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# Flexibility and risk allocation in long term contracts – an international perspective

Seminar June 12, 2012 in Oslo

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MarIus nr. 418
Sjørettsfondet
Nordisk institutt for sjørett
Universitetet i Oslo

ISSN: 0332-7868

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Print: 07 Xpress as

# Content

# Preface

In February 2012 a research project entitled Flexibility and risk allocation in long term contracts – an international perspective, was established as a joint project between the Scandinavian Institute of Maritime Law and the Institute of Private Law at the University of Oslo. A kick-off seminar for the project was held 12 June 2012 in Oslo, hosted by the law-firm Wikborg Rein. The articles contained in this issue consist of a selection of papers by persons contributing with lectures during the seminar.

The first article by Jonas Rosengren discusses selected topics relating to commercial arbitration, such as: to what extent do methods of construction of contract differ from one legal system to another? – and how do international arbitrators go about the task of having to deal with methods of construction of a different legal system from the one in which they are trained? The article is published in Swedish since an English version of the article is already published in a different journal – (2013) 30 J. Int. Arb. 1 – entitled Contract Interpretation in International Arbitration.

In the second article Trond Solvang discusses possible research topics in the law of chartering, primarily from the perspective of combining English and Norwegian (Scandinavian) contract law and methods of construction.

Thereafter Giovanni Iudica gives an account of various types of Dispute Boards, a variation of Alternative Dispute Resolutions (ADR), used in long term and complex construction contracts. Noteworthy features are that these Boards typically consist of non-lawyers (engineers or economists) and that decisions rendered by such Boards, to the extent they are not merely advisory in nature, are binding on a contractual basis – meaning that legal redress is to be sought in terms of breach

of contract by the non-compliant party, rather than having the Board's decision enforced as an arbitral award.

Finally, Giuditta Cordero Moss discusses what happens when international contracts influenced by one legal system (the English) is made subject to the law of a different system (the Norwegian) – and as part of this: to what extent can international contracts realistically be designed as "self-sufficient" (detached from the choice of law)? The lecture she gave at the seminar was based on an excerpt of the more extensive article presented here; the article giving a review of a former research project of which she was in charge, exploring various English law topics derived from so-called boiler plate clauses and tested within the context of Norwegian choice of law.

Trond Solvang

# Avtalstolkning i internationella skiljeförfaranden[1]

**Av Jonas Rosengren, advokat, Advokatfirman Vinge, Göteborg**

## 1 Inledning

Med tanke på hur många kommersiella tvister som kretsar kring avtalstolkning kan man fråga sig varför inte metodfrågor kring avtalstolkning har ägnats mer uppmärksamhet inom ramen för internationella skiljeförfaranden.[2] Skälet synes vara att avtalstolkning, till skillnad från tolkning av internationella konventioner, typiskt sett är en fråga för nationell rätt[3] och inget som särskilt angår skiljeförfarandet som tvistlösningsmekanism. När rättsregler i en viss rättsordning ska tillämpas utanför de nationella domstolar där de hör hemma, och av skiljemän som kan komma från en annan rättslig bakgrund, uppstår emellertid ofta frågor kring hur reglerna ska karaktäriseras och med vilken metod de ska angripas. Denna artikel avser att identifiera några skillnader i avtalstolkningmetoder mellan olika rättssystem, undersöka vilken betydelse dessa kan få på tolkningsresultatet och diskutera i vilken utsträckning skiljemännen styrs av rättsregler vid tolkningen.

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1 En omarbetad och utökad engelsk version av artikel är publicerad som ”Contract Interpretation in International Arbitration” (2013) 30 J. Int.Arb. 1.

2 Jfr dock undersökning av skiljepraxis i J. Karton, The Culture of International Arbitration and the Evolution of Contract Law (Oxford University Press, 2013), som tillkommit efter manus till denna artikel slutförts.

3 Jfr art. 12(1)(a) of Council Regulation 593/2008 (Rom I-förordningen).

# 2 Skillnader mellan olika rättssystem

Även om metoderna för avtalstolkning kan skilja sig åt mellan olika rättssystem är det inte en enkel uppgift att fastställa hur de skiljer sig och vilken praktisk betydelse, om någon, detta kan få för avtalstolkningen i en internationell miljö. En vanlig generalisering i den internationella avtalsrättsliga diskussionen är att göra åtskillnad mellan på ena sidan sidan rättssystem grundade på common law, som anses tillämpa en objektiv tolkningsmetod med en utpräglad språklig- eller bokstavstolkning, och på andra sidan rättssystem grundade på kontinentaleuropeiska rättssystem (civil law), som anses tillämpa en subjektiv tolkningsmetod som främst betonar parternas avsikter. Det finns de som menar att denna skillnad är avgörande och att tolkningsresultatet därför kan variera betydligt beroende på tillämplig lag. En engelsk akademiker och praktiker gör i en handbok om finansrätt gällande att:

> "The choice between the law of a civil law jurisdiction and that of a common law jurisdiction is not simply between the substantive rules of law relating to the subject-matter of the contract. The choice will affect fundamentally the way in which a court will address the task of finding out what the contract means. The common law draftsman of a financial contract may be alarmed to find that his painstakingly-crafted wording is being treated by the court in the civil law jurisdiction as comparatively unimportant, in its quest to find out what the parties really meant. A party from a civil law jurisdiction may be equally alarmed to find that a common law judge regards as irrelevant his categorical statement of what he meant."[4]

Jag menar att denna skarpa dikotomi mellan common law och civil law är överdriven och inte håller för en närmare granskning. Man kan för det första sätta ifråga om det alls är meningsfullt att inordna olika rättssystem i "common law" respektive "civil law" för en jämförelse mellan

[4] C. Bamford, Principles of International Finance Law 313 (Oxford University Press, 2011). Jfr även C. Borris, Common law and Civil Law: Fundamental Differences and their Impact on Arbitration 60 JCI Arb. 78, 84 (No. 2, 1994).

olika avtalstolkningsmetoder. Rättssystem inom en och samma rättsfamilj kan i själva verket uppvisa större skillnader sinsemellan än rättssystem som tillhör olika rättsfamiljer.[5] Även om det kan finnas betydande skillnader i avtalstolkningsmetoder mellan olika rättssystemen emellan, är det mycket som talar för att man når ungefärligen samma resultat med tillämpning av de olika metoderna.[6] Komparativa undersökningar om avtalstolkningsmetoder ger inte heller stöd för uppfattningen att det skulle finnas någon allmän skiljelinje mellan tolkningsmetoder i olika rättsliga traditioner.[7]

En svårighet med att jämföra avtalstolkningsmetoder i olika rättssystem är att se bortom retoriken kring tolkningsprocessen. I det inflytelserika avgörandet *Investors vs. West Bromwich* från engelska House of Lords, definieras avtalstolkning i engelsk rätt som "the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[8] Det kan noteras att partsavsikten inte alls får något utrymme i denna definition. De allmänna riktlinjer för tolkningen som man möter i rättssystem grundade på civil law eller i internationella instrument betonar däremot som utgångspunkt de subjektiva elementen, avtalet ska tolkas i enlighet med parternas "gemensamma partsavsikt".[9] När en sådan gemensam partsavsikt inte kan fastställas, anvisas emellertid reservregler som påminner om den objektiva tolkningsmetoden i engelsk rätt, exempelvis att "avtalet ska tolkas i enlighet med hur det skulle uppfattas av

[5] S. Vogenauer, Interpretation of Contracts: Concluding Comparative Observations in Contract Terms 150 (A. Burrows & E. Peel eds., Oxford University Press 2007).

[6] C. Valcke, Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric i Exploring Contract Law 38 (J. W. Neyers, R. Bronaugh & S. G. A. Pitel eds., Hart Publisher, 2009).

[7] Förutom i not. 3–4 anmärkta arbeten, se H. Kötz, European Contracts Law 107ff. (Oxford University Press 1997) och fallstudierna i H. Beale, Cases, Materials and Text on Contract Law s. 667–710 (2nd ed., Hart Publishing, 2010).

[8] *Investors Compensation Scheme v. West Bromwich Building Society,* [1998] WLR 896, 912.

[9] UPICC Art. 4.1(1). Jfr även Draft Common Frame of Reference (DCFR) Art. II-8:101(1) och liknande formuleringar i Art. 1156 av franska Code Civil och § 133 i tyska civillagboken (BGB).

förnuftiga personer med samma bakgrund som avtalsparterna och med beaktande av samma bakomliggande omständigheter."[10]

Med hänsyn till svårigheten att bevisa en partsavsikt som skiljer sig från hur en förnuftig person skulle uppfatta avtalet med beaktande av avtalet som helhet och de relevanta bakomliggande omständigheterna, blir den subjektiva tolkningsmetoden i praktiken endast undantagsvis tillämplig på kommersiella avtal.[11] Det framstår också som om de subjektiva och objektiva tolkningsmetoderna i själva verket betonar två olika aspekter av en och samma tolkningsprocess; att fastställa parternas gemensamma avsikt är själva målet med tolkningen, men detta låter sig i praktiken endast göras med någon form av objektiv tolkningsmetod.[12] När de objektivt konstaterbara omständigheterna påvisar att ordalydelsen inte återspeglar parternas gemensamma avsikt, tillhandahåller såväl rättssystem grundade på common law som civil law metoder som avtalstolkaren kan tillgripa för att avtalet ska ges en innebörd som överensstämmer med denna gemensamma partsavsikt.[13]

Om vi lämnar de övergripande utgångspunkterna för tolkningen och i stället går in på hur innebörden av avtalsvillkor närmare ska fastställas är det svårt att hitta hållfasta regler. Rättsordningarna tillhandahåller olika former av maximer eller principer som ska hjälpa rättstillämparen att komma fram till en tolkning som överensstämmer med parternas avsikt. Eftersom dessa maximer eller tolkningsprinciper

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10 UPICC Art. 4.1(2) och DCFR Art. II-8:101(3).

11 Official Comment to the UPICC (UNIDROIT, 2004), 118 och I. Schwenzer (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG) 154 ff. (3rd ed., Oxford University Press 2009).

12 Jfr *Rainy Sky SA & Orsd v. Kookmin Bank*, [2011] UKSC 50, para. 14. I *Svenska Petroleum Exploration A.B. v. Lithuania,* [2006] EWCA Civ 1529, para. 24, där engelska Court of Appeal tillämpade litauisk rätt, ansåg domstolen att uttrycket "subjektiva uppfattningar" var missvisande och att en efterforskning efter en parternas egna privata uppfattningar skulle vara en meningslös övning. Parterna enades om att den korrekta tolkningsmetoden under litauisk rätt var att inte bara efterforska partsviljan med utgångspunkt från ordalydelsen i avtalet, utan också med stöd av andra tillgängliga tolkningsdata.

13 För engelsk och tysk rätt, se G. McMeel, The Construction of Contracts, s. 483 (2nd ed., Oxford University Press 2011) och B. Markesinis, H. Unberath, & A. Johnston, German Contract Law, s. 288 (2nd ed., Hart Publishing 2006).

i regel grundar sig på semantiska, logiska eller förnuftsmässiga överväganden överensstämmer de till stor del mellan olika rättssystem, även om de kan komma till uttryck på olika sätt. Dessa allmänna maximer eller tolkningsprinciper tar sig i allmänhet inte uttryck i strikta regler, utan ger allmänna hållpunkter för tolkningen, som sällan anvisar ett specifikt tolkningsresultat. För att tala med Oliver Wendell Holmes: ”general propositions do not decide concrete cases”.[14]

Detta för oss in på en diskussion kring uppfattningen att engelsk rätt skulle tillämpa en mer utpräglad språklig tolkning än andra rättssystem. Om man med språklig tolkning avser en tolkningsmetod där ord och uttryck fastställs med hänvisning till deras normala och lexikaliska betydelse utan beaktande av det sammanhang där de förekommit, framstår inte detta som någon rättvisande beskrivning av engelsk avtalsrätt.[15] Betoningen i modern engelsk rättspraxis på att avtalet ska tolkas som det uppfattas av en förnuftig person i parternas ställning och till betydelsen av de bakomliggande omständigheterna anses markera en utveckling bort från en bokstavstolkning till en ändamåls- eller kommersiell avtalstolkning.[16] Engelska domstolar har vidare återkommande visat sig vara beredda att se bortom ordalydelsen för att ge utrymme åt förnuftsmässiga överväganden.[17] Med detta är inte sagt att ordalydelsen saknar betydelse. Ordalydelsen måste rimligen utgöra den naturliga utgångspunkten för tolkningen i alla rättssystem. Men vad som alltmer kommit att understrykas i engelsk rätt är att tolkningsprocessen inte nödvändigtvis kan stanna där. De begränsningar rörande relevanta omständigheter som får beaktas vid tolkningen betyder emellertid att själva ramen för tolkningen i vissa fall kan vara mer begränsad i rättssystem som grundas på common law.

