INTERNATIONAL COMMERCIAL CONTRACTS

APPLICABLE SOURCES AND ENFORCEABILITY

Any practising lawyer and student working with international commercial contracts faces standardised contracts and international arbitration as the mechanism for dispute settlement. Transnational rules may be applicable, but national law is still important. Based on extensive practical experience, this book analyses international contract practice and its interaction with the various applicable sources: which role is played by the contractual regulation, which by national law, which by transnational sources, what is the interaction among these factors and how does this all apply to contracts that refer disputes to international arbitration?

GIUDITTA CORDERO-MOSS is a professor at the Law Faculty of the University of Oslo where she teaches international commercial law, international commercial arbitration 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.

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GIUDITTA CORDERO-MOSS

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PREFACE

This is the book that I would have liked to have read when I started my career as an in-house lawyer in an Italian multinational company about thirty years ago. Working with international contracts, I soon started wondering about various aspects of contract drafting. Why are international contracts written in a style that is completely different from their domestic counterparts and why are they written in the same style irrespective of the law that governs them? Is there some sort of transnational law that allows for the governing law to be disregarded and requires that contracts be written in a certain way, independently of the jurisdiction in which they will be implemented? Is national law made redundant by the extremely detailed style of the contracts? Does the choice-of-law clause written in the contract mean that the parties may exclude the applicability of any other rules from any other laws? Does the arbitration clause written in the contract mean that the parties may rely fully on the terms of the contract and the choice of law made therein, and need not be concerned with any other sources?

These questions continued presenting themselves after I went over to a Norwegian multinational company, and became even more pressing when I started following this company's legal interests in what was soon to become the former Soviet Union.

After numerous years as a corporate lawyer, in which a thorough analysis of these questions inevitably had to yield to new projects and more urgent matters, my generous employer gave me the opportunity to spend some time researching some of these issues. The result was a PhD thesis at the Institute of State and Law in the Russian Academy of Sciences, Moscow, under the knowledgeable supervision of Professor August A. Rubanov. This was the introduction to my academic career: the Russian PhD was followed by a PhD at the University of Oslo, under the invaluable supervision of Professors Sjur Brækhus and Helge J. Thue. Since then, about fifteen years have elapsed, during which I have devoted my research and teaching at the University of Oslo to the list of questions that I had compiled in my nearly fifteen years as a corporate lawyer, and to the additional questions that continue to arise in connection with arbitration proceedings that I am involved in or legal advice that I am requested to render.

The results of these almost thirty years of dwelling on the practical and academic aspects of international contracts, their sources and their enforceability are reflected in this book. Academically, the questions arising from international contracts fall into

separate disciplines: contract law, comparative contract law, private international law, civil procedure and international arbitration. Scholars may specialise in a couple of these disciplines, but rarely in all of them. Therefore, it is not very common for all of the implications of international contracts to be dealt with in one book. In practice, however, questions arise out of international contracts in their complexity, irrespective of the academic discipline within which they fall. This explains the opening sentence of this preface, stating that this is the book that I would have liked to have read when I started working with international contracts.

In addition to the text being based on my own research and my practical experience, the material presented here takes advantage of the results of two research projects that I have organised at the University of Oslo.

The first project, the so-called 'Anglo project', was financed by the Norwegian Research Council and it ran from 2004 to 2009. It started from the observation that international contracts are written on the basis of common law models, even when they are subject to a civil governing law, and a series of so-called boilerplate clauses were analysed to assess their function in the original common law models and to verify what legal effects these clauses could achieve under civil laws. The project produced three PhD theses and a series of master's theses (a list may be found at www.jus.uio.no/ifp/english/research/projects/anglo/index.html) and resulted in a book: Giuditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (2011).

The second research project, the so-called 'APA' (Arbitration and Party Autonomy) project, is still running, and is financed by the University of Oslo and the Norwegian multinational companies Statoil ASA, Orkla ASA, Yara ASA, as well as the law firms Selmer and DLAPiper. This project verifies to what extent party autonomy meets restrictions when a contract contains an arbitration clause. The project has so far resulted in various international conferences and a series of masters theses (a list may be found at www.jus.uio.no/ifp/english/research/projects/choice-of-law/), as well as in a book: Giuditta Cordero-Moss (ed.), *International Commercial Arbitration: Different Forms and their Features* (2013).

In addition, this book benefits from my lecturing activity, first of all at the University of Oslo, but also at the Centre for Energy, Petroleum and Mineral Law and Policy, Dundee, at the LLM in International Trade Law organised by the ILO, the University of Turin and the University Institute of European Studies, at The Hague Academy of International Law, as well as at the numerous universities and organisations where I have lectured as a guest. The questions and discussions following a lecture or the presentation of a paper are often useful to illustrate or clarify matters, and can give inspiration for new issues.

Another important source that this book takes advantage of is my participation in the UNCITRAL Working Group on Arbitration, where I was the delegate for Norway during the revision of the UNCITRAL Arbitration Rules and the preparation of a standard of transparency for treaty-based arbitration. The discussions in the Working

Group and the assistance given by the UNCITRAL Secretariat have provided an invaluable insight into the different approaches to various aspects of arbitration, as well as into the logic of international cooperation.

I would like to thank the members of the Department of Private Law of the Law Faculty, University of Oslo, of which I am presently the Director, for their support and for having borne with me while I was finalising this book. Thanks also to research assistants Nanette Christine Flatby Arvesen and Øivind K. Foss, of the APA-project, who have compiled the bibliography.

I would like to thank Cambridge University Press, and particularly Senior Commissioning Editor Sinead Moloney, for their very pleasant and professional cooperation in connection with the publication of this book.

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GIUDITTA CORDERO-MOSS
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