To what extent mandatory rules of the governing law have an impact in the context of international commercial arbitration will be analysed in Chapter 5, Section 2.

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principle of good faith – in short, the balance between certainty and justice. That the same contract wording may be interpreted differently depending on the legal tradition of the interpreter largely deprives of its meaning the self-sufficiency goal, since it entails that the legal effects of the contract do not flow solely from the contract, but from the interaction of the contract with the governing law. Neither is much help afforded by the observation that legal systems converge on an abstract level and that, consequently, very similar results may be achieved in the various systems, albeit by applying different legal techniques.

First, convergence can rarely be said to be complete, as Chapter 3, Section 3 will show. Even within one single legal family there are significant differences, for example, between the US and English law regarding exculpatory clauses. Even within the same system, there may be divergences, as the same clause may have different legal effects in the different states within the US.[2]

Reducing the divergence to a mere question of technicalities, furthermore, misses the point: it is precisely the different legal techniques that matter when a specific wording has to be applied. It would not be of much comfort for a party to know that it could have achieved the desired result if only the contract had had the correct wording as required by the relevant legal technique. The party is interested in the legal effects of the particular clause that was written in the contract, not in the abstract possibility of obtaining the same result from a different clause.

Neither can the inconsistency of a contract wording's legal effects be overcome by invoking transnational sources to provide a uniform system that is independent of the peculiarities of national laws. As Chapter 2 will show, there do not seem to be any generally acknowledged transnational principles that are sufficiently specific to give uniform guidance on the interpretation of contracts.

The question of contract interpretation, thus, has to be addressed under the governing law.

To avoid external interferences, contracts often contain a series of clauses in which the parties try to take into their own hands those aspects where the balance between certainty and justice may be challenged – the so-called boilerplate clauses. These clauses relate to the interpretation and general operation of contracts, and are to be found in most contracts irrespective of the subject matter of the contract. They are relatively standardised and their wording is seldom given attention to during the negotiations. Some examples of these clauses will be presented in Section 4 below.[3] Their interpretation under transnational sources will be discussed

[2] Edward T. Canuel, 'Comparing Exculpatory Clauses under Anglo-American Law: Testing Total Legal Convergence', in Giuditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press, 2011), pp. 80–103 Section 2.

[3] For a more extensive list of boilerplate clauses and an analysis of their legal effects under a variety of legal systems, see Giuditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press, 2011).

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in Chapter 2, Section 4.2 and their interpretation under various governing laws will be presented in Chapter 3, Section 4.

2 The models for international contract drafting

English is undeniably the common language for international business transactions. Communication between the business parties is mainly carried out in English and contracts that formalise the deals are written in English. Searching for models for specific contract terms or for entire contracts, English language wording will be the most common result. This has bigger consequences than the mere linguistic aspect: contracts that are originally written in the English language are usually drafted by lawyers educated in the common law tradition, and are developed to meet the requirements of and satisfy the criteria for contracts that are subject to the common law. Consequently, most of the internationally distributed publications offering model contract collections reproduce common law style contracts. As a result, law firms and corporate lawyers in a variety of jurisdictions (not only in common law jurisdictions) learn to draft international contracts on the basis of these models. International financial institutions impose the use of US or English style contracts for the transactions that they are financing, irrespective of whether the financed entities or the investors involved come from common law states or not, or whether most of the related contracts are governed by English law, or another system of common law, or not. As a result, operators in civil law states become accustomed to drafting in the common law style to meet the expectations of financial institutions. During the former Soviet Union's and the East European countries' transition to market-driven economies in the 1990s, for example, the European Bank for Reconstruction and Development, an international organisation devoted to financing East European and former Soviet Union projects, almost exclusively adopted common law contract models for projects that were to be carried out in those civil law countries, even when all of the parties involved belonged solely to the civil law tradition. Contract types developed through practice, such as, for example, swap contracts and other contracts for the trade of financial derivatives, are standardised by branch associations following the common law contract style. As a result, new types of transactions are regulated exclusively by common law style contracts, and these contracts are used to regulate not only international transactions, but even domestic transactions within civil law systems. Contracts for the hedging of financial risk, for example, might be written in English and inspired by English law, even if they are entered into by a Norwegian company and a Norwegian bank and are governed by Norwegian law.

The above-described widespread use of common law models is such that it is increasingly affecting even traditional contract types and domestic legal relationships, such as the rental of real estate or sale agreements within the borders of the same country. Even contract models applied by the Norwegian public sector for public

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