[14] Skiljaktig mening i *Lochner v. New York*, 198 U.S. 45, 76 (1905).

[15] För en mer ingående diskussion om avtalstolkning i engelsk rätt, se J. Rosengren, Engelsk avtalstolkning i ett svenskt perspektiv, SvJT 2010 s. 1-22.

[16] See Lord Steyn i *Mannai Investments Ltd v. Eagle Star Assurance Co. Ltd.,* [1997] AC 749, 770 och G. McMeel, The rise of commercial construction in contract law, [1998] LMCLQ 382. Det är svårt att finna någon saklig skillnad mellan “purposive” och “commercial” i fråga om tolkningsmetoder; det förefaller som om det senare uttrycket framstår som mindre kontroversiellt för en engelsk jurist.

[17] För ett färskt exempel, se *Rainy Sky,* ovan n. 10.

Många bedömare, inte minst engelska jurister, invänder mot beskrivningen att principerna för avtalstolkning har kommit att närma sig varandra och pläderar för, på grundval av praktiska erfarenheter eller exempel från rättspraxis, att engelsk rätt och andra rättssystem grundade på common law alltjämt lägger större vikt på de språkliga uttrycken än domstolar i rättssystem som grundas på civil law.[18] Ett påstående om att ett visst rättssystem är benäget att tillämpa en mer utpräglad språklig tolkningsmetod än andra är emellertid inte lätt att belägga genom empiriska undersökningar av rättspraxis. Ett flertal ledande avgöranden i engelsk rätt ger visserligen uttryck för en strikt språklig tolkning med hänvisning till betydelsen av förutsebarhet i internationell handel.[19] Men när man jämför sådana avgöranden med rättspraxis i andra länder måste man beakta den kommersiella bakgrunden till dessa avgöranden. En betydande del av engelsk rättspraxis i avtalsrättsliga tvister har sin kommersiella bakgrund inom befraktning av fartyg, finansiella transaktioner och internationell handel, där förutsebarhet traditionellt tillmäts stor betydelse. Rättsfall där domstolar tillämpar en strikt språklig tolkning för sådana avtalstyper och avtalssituationer kan påträffas inom de flesta rättssystem. Även domare eller skiljemän inom ett och samma rättssystem kan naturligtvis också ha olika uppfattningar om hur avtal ska tolkas och vilka värdering som ska vara styrande.[20] Detta rör i synnerhet de svårbedömda tolkningsfrågor, som blir föremål för prövning i överrätterna och som redovisas i rättspraxis. När man ska jämföra avtalstolkningsmetoder i olika rättssystem på grundval av rättspraxis ställs man följaktligen inför utmanande metodologiska frågeställningar.[21]

Eftersom avtalstolkningsprinciper till sin natur är allmänt hållna

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[18] Jfr J. Dalhusien, Dalhusien on Transnational Comparative, Commercial, Financial and Trade Law, vol. 2 20 (4th ed., Hart Publishing 2010).

[19] Se exempelvis *A/S Awilco of Oslo v. Fulvia S.p.A. di Navigazione of Cagliari (Chikuma)*, [1981] 1 WLR 314 och andra rättfall anmärkta i McMeel, ovan n. 11, s. 47ff.

[20] E. McKendrick, The Creation of a European Law of Contracts 35 (Kluwer 2004).

[21] Jfr diskussionen i M. Van Hoecke, Deep Level Comparative Law, i Epistemology and Methodology of Comparative Law s. 168–69 (M. Van Hoecke ed., Hart Publishing 2004).

och beroende av omständigheterna i det enskilda fallet, kan man sluta sig till att det sällan är möjligt att med något mått av säkerhet förutse när avtalstolkningsmetoder från ett rättssystem skulle medföra ett annat resultat än tolkningsmetoder från ett annat rättssystem. Man ska inte heller överdriva betydelsen av tolkningsprinciper för lösa konkreta avtalstolkningsproblem. Tolkningsprocessen är inte enbart en fråga om tillämpning av regler eller principer.[22] Den är i stor utsträckning avhängig av skiljemannens erfarenhet och intuition.[23] Denna intuition torde i sin tur återspegla skiljemannens rättsliga, kulturella och kommersiella bakgrund. En skiljeman med sin huvudsakliga bakgrund inom sjöfart eller internationell handel kan ha en annan inställning till avtalstolkning än någon med erfarenhet från andra områden. Skiljemannens egen uppfattning om sunt förnuft kan säkerligen ofta ha större betydelse för tolkningen än de avtalstolkningsmetoder som anvisas av den lag som är tillämplig på avtalet.

# 3 Ramen för avtalstolkningen

Ett särdrag för rättssystem som grundas på common law är de rättsliga begränsningar avseende vilken utredning som ska beaktas vid avtalstolkningen. Enligt den s.k. parol evidence rule[24] med ursprung i engelsk rätt är bevisning inte tillåten i syfte att ändra, lägga till eller dra ifrån vad som kommit till uttryck i det skriftliga avtalet. Denna regel är avsedd att skapa förutsebarhet för avtalsparterna och hålla nere rättegångskostnaderna genom att begränsa den utredning som är tillåten för

[22] En kraftfull kritik mot användbarheten av allmänna avtalstolkningsprinciper framförs av J. Samuelsson, Tolkningslärans gåta (Iustus, Uppsala, 2011).

[23] Lord Steyn, The Intractable Problem of the Interpretation of Legal Texts 25 Syd. L. Rev. 5, 8 (2003). Intuition och dess begränsning diskuteras i D. Kahneman, Thinking, Fast and Slow s. 234ff (Penguin, 2011).

[24] Se allmänt härom E. Peel, Treitel on Contracts, s. 211ff. (13th ed., Sweet & Maxwell, 2011) och A. Farnsworth, Contracts s. 427–48 (3rd ed., Aspen, 2000).

att tolka avtalet.[25] Regeln är emellertid föremål för ett stort antal undantag som i hög utsträckning begränsar dess räckvidd. Innebörden av parol evidence rule och den betydelse som regeln har vid avtalstolkningen varierar också mellan de olika rättsystem som tillämpar någon form av sådan regel.[26]

Genom parol evidence rule i dess traditionella form begränsas avtalstolkningen till det skriftliga avtalets ramar och tillåts inte bevisning i form av avtalspreliminärer eller annan bevisning utanför själva avtalsdokumentet. Detta restriktiva synsätt är inte förenligt med de tolkningsprinciper som kommit till uttryck i senare engelsk rättspraxis, som anvisar att avtalskontexten ska beaktas till och med när det inte finns någon uppenbar otydlighet i det skriftliga avtalsdokumentet.[27] Trots att det i litteraturen pläderats för att avskaffa de rättsliga begränsningar som återstår kring vilka omständigheter som får beaktas vid tolkningen,[28] har man emellertid i engelsk rättspraxis nyligen bekräftat som gällande rätt att bevisning om vad som förekommit under avtalsförhandlingarna och parternas efterföljande agerande normalt inte ska få beaktas vid avtalstolkningen i engelsk rätt.[29]

Den praktiska betydelsen av dessa formella begränsningar i relevanta tolkningsdata ska emellertid inte överdrivas. När omständigheter av betydelse faller inom de rättsliga begränsningarna för tolkningen, tillhandahåller engelsk rätt ventiler i form av ”rectification” och ”estop-

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25 I *Shogun Finance Ltd v. Hudson*, [2004] UKHL 62, para. 49, hänvisade Lord Hobhouse till regeln som “one of the great strengths of English commercial law” och “one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty.”

26 Regeln om parol evidence förefaller spela en större roll i USA än in modern engelsk rätt, se S.J. Burton, Elements of Contract Interpretation s. 63ff. (Oxford University Press, 2009).

27 Se McMeel, ovan n. 11, s. 185. Den så kallade “four corners rule” tillämpas i USA (se Burton, ovan n. 24), även om det inte betyder att varje bevisning utanför avtalets ramar exkluderas; även här finns undantag.

28 Se McMeel, ovan n. 11, s. 232 med vidare hänvisningar till litteraturen.

29 Se *Chartbrook Ltd. v. Persimmon Homes Ltd*., [2009] UKHL 38, para. 39. Det är att märka, att Lord Hoffman bedömer avtalstolkning i fransk rätt vara “altogether different from that of English law.”

pel by convention" för att undvika obilliga resultat.[30] Enligt vissa uppfattningar som kommer till uttryck i litteraturen är engelska domstolar i allmänhet ovilliga att undanta bevisning utanför avtalets ramar, men kräver att sådan bevisning ska vara av avgörande betydelse för att den ska tillåtas påverka tolkningen av ett till synes fullständigt avtalsdokument.[31]

Oavsett vilken betydelse som ska tillmätas de rättsregler som begränsar den rättsliga ramen för avtalstolkningen i common law, uppstår emellanåt frågor och missförstånd kring begränsningsreglerna för tolkningsdata i internationella skiljeförfaranden. En grundläggande fråga rör hur man rättsligen ska karaktärisera dessa regler. Frågor kring bevisning är i allmänhet underkastade domstolslandets lag (*lex fori*) och inte den materiella rätten som är tillämplig på avtalet.[32] Benämningen parol evidence rule och hänvisningar till att bevisning inte är "tillåten" som ett resultat av denna eller andra begränsningsregler riskerar att leda tanken fel; sådana regler ska rätteligen karaktäriseras som materiella och inte processuella regler.[33] De är i själva verket avtalstolkningsregler som undantar viss bevisning från att tillmätas betydelse och om någon fråga uppstår om bevisningen ska tillåtas, grundas detta på att bevisning som är irrelevant för tolkningen inte ska beaktas.[34] Även om moderna skiljedomslagar och skiljereglementen ger en skiljenämnd utrymme att "determine the admissibility, relevance, materiality, and weight of any evidence,"[35] styrs de omständigheter som en skiljeman får beakta vid avtalstolkningen av den lag som är tillämplig på avtalet. Att låta de processuella reglerna bestämma vilken bevisning som ska tillmätas betydelse för att utreda den gemensamma partsavsik-

30 *Chartbrook*, ovan n.27, para. 41, och McMeel, ovan n. 11, s. 483ff.

31 E. McKendrick (ed.) Goode on Commercial Law s. 102 (4th ed., Penguin, London, 2009).

32 Rome I-förordningen art. 1(3).

33 C. Tapper, Cross and Tapper on Evidence s. 680 (12th ed., Oxford University Press 2010) och Burton, ovan n. 24, s. 65 med vidare hänvisningar.

34 R. Jacobs, L. S. Masters och P. Stanley, Liability Insurance in International Arbitration: The Bermuda Form, s. 38 (2nd ed., Hart Publishing 2011).

35 UNCITRAL Rules art. 25(6) och IBA Rules on the Taking of Evidence in Int'l Arbitration art. 9(1).

ten skulle inte medföra en lojal tillämpning av den materiella rätten.[36]

Det ovanstående kan illustreras av ett ICSID-avgörande där skiljemännen fann att deras skyldighet att lojalt tillämpa engelsk rätt innebar att de var förhindrade att beakta parternas uppträdande under avtalsförhandlingarna och deras efterföljande agerande.[37] Trots detta gick skiljenämnden vidare och diskuterade bevisningen kring dessa tolkningsdata, men fann att det inte spelade någon roll om bevisningen kunde tillmätas betydelse eller inte, eftersom den inte skulle ha betydelse för skiljenämndens bedömning.[38] Det finns också exempel i rättspraxis där engelska domstolar som tillämpat ett annat lands lag har beaktat vad som förekommit under avtalsförhandlingarna och parternas efterföljande agerande, när sådan bevisning varit tillåten enligt den lag som varit tillämplig på avtalet.[39]

Skiljemän som inte är utbildade i eller har praktiserat i ett rättssystem som grundas på common law, eller som kommer från ett annat rättsystem inom common law-familjen än det som är tillämpligt på avtalet, kan säkerligen uppfatta begränsningsreglerna för tolkningsdata med deras många undantag som tekniska och svåra att tillämpa. Även om de har beaktat bevisning som ger stöd för den innebörd de väljer att ge avtalet, kan skiljemännen vara försiktiga med att hänvisa till sådan bevisning och i stället grunda övervägandena i skiljedomen på avtalets ordalydelse snarare än annan bevisning. Även om IBA Rules of Evidence[40] eller andra tillämpliga procedurregler möjliggör för skiljenämnden att avvisa viss bevisning som obehövlig, medför den komplexitet som präglar begränsningsreglerna för tolkningsdata att det också ofta framstår som ett bättre alternativ för skiljenämnden att tillåta bevis-

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36 See L. Collins (ed.), Dicey, Morris and Collins on The Conflict of Laws, para. 32–193 (14th ed., Sweet & Maxwell 2006). Parol evidence rule anses följaktligen inte vara förenlig med en tillämpning av CISG, se Schwenzer, ovan n. 9, s. 161–62 och CISG Advisory Council Opinion No. 3.

37 *Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15 (ECT).

38 *Azpetrol Oil,* ovan n. 35, at 92–101.

39 Se exempelvis *Svenska Petroleum*, ovan n. 10.

40 IBA Rules, ovan n. 33, art. 9(2).

ningen och i stället pröva dess betydelse som en del av själva saken, om det inte på förhand framstår som uppenbart att bevisligen är obehövlig.[41] Om någon part gör gällande att det skulle föreligga något undantag från begränsningsreglerna i det enskilda fallet torde skiljenämnden inte ha något annat alternativ än att handlägga frågan på det sättet.

När man diskuterar vilken betydelsen av begränsningsregler har för avtalstolkningen är det viktigt att understryka att utredning som undantas genom sådana regler inte nödvändigtvis tillmäts större betydelse i rättssystem som saknar formella begränsningsregler beträffande sådan bevisning. Begränsningsreglerna i common law kan sägas tillhandahålla ett formaliserat och något fyrkantigt verktyg för att fastställa vad varje skiljeman måste förhålla sig till, nämligen vilken bevisning som är relevant för avtalstolkningen och vilket bevisvärde denna ska tillmätas.[42] Många kommersiella avtal innehåller vidare integrationsklausuler ("entire agreement" eller "merger clauses"), som ger upphov till liknande tolkningsproblem för skiljemannen som parol evidence rule, oavsett vilken rättsordning som är tillämplig på avtalet.

# 4 Avtalstolkning och utfyllande rättsregler

Även om allmänna tolkningsprinciper är likartade i de flesta rättsordningar och ger utrymme för olika bedömningar beroende på omständigheterna i det enskilda fallet, kan andra rättsliga faktorer inverka på tolkningsresultatet. Den tillämpliga lagen kan innehålla mer handfasta rättsregler av betydelse för tolkningen. Sådana rättsregler uppträder i olika former och medför att det ibland kan vara svårt att skilja avtalstolkning från tillämpning av rättsregler under den tillämp-

[41] I ett klandermål vid Svea hovrätt (24 februari 2012, mål T 6238-10) ansågs det inte strida mot *ordre public* för en skiljeman att vid en tillämpning av SCC Expedited Arbitration Rules vägra en begäran om en muntlig förhandling när muntlig bevisning inte skulle vara tillåten enligt parol evidence rule.

[42] Se J. Rosengren, SvJT 2010 s. 8 och J. Hellner, The parol evidence rule och tolkningen av skriftliga avtal, Festskrift till Bertil Bengtsson, s. 188 (Stockholm, 1993).

liga lagen.[43] Många internationella avtal syftar till att undvika detta genom att tillhandahålla en fullständig reglering av avtalet.[44] Ett försök att helt och hållet skilja avtalet från dess tillämpliga lag framstår emellertid som illusorisk. Frågan om avtalet fullständigt reglerar parternas överenskommelse i något specifikt avseende och därmed medför att utfyllande rättsregler är obehövliga, är i sig en avtalstolkningsfråga, som måste fastställas i enlighet med den lag som är tillämplig på avtalet.

Ett ord eller uttryck i avtalet kan ha bedömts eller existera som ett juridiskt-tekniskt begrepp i det lands lag som är tillämplig på avtalet. Om den tillämpliga lagen tillskriver vissa ord och uttryck en särskild betydelse blir detta ofta styrande för tolkningen.[45] Men eftersom ord och uttryck är beroende av det sammanhang inom vilket de förekommer är det inte alltid en enkel uppgift att fastställa om parterna avsåg att orden eller uttrycken skulle ges en sådan innebörd. Som exempel kan nämnas att det engelska uttrycket "condition" har olika betydelser i engelsk rätt beroende på sammanhanget.[46] Vid tolkning av uttryckets betydelse enligt engelsk rätt måste skiljenämnden därför avgöra om parterna avsett att använda det i någon juridiskt-teknisk betydelse eller om de avsett att ge det någon annan innebörd.[47] Om ett ord eller uttryck inte har någon etablerat juridisk-teknisk betydelse men har blivit föremål för tolkning i rättspraxis, får det bedömas utifrån avtalskontexten vilken betydelse sådan rättspraxis ska tillmätas. Intresset av förutsebarhet vid tolkningen talar för att tidigare rättspraxis i tolkningsfrågor ska tillmätas särskild betydelse vid tolkningen av standardavtal eller standardklausuler som inkorporerats i avtalet.[48] Detta övervägande gör sig inte gällande med samma styrka vid tolkningen av individuellt framförhandlade avtal.

När ett ord eller uttryck ges en särskild betydelse enligt den tilläm-

[43] Se utförligt härom J. Samuelsson, Tolkning och utfyllning (Iustus, 2008).

[44] Jfr diskussionen i G. Cordero-Moss (ed.), Boilerplate Clauses, International Commercial Contracts and the Applicable Law (Cambridge University Press 2011).

[45] Collins, ovan n. 34, paras. 32–192.

[46] Jfr N. Andrews m.fl., Contractual Duties s. 189ff. (Sweet & Maxwell, 2011).

[47] *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] AC 235, HL.

[48] McMeel, ovan n. 11, at 81.

pliga lagen kan man fråga sig om det är fråga om avtalstolkning eller rättstillämpning. Gränsen mellan fastställande av uttryckens betydelse och utfyllning med dispositiva rättsregler är svåra att särskilja inom ramen för en och samma rättsordning.[49] De olika momenten av tolkningsprocessen går in i varandra. Skillnaderna mellan tolkning och utfyllning blir däremot mer problematisk när man försöker separera dem. Dispositiva rättsregler kan ge uttryck för rättspolitiska överväganden som kan påverka tolkningen. Medan en skiljeman som är förtrogen med ett visst rättssystem kan röra sig sömlöst mellan tolkning och utfyllning och har förståelse för deras respektive roll i rättsordningen, förhåller det sig inte på samma sätt i ett internationellt skiljeförfarande där skiljemannen kan ha begränsad eller ingen kännedom om den tillämpliga lagen på avtalet. Olika tolkningsideologier skiljer sig också i fråga om det är ändamålsenligt att låta dispositiva rättsregler påverka tolkningen. Vissa menar att dispositiva rättsregler endast ska tillgripas som en sista utväg när en viss frågeställning inte kan avgöras på grundval av parternas avtal. Andra tolkningsideologier menar att dispositiva rättsregler ska uppfattas som noga övervägda normallösningar, som inte ska sättas åsido med mindre parterna klart gett uttryck från att frånvika dessa.[50]

Att separera avtalstolkningen från dess rättsliga kontext blir ännu svårare när man beaktar de olika roller som avtalstolkning kan spela i olika rättssystem. Olika rättsprinciper eller rättsregler kan samverka med avtalstolkning på olika sätt. En sådan rättsprincip som återfinns i skiljemannens verktygslåda i vissa rättssystem är den omdiskuterade läran om lojalitetsplikt. Lojalitetsplikten är förmodligen ett av de mest svårfångade och missförstådda begreppen i den internationella avtals-

[49] Kötz, ovan n. 5, at 119.

[50] Förarbeten till svenska sjölagen anger exempelvis att de dispositiva reglerna om befraktningsavtal ska tillämpas "utom när parterna själva klart överenskommit om en avvikande lösning", SOU 1990:13, s. 86. För kritiska synpunkter, se H. Tiberg, The Nordic Maritime Code [1995] LMCLQ s. 536–37.

rättsliga diskussionen.[51] Det är också ett begrepp som, när man väl försökt sig på att definiera det inom ramen för en rättsordning, inte kan ges samma innebörd när begreppet diskuteras utifrån en annan. I stället för att diskutera förekomsten och innebörden av lojalitetsplikten i sig, bör man snarare undersöka vilken funktion lojalitetsplikten har i den rättsordning där den uppträder. Den lojalitet som ska tillämpas vid tolkningen enligt 1969 års Wien-konvention om internationella konventioner är inte mer än en anvisning om att ett traktat ska ges en rimlig tolkning mot bakgrunden av traktatens ändamål och syfte.[52] Avtalsrättsliga grundsatser i olika rättsordningar om kontraktuell lojalitetsplikt kan ha en vidare funktion och få större betydelse vid tolkningen, men det är i allmänhet inte rättvisande att beskriva dem som övergripande skälighetsnormer som ingriper i tolkningen och tillämpningen av kommersiella avtal.[53] Medan man i vissa rättsordningar använder sig av allmänna principer om lojalitetsplikt för att uppnå ett visst resultat, använder man sig i andra rättssystem av läror om underförstådda avtalsvillkor (”implied terms”) eller extensiv avtalstolkning för att huvudsakligen uppnå samma resultat.

Det sagda kan illustreras av de olika tekniker som används för att tygla utövandet av avtalsbestämmelser som ger en part ensidig bestämmanderätt, exempelvis en långivares rätt att justera räntan i finansiella avtal. Medan engelska domstolar har använt sig av implied terms för att förhindra missbruk av en sådan ensidig bestämmanderätt,[54] kan rättssystem som tillämpar en lära om kontraktuell lojalitetsplikt i stället använda sig av en sådan lära för att förhindra sådant missbruk. Högsta domstolen i Sverige har uppnått i huvudsak samma resultat genom

[51] En komparativ undersökning som tillämpar en funktionell metod är R. Zimmerman & S. Whittaker, Good Faith in European Contract Law (Cambridge University Press 2000). Se även Dalhuisen, ovan n. 16, at 21, 65ff.

[52] Art. 31(1) i 1969 Wien-konventionen om traktaträtten. Jfr även diskussionen i R. Gardiner, Treaty Interpretation, s. 147ff. (Oxford University Press 2008).

[53] Den skandinaviska litteraturen om kontraktuell lojalitetsplikt är omfattande, se bl.a. J. Munukka, Kontraktuell lojalitetsplikt (Jure 2007) och H. Nazarian, Lojalietetsplikt i kontraktsforhold (Oslo 2007).

[54] *Paragon Finance plc v. Nash*, [2001] EWCA Civ 1466. Jfr även McMeel, ovan n. 11, s. 359ff.

traditionell avtalstolkning.[55] Även om det kan hävdas att underliggande överväganden kring skälighet och rimlighet (eller lojalitet) i grunden ligger bakom dessa olika tekniker för att tygla missbruk av avtalsbestämmelser som ger en part ensidig bestämmanderätt, skiljer sig rättssystemen i fråga om det är lämpligt att vid lösningen av konkreta avtalsrättsliga problem ta utgångspunkt från en överordnad lojalitetsprincip som ger uttryck för dessa överväganden. I engelsk rätt har man valt en "piecemeal approach" där rättsordningen successivt utvecklar och tillhandahåller olika former av verktyg för att ingripa mot oskälighet i vissa särskilda avtalsförhållanden.[56] Det förhållandet att en viss rättsordning tillämpar en övergipande lära om lojalitetsplikt säger oss möjligen något om dess rättsliga tradition och systematik, men mindre om omfattningen och innebörden av en sådan lojalitetsplikt.

Avtalstolkningen som rättslig metod är så flexibel att den kan tillgripas av skiljemännen för att skipa rättvisa mellan parterna i flera olika sammanhang.[57] Skiljenämnden kan många gånger välja mellan att uppnå ett visst resultat genom avtalstolkning eller genom att tillämpa materiella rättsregler som tillhandahålls av den tillämpliga lagen. Ett klassiskt exempel rör oskäliga friskrivningsklausuler, där skiljemännen antingen tolkningsvis kan komma fram till att friskrivningsklasulen inte är tillämplig (s.k. dold kontroll) eller tillämpa de rättsregler för kontroll av friskrivningsklausuler som kan finnas i den tillämpliga lagen för att pröva om friskrivningsklausulen står sig (s.k. öppen kontroll). Avtalstolkningen kan därmed bli ett kraftfullt verktyg i händerna på skiljemännen för att komma fram till ett i deras mening rimligt och rättvist avgörande av tvisten. En lojal tillämpning av den tillämpliga lagen kräver emellertid en förståelse av och respekt för avtalstolkningens roll i förhållande till andra rättsregler och rättsprinciper under den tillämpliga lagen.

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55 NJA 2005 p. 142.

56 *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] QB 433, CA.

57 Jfr diskussionen i P. Atiyah, Essays on Contract, s. 244 ff. (Oxford University Press 1986).

# 5 Internationella avtalsrättsliga principer

UNIDROIT Principles of International Commercial Contracts (UPICC) innehåller bestämmelser som särskilt utarbetats för internationella avtal. UPICC har mottagits väl i den internationella avtalsrättsliga diskussionen och har ofta åberopats av såväl skiljenämnder som domstolar över hela världen. Varje diskussion om tolkning av internationella avtal skulle därför vara ofullständig utan en diskussion om dessa principer.

Bestämmelserna i UPICC är starkt influerade av FN-konventionen om internationella köpeavtal (CISG), men är mer omfattande och sofistikerade. Utgångspunkten för tolkningen i artikel 4.1 UPICC överensstämmer i huvudsak med artikel 8 CISG, som anvisar en metod som bäst kan beskrivas som principiellt subjektiv, men objektiv i praktiken. Artikel 4.3 UPICC har samma inkluderande inställning till relevanta tolkningsdata som artikel 8(3) CISG, genom att förskriva att hänsyn ska tas till "alla relevanta omständigheter". Exemplifieringen av sådana omständigheter innefattar "avtalets natur och ändamål", men också avtalsförhandlingarna och parternas senare uppträdande, som faller utanför den bevisning som kan tillmätas betydelse enligt många rättsordningar som grundas på common law.

Andra bestämmelser återspeglar tolkningsprinciper som påträffas i en eller annan form i de flesta rättsystem. Artikel 4.3 UPICC föreskriver att ord och uttryck ska förstås mot bakgrund av avtalet som helhet. Enligt artikel 4.4 UPICC ska avtalsvillkor vidare tolkas för att ge dem betydelse snarare än att frånta dem betydelse. Artikel 4.6 UPICC innehåller ett uttryck för den rättspolitiskt grundande oklarhetsregeln (*contra proferentem*), som föreskriver att om ett avtalsvillkor som tillhandahålls av en avtalspart är oklart, ska avtalet tolkas till förmån för den andra parten. Tolkningsregeln är inte avsedd att tillämpas reflexmässigt så snart något avtalsvillkor är oklart; det är en reservregel som ska tillämpas som en sista utväg när det inte är möjligt att undan-

röja oklarheten med tillämpning av andra tolkningsmetoder.[58] UPICC ger också ledning för tolkningen av vanliga avtalsvillkor och klausuler i internationella avtal, så som integrationsklausuler (artikel 2.1.17), åtaganden om ”best efforts” (artikel 5.1.4), hardship (artikel 6.2) och force majeure-klausuler (artikel 7.1.7).[59]

UPICC kan tillämpas som *lex contractus* när parterna inte har valt någon tillämplig lag, även om det finns goda grunder för skiljemännen att vara försiktiga med att tillämpa dem i stället för någon nationell rättsordning.[60] Det är mer vanligt att skiljemännen använder sig av UPICC som utfyllning eller stöd för tillämpningen av internationella konventioner eller nationell rätt. Skiljemän åberopar också UPICC eller andra internationella instrument för att legitimera en bedömning av en rättsfråga enligt nationell rätt.[61] Även om det kan förefalla okontroversiellt att hänvisa till UPICC för tolkning av ett avtalsvillkor som inte har någon etablerad betydelse i den tillämpliga lagen, bör skiljemännen akta sig för att hänvisningen till innebörden av ett begrepp i ett internationellt instrument inte innebär att skiljemännen i själva verket tillämpar detta instrument i stället för den tillämpliga lagen.

De frågeställningar som en användning av internationella instrument kan ge upphov till kan illustreras av ett avgörande från Högsta domstolen i Schweiz, avseende klander av en skiljedom enligt ICCs skiljereglemente som avgetts i Zürich.[62] Skiljenämnden stod inför tolkningen av uttrycket “material breach” i ett avtal som skulle tolkas i enlighet med schweizisk rätt så som denna tillämpas mellan nationella parter. Efter att skiljemännen funnit att “material breach” inte var ett definierat rättsligt begrepp enligt schweizisk rätt, hänvisade de till be-

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58 S. Vogenauer & J. Kleisterkamp (eds.), Commentary on the UNIDROIT Principles of International Commercial Contracts (UPICC) s. 528 (Oxford University Press 2009).

59 Jfr även M. Fontaine & F. de Ly, Drafting international Contracts: An Analysis of Contract Clauses (Transnational Publishers 2006) och den komparativa studien i Cordero-Moss, supra n. 42.

60 Se Vogenauer & Kleisterkamp, ovan n. 55, at 90–91.

61 Ibid. s. 95ff.

62 Schweiziska federala högsta domstolen, Första civila kammaren, 4A_240/2009, 16 December 2009.

greppet ”fundamental breach” enligt artikel 25 CISG och artikel 7.3.1 UPICC till stöd för sin tolkning. Den förlorande parten försökte klandra skiljedomen på den grunden att hänvisningen till CISG innebar att skiljemännen överskred sin behörighet genom att inte hålla sig till parternas uttryckliga lagval och berövade parternas rätt att utföra sin talan genom att inte ge dem tillfälle att yttra sig över tillämpningen av artikel 25 CISG. Den schweiziska högsta domstolen avslog klandertalan och bekräftade att en skiljemans hänvisning till sådana internationella instrument till stöd för tolkningen av avtalet inte innebar något överskridande av deras uppdrag eller stred mot grunderna för rättsordningen enligt schweizisk rätt.

Skiljemännens tolkningsmetod har kritiserats med hänvisning till att distinktionen mellan tillämpning av andra rättsregler och användandet av dem för avtalstolkningen framstår som något konstgjord och att skiljenämnden i själva verket kan sägas ha fastställt parternas rättigheter och skyldigheter enligt avtalet med tillämpning av rättsregler som uttryckligen exkluderats av avtalsparterna.[63] Med detta synsätt skulle skiljemännen ha fastställt innebörden av uttrycket “material breach” med hänvisning till motsvarande eller liknande begrepp i schweizisk rätt i stället för att ta genvägen via internationella instrument. Även om detta rättsfall illustrerar att förekomsten av internationella avtalsprinciper och instrument inte ursäktar en undersökning av innehållet i den tillämpliga lagen, så är det svårt att kritisera en hänvisning till sådana principer och internationella instrument när den tillämpliga lagen inte ger någon vägledning i tolkningsfrågan eller där parterna inte har förebringat tillräcklig utredning om den tillämpliga lagen. När det gäller internationella standardavtal finns det också starka argument som talar för internationella tolkningsprinciper ska tillämpas i syfte att skapa en enhetlig tillämpning avtalen.[64] Skiljemän som använder sig av internationella principsamlingar och andra internationella instrument som stöd för avtalstolkningen bör emellertid vara uppmärksamma på att detta inte medför att de i praktiken tillämpar

[63] J. Kleisterkamp, ASA Bulletin, (2011, Volume 29, Issue 2), s. 474–86.

[64] Se Ulrich Magnus i Cordero-Moss, ovan n. 42, s. 187.

andra rättsregler än dem som parterna anvisat som tillämpliga på avtalet.

# 6 Sammanfattning

När man jämför olika avtalstolkningsmetoder och deras betydelse är det nödvändigt att se bortom retoriken kring tolkningsprocessen i de olika rättsordningarna. Även om det finns metodmässiga skillnader är avtalstolkningsprinciper i allmänhet så flexibla och beroende av omständigheterna i det enskilda fallet att det sällan är möjligt att med någon säkerhet förutse när avtalstolkningsmetoder från en rättsordning nödvändigtvis skulle leda till ett annat resultat än tolkningsmetoder från en annan rättsordning. Man ska därför vara försiktig med att godta generaliserande omdömen om avtalstolkningsmetoder i olika rättssystem, inklusive den förmenta dikotomin mellan common law och civil law. Synsättet att avtalstolkning är en konst och inte någon vetenskap är inte rättvisande såtillvida att tolkningen äger rum mot bakgrund av rättsregler och en viss rättslig kontext. Men det finns förstås en gräns för hur långt tolkningsprocessen kan fångas upp i eller alls kontrolleras av rättsregler. Att tolkningsregler till sin natur är svårfångade och flexibla behöver emellertid inte betyda att skillnader mellan olika rättsordningar saknar betydelse. En lojal tillämpning av den lag som är tillämplig på avtalet kräver skiljemannens förståelse av och respekt för avtalstolkningens roll i den relevanta rättsordningen och dess förhållande till olika rättsregler. Olika rättsordningar behöver inte heller ha samma uppfattning om vad som är en avtalstolkningsfrågor och vad som inte är det. För avtalstolkaren gäller det att ha ett öppet sinne inför skillnaderna, men samtidigt inte dra alltför långa slutsatser av den metod som en rättsordning anvisar för att angripa avtalstolkningsproblem. Svårigheten att ge några allmänna riktlinjer eller principer för denna verksamhet gör att avtalstolkningen gärna framstår som svårare i teorin än i praktiken.

# Charterparty law – some ideas for future research projects

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## 1 Introduction

The purpose of this paper is to suggest some research topics under the label "flexibility and risk allocation in long term contracts", originating from the law of chartering of ships. The selection of topics is to some extent random; no doubt there may be other fruitful topics than those raised here. Moreover, I do not venture to give any clear answer to the various questions raised; I merely raise them as possible stepping-stones for further research.

I have chosen to split my review in two: First some remarks on substantive law aspect, then some remarks on methods of construction of contracts. In both respects the review has a comparative angle from Norwegian towards English law due to the fact that the law of chartering is highly influenced by English (and partly American) law.

## 2 "Flexibility" and time chartering

On the topic of substantive law time chartering is an obvious candidate under the label "flexibility in long term contracts". For example in a 10 year time charter; with trading limits worldwide; with a wide combination of contractual cargoes; with a right for the charterer to decide the nature of cargo documents to be issued, and so on, the notion of flexibility constitutes so to speak the very essence of the contract. Obviously there are restrictions to such flexibility provided for in the contract

itself. There are safe port clauses, war clauses, ice clauses etc. But there are plenty of remaining areas in need of legal resolution outside the scope of these clauses.

One example: To what extent has the shipowner assumed the risk of damage to the vessel outside of safe port or war risk or ice clauses? In recent times that type of question has come up, following the piracy threat in the Gulf of Aden.[1] The answer may of course depend on facts but it also depends on notions of law, like the notion of assumption of risk and, in Norwegian law, the doctrine of "bristende forutsetninger" (frustrated expectations).[2]

Another example: What is the extent of a shipowner's right of indemnity against the charterer for suffering inconvenience by complying with charterer's orders? Also this may be covered by clauses, or it may not be. Some time ago I was involved in a case where the ship was ordered to load a grain cargo at a Russian port. The order was as such legitimate under the terms of the charter. However, there was a risk of insects (gipsy moths) in cargoes from that area which had caused U.S and Canadian health authorities to place 6 months ban on vessels having traded there. After redelivery of the vessel the shipowner suffered losses by obtaining reduced hire rate under the next employment, due to those trading restrictions involving Canada and the U.S. Could the shipowner recover such loss of income from the previous charterer?

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1 See e.g. my article Piracy in the Gulf of Aden, Nordisk Membership Circular, No 568, February 2009.

2 See the many cases under Norwegian/Nordic law concerning increase of war risk and the shipowner's entitlement to terminate: Nordiske Domme (ND) 1920.469 SH; ND 1921.17 NH; ND 1921.19 NH; ND 1921.196 NH; ND 1921.497 NH; ND 1923.517 SH; ND 1944.241 NV. See also Section 394 third paragraph of the Maritime Code (MC) regulating the parties' entitlement to terminate in case of (increased) war risk. A noteable feature is that Section 394, covering time chartering and introduced in the Code in 1939, does not mention piracy risk while the corresponding (and elder) provision for voyage chartering does so mention, in Section 358. The reason for omitting piracy in time chartering was apparently that such risk in 1939 was considered outdated, see Johs. Jantzen, Godsbefordring til sjøs, 2. edition, 1952, page 322: "Sjørøveri som en hindring eller fare for skipsfarten vil vanskelig kunne forekomme nå for tiden." ('Piracy as an obstacle or danger to shipping will hardly occur nowadays', my translation')

There was no breach of charter. Are there doctrines outside the scope of breach which may provide a remedy?

Under English law there is the doctrine of indemnity for compliance with charterer's orders.[3] Under Norwegian law there may be something similar, like the notion that "risk should follow function."[4] Admittedly this "risk- follows-function" principle primarily refers to remuneration risk, not "risk" in terms of liability for damages. But also on this latter point there is in Norwegian law some indication that "liability-follows-function" as held in the arbitration case Jobst Oldendorff[5] where the shipowner was awarded indemnity against the charterer for third party liability incurred by the shipowner in consequence of an event within the charterer's "functions". But the scope of such doctrines is fairly loose, both under English and Norwegian law, and perhaps for good reasons as such doctrines may involve intricate aspects of causation and also aspects of adjacent areas of law, like liability for breach of contract. Moreover, such doctrines often become intertwined with construction of the terms of the contract: does the contract exclude their application, or are the doctrines perhaps already consumed by the contract terms?[6]

The purpose of the above review has simply been to illustrate that what could be termed "flexibility" in contracts may have a flip side of partly unexplored legal terrain – and it may be worth mentioning that the above English gipsy moth case was settled amicably for lack of certainty of the English law position.

Off-hire is another feature of time chartering, falling squarely within our label of "risk allocation in long term contracts". As will be trite, the essence is that charter hire is not payable if charterers are deprived of

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3 An important decision is the Island Archon, [1994] 2 Lloyd's Rep 227, which concerned a (fictitious) cargo claim brought against the shipowner by the port authorities at Basrah, Iraq, for which the Court of Appeal held the shipowner entitled to be indemnified based on the doctrine of indemnity for compliance with charterer's orders, i.e. their sailing orders to Basrah.

4 See e.g. Viggo Hagstrøm, Obligasjonsrett, 2002, pages 40 and 320-22.

5 ND 1979.364.

6 See my article, The English doctrine of indemnity for compliance with time charterer's orders – does it exist under Norwegian law? (to be published in SIMPLY 2012)

the use of the ship by reason of certain off-hire events. The details of this we shall not go into. However, viewed from a perspective of general contract law the phenomenon of off-hire is not much explored.[7] Is off-hire "mislighold" (failure of performance), is it "gjensidighetsbeføyelse" (right of retention), or is it a mere right of set-off in payment for certain events? Perhaps off-hire is a mixture of things not easily captured by such categories.

This type of structural analyses may be of value, not only academically but also when advising on practical cases. For example: What if the service of the vessel is prevented by off-hire events but the charterer is at the same time prevented from using her, for example by lack of employment? What is then the decisive factor for whether or not the vessel is off-hire: is it the (hypothetical) deprival of use, or the fact that the charterer does not suffer any loss of time? Charterparty clauses are surprisingly silent on this and the Maritime Code is not very clear.[8] The answer may therefore turn on more fundamental analyses of contract law.

Another example: What is the limit to charterers' right to invoke off-hire if the off-hire event is brought about by charterer's conduct? Must the charterer be in breach of contract to be deprived of the remedy (for example when supplying the vessel with bad bunkers which damages the machinery, thus putting the vessel prima facie off-hire)? Or are there other relevant criteria, like an approach based on the proximity of charterer's conduct to the off-hire event? Also here charter-

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7 Some discussion can be found in the following: Kjetil Krokeide, Forutsetningslæren og misligholdsbegrepet, særlig i langsiktige kontraktsforhold, TfR årg. 90 (1977), pages 569 ff (particularly pages 582 and 633-42); my book, Forsinkelse i havn – risikofordeling ved reisebefraktning, 2009, (Solvang) pages 227-31, 207-209, 250-55, 417-21; Kai Krüger, Norsk kontraktsrett, 1989, pages 197, 203, 206, 209; Hans Petter Michelet, Håndbok i tidsbefraktning, 1997, pages 333 ff.

8 MC Section 392 refers to "… the time lost to the charterer ..." thus indicating that the actual loss of time suffered by the charterer is decisive, but the formulation is probably aimed at different situations than those of competing hindrances, see the cases Arica and Hindanger discussed below. See similar discussion in voyage chartering and laytime matters, Solvang, pages 346 ff. and 385-87.

party clauses are surprisingly silent.[9] The Maritime Code seems to take too narrow an approach in that only conduct for which the charterer is liable appears to deprive him of the off-hire remedy.[10] Also this topic could therefore benefit from a more fundamental study. Moreover, it is linked to the doctrines already mentioned; the Norwegian notion of "risk follows function" and the English doctrine of "indemnity for compliance with orders".

The development of off-shore supply contracts has further expanded the charterparty topics and introduced new contractual phenomena. Traditional off-hire may now be replaced by a variety of hire rates depending on the cause of delay, extending from "traditional" events within the shipowner's sphere of risk, to events traditionally within the charterer's sphere of risk: there may be standby off-hire rates, force majeure off-hire rates, vessel maintenance off-hire rates, and vessel defect off-hire rates. Presumably this development is driven by a combination of bargaining power and an assessment of the parties' proximity to the various causes of delay. From a theoretical viewpoint this clearly is of interest as it illustrates a bridging of new and traditional contractual phenomena, also shedding further light on my above point about the legal nature of off-hire.

Similar hybrids in off-shore supply contracts can be found in the area of liability regimes. For example in the Supplytime there is a system of knock for knock when the vessel is employed at the oil field, while a traditional system of liability for breach is retained in other areas of performance, such as the shipowner's delivery obligations, and the charterer's obligation to supply good bunkers to the ship, and the

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9 Tanker charterparties like Shelltime 4 contain no explicit regulation while Bimco dry cargo charters do, see Baltime clause 11 (B) and also Supplytime 2005 clause 13 (a) (i)-(v).

10 MC section 392 states i.a.: "Time charter hire is not payable for time lost to the charterer by reason of … maintanence of the ship or repair of damage to the ship for which the charterer is not liable". Arguably the mention of charterer's "liability" is confined to incidents of damage to the ship where it makes good sense that charterer's risk for loss of time corresponds to his liability for property damage and repair costs – hence the provision seems not to address other cases of deprival of use of the ship (more or less) attributable to the charterer's conduct.

charter's obligation to nominate safe ports outside the oilfield area.[11] Also this opens for theoretical analyses addressing hybrids of regimes adopted within one and the same contract.

## 3 "Flexibility" and voyage chartering

From this review of time chartering we shift to voyage chartering. A traditional voyage charter would hardly be associated with "flexibility in long term contracts". There is simply a voyage from A to B which is not "long term" and with no real "flexibility" built into it.

However, it should be recalled that voyage charters often form the basis of long term contracts, like consecutive voyages or contracts of affreightment (volume contracts).[12] Moreover, the "traditional" charter from A to B may not be that traditional any more. Influenced by the tanker trade, with oil traders wishing to have the option of where to ship and land cargoes, the system of ranges of ports has been increasingly developed. As part of this the charterer is often given an option to re-direct the vessel en route, or to direct the vessel to areas to await further sailing orders.[13] Since freight is earned upon performance of the voyage there is clearly a need to adjust the earning of freight to whatever delays caused by such ordering to wait or to deviate. This is basically achieved by linking the extra time to the charter party regime of laytime and demurrage.[14]

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11 Supplytime 2005 clause 14 lines 627-29.

12 Contracts of affreightment normally contain extensive flexibility both concerning cargo quantity to be carried and timing of the individual shipments. The contract structure also contains the peculiar feature of being both of a generic and of specific nature: the shipowner's obligation to procure and nominate suitable tonnage for each shipment is generic in nature, while performance of each shipment is specific, as in traditional voyage chartering. See Thor Falkanger, Transportkontrakter, AfS Bind 5, page 370-414.

13 See e.g. Asbatankvoy clause 4.

14 Some considerations about possible implications of linking the scheme for risk allocation in ports (laytime) to delays during the sea voyage, are given in Solvang, page 811-13.

This type of flexibility in voyage chartering has had an impact on traditional legal thinking. For example charterers' liability for ordering the vessel to unsafe ports, may turn out differently in a "flexible" voyage charter with ranges of ports, than in a traditional port A-to-B charter. Instead of the owner having traditionally assumed the risk of going to port a named port A, he is now at the mercy of the charterer's right of instruction.[15]

There may also be other aspects linked to the right of instruction. In one English case[16] the vessel was re-routed while under way to load port which caused her not to meet the cancelling date. The charterer purported to cancel. The shipowner claimed damages for wrongful cancellation and succeeded. The court held that the charterer could not invoke a contractual right which was brought about by his own conduct – even though that conduct (order of redirection) was in itself lawful. Under Norwegian law that result probably would follow from the principle of "kreditormora" (mora accipiendi). In English law such labels are not used but the result became the same. It belongs to the story that the charterer tried an alternative way to justify the right to cancel: Among the ports within the range, some were so far away that it was unlikely that the vessel would have arrived there in time, even without any deviation caused by the charterer. The charterer's argument was therefore: 'why should the cancellation be unlawful when it was within my power to order the vessel to a port where I clearly would have had a right to cancel?' The court declined to go into that type of hypothetical reasoning on causation. Rather the charterer was held to the directions actu-

[15] In English law the question of charterers' liability for ordering the ship to unsafe ports, is generally less settled in voyage than in time chartering , see Cooke et al., Voyage Charters, 3rd ed., 2007, page 113 ff. In Norwegian law MC Section 328 imposes liability for negligence upon charterer for damage to the ship caused by ordering it to unsafe ports, but there may be a fine-line balancing between such liability and the owner's assumption of risk, see NOU 1993: 36 page 62. Additional questions may arise concerning possible restrictions in the charterer's right to nominate ports where delays will be for the owner's account under the charterparty laytime/demurrage scheme, see under English law, The Vancouver Strikes cases: Reardon Smith v. Ministry of Agriculture, [1963] 1 Lloyd's Rep. 12. See for Norwegian law, Solvang, page 647.

[16] Shipping Corp. of India v. Naviera, Lloyd's Rep 1976, 1, 132 C.C.

ally given.[17]

Other questions have arisen as to when an option to re-direct the vessel must be considered exhausted. For example if the vessel has commenced loading at a port to which she is ordered, charterers can hardly be entitled to "re-direct" her by ordering her to discharge the cargo already onboard, and go to a different load port as part of one and the same voyage order. Exactly where that cut-off point may occur is unsettled both under Norwegian and English law.

My point in going through these topics is again to indicate some general aspects arising from this type of flexibility. There is for example some resemblance between this right of re-direction in voyage charters, and the system of variation orders in construction or shipbuilding contracts.

On the topic of risk allocation, laytime and demurrage must be mentioned. This is essentially a system for allocating the remuneration risk for unforeseen delays during the vessel's port stays. I shall not dwell too much on it as the topic is extensively covered in legal literature. It should however be mentioned that it is not uncommon for a vessel to be delayed during port stays for periods exceeding the intended duration of the whole charter. Therefore the allocation of risk in laytime and demurrage clauses may be as important to the shipowner as the agreed freight, and in that sense the notion of "flexibility" in contracts may to some extent merge with the notion of "risk allocation".

[17] Some thoughts on this type of hypothetical consequenses following "kreditormora" are given by Per Augdahl, Den norske obligasjonsretts alminnelige del, 1978, page 210. See further remarks, Solvang, pages 212 and 266-68.

# 4 "Flexibility" and possible abuse of contractual rights

This brings us to another aspect of "flexibility", having to do a party's possible abuse of rights. A good illustration is the English House of Lords[18] case, The General Guisan.[19] That case concerned a consecutive voyage charter with duration of two years. The demurrage rate had been set artificially low compared to the freight rate as the demurrage rate formed part of a settlement of an earlier dispute between the parties. During the contract period the market dropped. In consequence it suited the charterer to have the vessel lie idle at load port, earning demurrage, rather than having her perform voyages, earning freight. In that way the vessel performed only about half the voyages which could have been performed during the two years, and the shipowner claimed damages, in excess of the demurrage rate, for the value of the non-performed voyages.

The shipowner lost. The House of Lords held that there was no restriction in the contract as to how the charterer could use the agreed laytime. Moreover, the exceeding of laytime is under English law considered breach of contract, and demurrage which then becomes payable, is considered liquidated damages for such breach.[20] The House of Lords found nothing in the wording of the contract which indicated that the shipowner could claim anything in excess of demurrage.

This case is perhaps of old age but it is important authority under English law still today. It provides a fairly clear answer to the question whether shipowners are entitled to damages in excess of the demurrage rate, even when charterers deliberately delay vessels in port.

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18 Now: the Supreme Court.

19 Suisse Atlantique v. NV Rotterdamsche Kolen Sentrale, [1966] Lloyd's Rep. 529 HR.

20 In Norwegian law it is probably more appropriate to consider demurrage a type of 'extended freight', similar to the system of 'added remuneration' known from the law of construction contracts, see Solvang page 357-61.

# 5 "Flexibility" and methods of construction of contracts

This brings us to the second part of this paper, the aspect of methods of construction. For a start: If one were to imagine a different outcome in the General Guisan case, this could probably be achieved in various ways. One could, as was argued by the shipowner in that case, say that there must be implicit in the intention of the parties that a normal sequence of voyages would be performed.[21] It could also be said that the general purpose of laytime and demurrage is to allocate the risk of delays occasioned by external events, which should not extend to charterers' deliberate detention of the vessel.[22] Or it could perhaps be said that there must be a covenant of loyalty and good faith which prohibits exploitation of contractual rights.[23] Or one could, with the House of Lords, say that the contract was clear in its terms and that the need for certainty in contract law requires this type of restrictive construction. Moreover, if the shipowner wanted a minimum number of voyages to be performed, he could have provided for it in the contract; he did not do so and must bear the risk. And finally: if a certain number of voyages were to be implied, where is the line to be drawn? Is it up to the courts to venture into that type of speculation?

The General Guisan case may serve as illustration of what may be called differences in mentalities in different legal systems. The case has not been followed in US law. In a decision by the first instance court in New York from 1974[24], a shipowner was awarded damages in excess of the demurrage rate under a similarly worded consecutive voyage charter and on the same type of facts. The court stated amongst other:

> "Charterer relied upon the decision in a recent English case, Suisse

[21] Page 534 of the judgment.

[22] See in that direction, Solvang, page 293-300.

[23] A separate point is that the considerations entailed in duties of loyalty may shape the outcome of construction of contract wording, see the Hindanger case below.

[24] Concord Petroleum v. Mobil Ship & Transport, 1974 AMC 103.

> Atlantique v. NV Rotterdamsche … affirmed by The House of Lords … . … This decision is contrary to the above-quoted American decisions. The charterparty clearly specifies … that it is to be construed and governed by the laws of the United States." [25]

And in summary of those previous American decisions, the court stated:

> "It requires no situation of authority for the proposition that every contract contains an implied covenant of good faith and fair dealing …, a covenant with an implied obligation to cooperate with the other so that he may obtain the full benefits of performance." [26]

Under Norwegian law there is no clear parallel to the General Guisan case. It may, however, be worth quoting the sentiment of a legal scholar, Per Gram, opposing the General Guisan decision (in my translation):

> "The decision illustrates the result of excessive adoption of the so-called commercial legal approach (det såkalte handelsrettslige syn) to construction of contracts; that a contract has to be construed strictly according to its wording because the parties must be given certainty as to their rights and obligations. This should, however, not lead to results which are far beyond what the parties reasonably can have intended. The fact that the contract was vulnerable according to its wording, should not lead to acceptance of disloyal exploitation of that wording."[27]

The perhaps obvious point I wish to make is that differences in mentalities are of importance. And this may be of particular importance under Norwegian law, with arbitration awards illustrating the dilemma of, so to speak, bridging different types of mentalities in legal thinking.

The Arica case[28] concerned time chartering and off-hire. The ship

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25 Page 106 of the judgment.

26 Page 105 of the judgment.

27 Per Gram, Fraktavtaler og deres tolkning, 1977, page 160.

28 ND 1983. 309.

had a breakdown en route from the US West Coast to Japan and was towed at reduced speed across the Pacific. The charterparty contained a so called period off-hire clause, providing for off-hire from occurence of the off-hire event until the ship is again in an efficient state for charterers' use.[29] The majority of the arbitrators held that when the draftsmen of the standard contract had chosen that particular wording, they must be taken to have intended a solution of "period off-hire" as laid down by the English House of Lords in a decision from 1891, the Westfalia.[30] In the Arica such a period solution led to a very unbalanced result in that charterers effectively got the value of the cross-Pacific carriage for free. Application of the Maritime Code would have given a net off-hire solution, crediting the shipowner with the value of the cross-Pacific voyage.

The Arica has generated a fair amount of legal commentaries which I shall not go into.[31] Instead I wish to point to certain connections between what may be viewed as mere construction of wording, and adjacent substantive law. The result in the Arica may raise questions about undue enrichment: why should charterers have the service of the vessel for free? In the preparatory works of the Swedish Maritime Code of 1994, it is stated that from a Swedish law perspective, the Arica solution would mean "a plain situation of unjust enrichment".[32]

One slight paradox on this point of enrichment is that in the Westfalia, from 1891, there was a question of adopting the doctrine of quantum meruit in favour of the shipowner. Quantum meruit has a similar function as undue enrichment by providing for market based remuneration in case of performance outside the scope of the contract.

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29 The clause, contained in Texacotime, provided: "In the event of loss of time … due to … repairs, breakdown … of machinery … hire shall cease to be due or payable from the commencement of such loss of time until the vessel is again ready and in an efficient state to resume her service …".

30 Hogarth v. Miller [1891] A.C. 48 HL.

31 See e.g. Erling Selvig, Tolking etter norsk eller annen skandinavisk rett av certepartier og andre standardvilkår utformet på engelsk, TfR, årg. 99 (1986) page 1-26; Kurt Grönfors, Tolkning av fraktavtal, SGS (Skrifter/sjörättsföreningen i Göteborg: 67), 1989, page 51-53; Kai Krüger, Norsk kontraktsrett, 1989, pages 524, 516-529 and 885-887, and Solvang, page 70-87 with further references.

32 SOU 1990: 13 page 85: Befrakter ville "rent av säges ha gjort en ubehörig vinst".

Quantum meruit was not applied in the Westfalia but that had to do with the facts of that case, which were quite different from those of the Arica.

In the Westfalia the time charterer was also the owner of the cargo and had paid general average contribution to the shipowner much in excess of the disputed hire. In addition the charterer had expended the costs of towing the ship the last leg towards the destination. Lord Watson stated:

> "In that state of facts, I cannot find any consideration which points to the propriety of making an allowance based on quantum meruit to the appellants."[33]

A paradox is therefore that on the facts of the Westfalia case a period off-hire solution did all-in-all give the most balanced outcome, while in the Arica that was not the case. And one may perhaps ask: Would the House of Lords in 1891 have applied the doctrine of quantum meruit to the facts of the Arica?

And one may perhaps also ask rhetorically: Is it likely that the draftsmen of the standard charter in the Arica had in mind these aspects of the Westfalia decision? This is of some importance since in the Arica the majority did not adopt the English law position as such, they adopted what the draftsmen must be taken to have intended. The majority stated:

> "The Westfalia decision gets its significance, not as a reflection of English law, but because the decision in a clear way forms the background of and gives meaning to the off-hire clause."[34]

One last paradox in this respect is that, unlike many House of Lords decisions, the Court toned down the suitability of this decision as precedence for later cases. There were two dissenting fractions, each con-

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[33] Lord Watson's speach as quoted from John Weale, Charter parties: "A case of no great consequence": Hogarth v. Alexander Miller, Brothers & Co [1891] A.C. 48 [H.L.], Journal of Maritme Law and Commerce, Vol. 34 (2003), page 669.

[34] Page 323 of the award.

struing the clause differently from the majority, and there was the aspect of quantum meruit. Lord Bramwell ended his speech by stating:

> "This case is of no great consequence in point of amount, nor I should think in point of precedent – there is not very likely to be another case like this, I should think."[35]

Another case which illustrates the complexity between construction of contract wording and its link to substantive law, is the arbitration case, Hindanger.[36] Also this case concerned what under English law is considered a period off-hire clause. However, now the clause had the effect of being unbalanced the other way around, in favour of the shipowner.

While under way from US East Coast to the Arabian Gulf, the vessel suffered breakdown west of Brazil. The shipowner looked for options for where to repair. Palermo in Italy would be one option, which was in the direction of the voyage. The shipowner instead selected a yard at New York and the vessel was towed there for repairs. During that tow the vessel was obviously off-hire but according to a period clause she was again on-hire when having completed repairs, at New York. The effect of this was that the charterer would have to pay hire twice for the distance from the US East Coast to the point of deviation off Brazil.

In the Hindanger the charterparty was governed by English law, with arbitration in Norway. The arbitrator felt bound to apply the English law construction of a period off-hire clause. On the other hand, he managed to achieve a balanced result by finding that the shipowner was under a duty to "economize with charterer's time", a concept he derived from a clause obliging the master to prosecute voyages with due dispatch.[37] Having selected New York rather than Palermo, the arbitrator held the shipowner to have breached that duty of "economizing with charterers' time". And what would otherwise have been payable as hire under the offhire clause, was set-off against charterers' entitlement to damages.

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35 As quoted from Weale l.c. page 672.

36 ND 1962. 68.

37 Page 87 of the award.

One difficulty with this case is that under English law it is very doubtful that such a duty of "economizing with charterer's time" would be derived from the mentioned clause. Moreover, English law would hardly imply a general duty of the shipowner to "economize with charterers' time". In fairness, the arbitrator did not assert that such duties existed under English law. He was given little evidence on the English law position, and admitted that his finding was influenced by Norwegian principles of construction on this point[38]– after having adopted the English law construction of a period off-hire clause. He stated (in my translation):

> "*To my knowledge there are no English court decisions where this [due dispatch] clause has been construed in the l*ight of a similar dispute as the one before me.[39] English legal commentaries do not provide any guidance, nor have the parties provided me with any statement enabling me to draw any conclusion as to how the English courts must be assumed to resolve the issue. Consequently I have no alternative but to rely on the understanding which I myself find appropriate. The fact that Norwegian legal method and principles of construction thereby comes into play, is unavoidable."[40]

What I wish to point out is again the risk of ending up with a mixture of English law solution of construction of contract wording, and the supplementing of such solutions of construction with Norwegian substantive law, such as a duty of loyalty, or as in the Hindanger: a duty "to economize with charterer's time". Or perhaps more to the point in the Hindanger: an English construction of the off-hire clause and a Norwegian construction of the dispatch clause.

It might be added that after these Norwegian arbitration cases, most

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38 Page 87 of the award.

39 It may added that the arbitrator apparently was unaware of the decision by the Court of Appeal from 1902 in Vogemann v. Zanzibar, (1902) 7 Com. Cas. 254, which seems to apply a rigid period off-hire solution on facts similar to those in the Hindanger. That decicion has in turn been followed in later cases, see the Marika M [1981] 2 Lloyd's Rep. 622.

40 Page 87 of the award.

standard charter forms have been amended to rectify the imbalance of the English law solutions of construction. In modern "period off-hire" clauses, like in the Shelltime, there is wording to the effect that "distance made good" during offhire shall be credited to the shipowner[41] - thus avoiding the Arica solution. And there is wording to the effect that if the vessel deviates during off-hire, hire shall only re-commence when she is in an equidistant position to that from where she deviated[42] – thus confirming the Hindanger solution. I am certainly not saying that these amendments were the result of the Arica and Hindanger decisions. I am merely saying that a more balanced solution has been adopted by the market players, including Shell who, under English law, would not benefit from the "distance made good" amendment.

# 6 Concluding remarks

We have been through some illustrations of what might be possible directions in a research project. To summarize on the substantive part: Are there parallels to be seen between different type of contracts which could increase our insight into more general contractual phenomena? And would it be worthwhile going in some depth into selected phenomena, like off-hire, within the framework of general principles of contract law? One further example on an international level: What is frustration under English law compared to the Norwegian principle of "bristende forutsetninger" (frustrated expectations)? Such questions need not be elevated into ambitious research projects but the very approach of such analyses might have the benefit of increasing awareness both of our own legal system and that of others.

The second point raised concerns differences in mentalities in the construction of contracts. Also research on such topics can be done at different levels of ambition. But generally it is probably true that the

41 Shelltime 4 clause 21 line 229.

42 Shelltime 4 clause 21 line 228.

more we know about English law and the reasoning behind the end-result of English precedent, the better positioned we are to see the ramifications of adopting, or not adopting, those solutions into Norwegian law. And such increased awareness is obviously not of academic benefit only; it also involves the work of practitioners both when drafting, advising on, and resolving disputes under English language contracts. Moreover, there may well be reasons to differentiate: The charterparty law is probably the area of contract law deepest embedded in English law through a multitude of case law related to the contract wording. However, this does not exclude also other areas of contract law from benefitting from such analyses.

# The Dispute Board in Construction Contracts

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## 1 Construction contracts and dispute resolution

Construction contracts, as small and simple the project may be, will inevitably give rise to reasons of disagreement between the Parties[1]. And, as is evident, the higher the level of complexity and importance of the contractor's services, the greater the risk that the disagreement will evolve in a dispute.

In particular, in a building construction contract, the schedule for the work's development, however detailed and carefully designed, can - at the time of its implementation - result inaccurate, incomplete, sometimes wrong, or unsuitable to provide the commissioning Party with the expected profitable results.

Especially during the execution of the works, the Parties' ideas and intentions can develop, in entirely unexpected ways, in a more or less serious and radical conflict, even if the Parties seemed to have reached an arrangement based on a shared regulation, both in the project and in the contractual agreement.

Just to make a few examples, think of the contrasting positions that the Parties can adopt to address the need to make changes to the schedule in order to ensure the execution of the works in a workmanlike manner; think of possible changes of mind of the commissioning Party

[1] C. CALABRESI retraces the many possible causes of conflicts between the parties of a construction contract, *Il* Dispute Board *nei contratti internazionali d'appalto*, in *Dir. comm. int.*, 2009, p. 753 follow.

desiring to modify the project or to order works originally not planned; think of the increased cost of labour and materials and of the increased cost of execution due to the discovery of soil conditions different from those initially expected.

Occasions of disagreement frequently are also due to the fact that the technical rules to follow for the execution of the works aren't clear and indisputable, but usually present inevitable margins of ambiguity.

In international tenders, further causes of conflict can arise from changes in the regulatory framework or from oscillations of the exchange rates.

In addition to the complications just described, other problems may arise from the natural tendency of contracting enterprises to submit proposals most favorable to the commissioning Party in order to win the tender and be awarded the works. This practice can reveal detrimental to the tenderer if the cost of execution is higher than expected, thus transforming the contract into a bad deal.

Similar difficulties may give rise to disputes between the contracting Parties, consequently slowing down or even completely stopping the commencement, continuation or completion of the works, pushing up the cost of the project realization and compromising further collaboration opportunities between the Parties, thereby damaging their business relationships.

It is known that the ordinary civil justice is usually unable to provide an adequate response to a swift and satisfactory resolution of disputes between the Parties in their construction contracts, especially internationally.

However the awareness that even arbitration is not without weaknesses is less diffused[2].

Besides often being very expensive, arbitration does not always

[2] For a summary of the critical aspects of arbitration in relation to disputes concerning construction contracts, see C. CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 763 follow., note 59.

guarantee a solution to the dispute in quick times. In particular, it is not uncommon that the discussion is delayed because of procedural issues.

More specifically related to the characteristics of construction contracts are the difficulties inherent in the mainly technical nature of the issues which the Parties discuss. Moreover, the considerable typical duration of these contracts implies that the arbitrators must examine a high amount of documentary evidence to get a complete picture of the relevant circumstances, not to mention that the dispute very often originates from events dating back, implying complications resulting from assessment activities carried out at a considerable distance of time from the events to analyse.

## 2 ADR techniques

Hence, the role played in this field by ADR techniques (Alternative Dispute Resolution) is extremely important. It should be noted that arbitration is often referred to as an ADR solution; however arbitration is characterised by an ineliminable degree of formality and by the fact that judging is attributed to the arbitrator, getting therefore very close to an ordinary judgment, while ADR methods are particularly flexible and less formal. It is therefore more appropriate to reserve the term 'ADR' to those instruments characterised by confidentiality and by the presence of one or more neutral third Parties guiding the Parties to a solution of their problems, with the aim to reach an agreement which will be most satisfying for the Parties and will enable them to continue their business relationships.

There are many types of ADR methods, each of them having significantly different features.

In what follows we will deal in more detail with the ADR method called 'Dispute Board'[3].

## 3 From the Engineer to the Dispute Board in the resolution of disputes regarding construction contracts

Initially the FIDIC contracts (Fédération Internationale des Ingénieurs-Conseils) comprised the figure of the Engineer, who had multiple tasks and duties[4]. The engineer, paid by the commissioning Party, was responsible, among others, for the planning, implementation and supervision of the works. However he also had to examine the contractor's

[3] On this subject, see - without any pretense at completeness - C.R. Seppälä, *The new FIDIC Provision for a Dispute Adjudication Board*, in *International Construction Law Review*, vol. 14, Part 4, 1997; C. Dering, *Dispute Board: it's Time to move on* in *International Construction Law Review*, 2004, vol. 21, IV, p. 438 follow.; N. BUNNI, *The FIDIC Forms of Contract*, 3rd ed., Blackwell Publishing, 2005; DJA CAIRNS-I. MADALENA, *The ICC Dispute Board Rules* in *International Arbitration Law Review*, 2005, vol. 8, 2, p. 41 follow.; P.M. GENTON, *ICC promotes Dispute Board Rules worldwide*, in *Construction Law Journal*, 2005, 21, p. 102 follow.; C. KOCH, *The new Dispute Board Rules of the ICC*, in *ASA Bulletin*, 2005, p. 53 follow.; J. GLOVER-C. THOMAS-S. HUGHES, *Understanding the new FIDIC Red Book. A Clause by Clause Commentary*, Sweet & Maxwell, 2006; J. JENKINS-S. STEBBINGS, *International Construction Arbitration Law*, Kluwer Law International, 2006; V. MAHNKEN, *Why international Dispute Settlement Institutions should offer ad hoc Dispute Board Rules* in *International Construction Law Review*, 2006, vol. 23, Part 4, p. 433 follow.; C. CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 753 follow.; U. DRAETTA, *Dispute Resolution in international Construction linked Contracts*, in *Dir comm. int.*, 2010, p. 3 follow.; C. CHERN, *Chern on Dispute Boards*, 2nd ed., Wiley-Blackwell, 2011; R. PANETTA, *Pre-Arbitral Proceedings in Construction Disagreements: The Dispute Board* (unpublished but available on following Website: www.iscl.it/wp-content/uploads/2011/10/Pre- Arbitral_Proceeding_in_Construction_Disagreements_-_The_Dispute_Board.docx

[4] For a comprehensive examination of the figure of the Engineer initially planned in the FIDIC contracts and of the subsequent transition to the Dispute Board, see C. CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 769 follow.

claims, assess the granting of time extensions and of change authorisations, as well as resolve disputes.

Nowadays the Engineer has been replaced by a Dispute Board (DB), that is usually made up of a panel involving independent subjects, often experienced engineers. One of the features that characterize a DB and distinguish it from arbitration and ordinary trials is the fact that a Board may be set up at the outset of a contract and remain throughout its duration, constantly following the execution of the works, unlike what happens in arbitration proceedings or before ordinary courts, which are often set up when the flow of work has already reached an advanced stage. This allows to avoid one of the typical disadvantages of arbitration and of ordinary judgment, namely the fact that they may also take place at a relevant distance of time from the events to which the dispute refers, making it necessary for the arbitrators or the judge to perform a long and expensive work of investigation and reconstruction of the relevant circumstances.

Moreover, the increasingly important role acquired by the DBs and their capabilities, and the possibility they have to give *informal assistance* even before a dispute arises, allow us to recognize that DBs have a function of dispute prevention.

To illustrate the main features of Dispute Boards as an alternative means of dispute resolution we will mainly take into account the Dispute Board Rules set by the ICC (International Chamber of Commerce)[5] and the regulation of the Dispute Board contained in the general conditions of the contracts provided by FIDIC (Fédération Internationale des Ingénieurs-Conseils)[6].

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[5] In general see, among others, D.J.A. CAIRNS-I. MADALENA, *The ICC Dispute Board Rules*, cit., P. 41 follow.; C. KOCH, *The new Dispute Board Rules of the ICC*, cit., p. 53 *follow.*

[6] On this subject, for all see N. BUNNI, *The FIDIC Forms of Contract*, cit.; C.R. Seppälä, *The new FIDIC Provision for a Dispute Adjudication Board*, cit.; J. GLOVER-C. THOMAS-S. HUGHES, *Understanding the new FIDIC Red Book. A Clause by Clause Commentary*, cit.

# 4 Several types of Dispute Board: Dispute Review Board (DRB), Dispute Adjudication Board (DAB), Combined Dispute Board (CDB)

There are two major types of Dispute Board, the Dispute Review Board (DRB) and the Dispute Adjudication Board (DAB).

In the first case, the result of the Board's activity is a non-binding recommendation, with which the losing Party can spontaneously comply, or otherwise resort to arbitration[7]. According to ICC rules, the recommendation becomes binding if neither Party sends a written notice of dissatisfaction to the other Party and to the DRB within thirty days[8]. According to other models, such as, for example, the rules provided by the American Arbitration Association[9], there is also the possibility that a recommendation never becomes binding.

In the DAB type the decision is binding for the Parties[10]. However

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7 ICC Dispute Board Rules, Article 4.1: DRBs issue Recommendations with respect to Disputes. ICC Dispute Board Rules, Article 4.2: Upon receipt of a Recommendation, the Parties may comply with it voluntarily but are not required to do so.

8 ICC Dispute Board Rules, Article 4.3: If no Party has sent a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation within 30 days of receiving it, the Recommendation shall become binding on the Parties. The Parties shall thereafter comply with such Recommendation without delay, and they agree not to contest it insofar as such agreement can validly be made.

9 Regarding this clarification see C. CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 777. On this subject see also C. DERING, *Dispute Board: it's Time to move on*, cit., p. 441.

10 ICC Dispute Board Rules, Article 5.1: DABs issue Decisions with respect to Disputes. ICC Dispute Board Rules, Article 5.2: A Decision is binding on the Parties upon its receipt. The Parties shall comply with it without delay, notwithstanding any expression of dissatisfaction pursuant to this Article 5. ICC Dispute Board Rules, Article 5.3: If no Party has sent a written notice to the other Party and the DAB expressing its dissatisfaction with the Decision within 30 days of receiving it, the Decision shall remain binding on the Parties. The Parties shall continue to comply with the Decision, and they agree not to contest it insofar as such agreement can validly be made.

the decision can be appealed (it will usually be referred to arbitration)[11]. In this case, one speaks of the provisional bindingness of the decision.

The ICC Rules also provide for a third type of Dispute Board, the Combined Dispute Board (CDB)[12]. The CDB normally issues a recommendation, but can issue a decision if one Party so requests and the other one does not object. In case of opposition, the Board decides whether to issue a recommendation or a decision, taking into account, in making the choice, if a decision may facilitate the execution of the contract, prevent damage to either Party, prevent the interruption of the contract or whether it is necessary to preserve evidence.

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[11] ICC Dispute Board Rules, Article 5.5: Any Party that is dissatisfied with a Decision shall, within 30 days of receiving it, send a written notice expressing its dissatisfaction to the other Party and the DAB. For information purposes, such notice may specify the reasons for such Party's dissatisfaction. ICC Dispute Board Rules, Article 5.6: If any Party submits such a written notice expressing its dissatisfaction with a Decision, or if the DAB does not issue its Decision within the time limit prescribed in Article 20, or if the DAB is disbanded pursuant to the Rules before a Decision regarding a Dispute has been issued, the Dispute in question shall be finally settled by arbitration, if the Parties have so agreed, or, if not, by any court of competent jurisdiction. Until the Dispute is finally settled by arbitration or otherwise, or unless the arbitral tribunal or the court decides otherwise, the Parties remain bound to comply with the Decision.

[12] ICC Dispute Board Rules, Article 6 "Combined Dispute Boards (CDBs)": (1) CDBs issue Recommendations with respect to Disputes, pursuant to Article 4, but they may issue Decisions, pursuant to Article 5, as provided in paragraphs 2 and 3 of this Article 6. (2) If any Party requests a Decision with respect to a given Dispute and no other Party objects thereto, the CDB shall issue a Decision. (3) If any Party requests a Decision and another Party objects thereto, the CDB shall make a final decision as to whether it will issue a Recommendation or a Decision. In so deciding, the CDB shall consider, without being limited to, the following factors: - whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party; - whether a Decision would prevent disruption of the Contract; and whether a Decision is necessary to preserve evidence. (4) Any request for a Decision by the Party referring a Dispute to the CDB shall be made in the Statement of Case under Article 17. Any such request by another Party should be made in writing no later than in its Response under Article 18.

# 5 Permanent Dispute Board and ad hoc Dispute Board

A Dispute Board is not always and not necessarily set up from the very beginning and throughout the duration of the contract (for the sake of brevity we will speak, in this case, of a stable or permanent DB), but can also be set up only after the onset of a dispute (the latter type is called *ad hoc* DB). As a matter of fact, there are not always sufficient reasons to justify the cost of a permanent Board - it really depends on the size of the works and the probability that disputes may arise.

The solution provided by a stable Board is adopted in the rules of the ICC.

As regards the FIDIC general conditions, it is necessary to distinguish between different types.

So the FIDIC Red Book (relating to the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer) foresees, in Sub-Clause 20.2, that "The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender", which makes it likely that the DAB will be appointed before the commencement of works.

To appoint a panel only after the onset of a dispute (*ad hoc* Dispute Board) is the practice adopted in the framework of other FIDIC contractual conditions, in particular those of the Yellow Book (regarding the Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor) and those of the Silver Book (relating to the Conditions of Contract for EPC/Turnkey Projects). Sub-Clause 20.2 of both models provides that "The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4".

# 6 Composition of a DB and appointment of its members

A DB is usually made up of a panel, but the Parties can also agree to appoint a single-person DB called Dispute Review Expert.

It may sometimes be suitable and advantageous to appoint a Board of two members[13], even if this choice may seem unusual. In this case, it is important that the members are jointly chosen by the Parties to reduce the appearance of partiality, and that arrangements are defined in order to reach a determination if the Board members do not reach an agreement; under the latter aspect, it can therefore happen that one of the members is given the power to issue decisions, while the other has a purely consultative role.

Usually, however, the Board comprises three members, even if panels with more members and a more complex composition are not rare, especially when expertise from a broad range of disciplines is required. To make a few examples, the DRB on the Hong Kong international airport project[14] was made up of a six-member panel and a *convenor* who dealt with the ca. twenty main projects. The same Hong Kong international airport project and the Channel Tunnel project had two appointed Boards, having respectively expertise in construction and in financial matters[15].

There may be further types of DB with a variable composition depending on the stage of execution of the contract and on the nature of the dispute.

Another possibility is to set up a DB with a large composition to

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[13] On this point see. R. PANETTA, *Pre-Arbitral Proceedings* in *Construction Disagreements: The Dispute Board*, cit. p. 38; N. BUNNI, *The FIDIC Forms of Contract*, cit., p. 608; C. CALABRESI, *The Dispute Board in international Construction Contracts*, cit., p. 793 follow.

[14] In the case of the Hong Kong airport see, for all, C. CHERN, Chern on Dispute Board, cit. , p. 73 follow.

[15] This is recalled by C. CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 794, note 277.

carry out consultative activities, and a smaller panel responsible for issuing recommendations or decisions. The Channel Tunnel project, for example, had a DB of five members, but the decision was issued by only three of them[16].

Each member of a DB shall be approved by the Parties, in other words the entire panel shall enjoy the Parties' confidence.

Of utmost importance are the requirements of impartiality and independence of the Board members. To be noted, in particular, is the obligation to report the existence of any facts or circumstances which might be of such a nature as to generate conflicts of interest.

As a general rule, the appointed Board members should be nationals of countries other than those of the Parties[17].

Regarding the competences of the Board members, there is a significant participation of people specialised in fields different from the legal field, such as engineers. Some consider that the panel should be composed exclusively of engineers, while others think it should be made up both of technical and legal experts (in particular, two technicians and a lawyer acting as chairman)[18].

## 7 The 'informal assistance with disagreement'

Sub-Clause 20.2 of the FIDIC Red Book provides for the possibility for the Parties to jointly request the DB to express an opinion on an issue. The request cannot be unilateral, but must come from both sides.

Even the ICC Dispute Board Rules contain a provision regarding the informal discussion of disputes between the Parties (see Article 16, en-

16 CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 794.

17 C. CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 796.

18 On these aspects see. C.R. Seppälä, *The new FIDIC Provision for a Dispute Adjudication Board*, cit.; C. CALABRESI, *Il* Dispute Board *nei contratti internazionali d'appalto*, cit., p. 795 follow.

titled "Informal Assistance with Disagreements"). With all the Parties' agreement, the DB may also, on its own initiative, handle the informal discussions of issues that have arisen between the Parties, before they assume the character of a genuine dispute; the DB's informal assistance can consist of "a conversation among the DB and the Parties; separate meetings between the DB and any Party with the prior agreement of the Parties; informal views given by the DB to the Parties; a written note from the DB to the Parties; or any other form of assistance which may help the Parties resolve the disagreement" .

The opinion delivered by the DB in the course of the informal assistance is not legally binding. If the DB is subsequently called upon to make a decision on the same issue, it shall not be bound by any opinion given during the informal assistance.

# 8 The formal submission of a dispute to the DB

According to the FIDIC Conditions (see Red Book, sub-clause 20.4) the formal referral of a dispute to the DB shall be made in writing by each Party, who will also include copies of the act for the other Party and for the Engineer[19].

[19] FIDIC Red Book, Sub-Clause 20.4, first paragraph: If a dispute (or any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

According to ICC Dispute Board Rules (Article 17[20]), the submission of a dispute to the DB shall be made through a written statement (the 'Statement of Case') to be sent to the DB and to the Counterparty. The statement shall contain a concise and clear description of the nature and circumstances of the dispute, a list of issues referred to the DB with the referring Party's position about them, any element supporting the referring Party's position such as documents, drawings, work schedules and correspondence, and finally the object of the determination requested to the DB. It should be pointed out that, in the case of a CDB, if the referring Party wishes the Board to issue a binding decision, it must specify it, explaining the reasons why it considers that the DB should issue a decision rather than a recommendation.

The ICC Rules also govern the statement (the 'response', see Article 18[21]) with which the responding Party shall respond, usually within 30

[20] ICC Dispute Board Rules, Article 17 "Formal Referral of Disputes for a Determination; Statement of Case" (1). Any Party shall refer a Dispute to the DB by submitting a written statement of its case (the 'Statement of Case') to the other Party and the DB. The Statement of Case shall include: - a clear and concise description of the nature and circumstances of the Dispute; - a list of the issues submitted to the DB for a Determination and a presentation of the referring Party's position thereon; - any support for the referring Party's position such as documents, drawings, schedules and correspondence; - a statement of what the referring Party requests the DB to determine; and - in the case of a CDB, if the referring Party wishes the CDB to issue a Decision, its request for a Decision and the reasons why it believes that the CDB should issue a Decision rather than a Recommendation. [...]. (3). The Parties remain free to settle the Dispute, with or without the assistance of the DB, at any time.

[21] ICC Dispute Board Rules, Article 18 "Response and Additional Documentation": (1). Unless the Parties agree otherwise or the DB orders otherwise, the responding Party shall respond to the Statement of Case in writing (the 'Response') within 30 days of receiving the Statement of Case. The Response shall include: - a clear and concise presentation of the responding Party's position with respect to the Dispute; - any support for its position such as documents, drawings, schedules and correspondence; - a statement of what the responding Party requests the DB to determine; - in the case of a CDB, a response to any request for a Decision made by the referring Party, or if the referring Party has not made such a request, any request for a Decision by the responding Party, including the reasons why it believes that the CDB should issue the type of Determination it desires. (2). The DB may at any time request a Party to submit additional written statements or documentation to assist the DB in preparing its Determination. Each such request shall be communicated in writing by the DB to the Parties.

days, to the Statement of Case of the referring Party. It shall include the responding Party's position, any element supporting this position, and what the responding Party requests the DB. Additional details regard, similarly to what happens to the referring Party's statement, the case of CBD.

According to the FIDIC Conditions (see Annex on Procedural Rules), the DB can decide whether to hold a hearing or not, and has wide inquisitorial powers; the DB establishes the rules of procedure to be applied in the decision of the case, decides on its own competence, and has broad powers to conduct the hearing, not being bound by rules or procedures other than those contained in the contract and the Rules of the Annex. Further, the DB can take the initiative in ascertaining the facts and issues for the decision, can use its specialised knowledge, and may, where appropriate, provide protective or provisional measures.

Pursuant to the rules of the ICC, a hearing shall be held unless the Parties and the DB agree otherwise[22]. Unless the DB decides otherwise, the hearing shall consist of the presentation of the case, first by the referring Party and then by the responding Party; of the indication by the DB to the Parties of any issues which need further clarification; of the clarification by the Parties, with the opportunity to respond to clarifications made by the other Party, to the extent that new issues have been raised in such clarifications[23].

The proceedings shall primarily be governed by ICC Rules, subordinately by any rules defined by the Parties or the DB. Moreover, in the absence of an agreement thereto, the DB shall have the power to determine the language of the proceedings, require the Parties to produce

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22 ICC Dispute Board Rules, Article 19, comma 1: A hearing regarding a Dispute shall be held unless the Parties and the DB agree otherwise.

23 ICC Dispute Board Rules, Article 19, comma 8: Unless the DB decides otherwise, the hearing shall proceed as follows: - presentation of the case, first by the referring Party and then by the responding Party; - identification by the DB to the Parties of any matters that need further clarification; - clarification by the Parties concerning the matters identified by the DB; - responses by each Party to clarifications made by the other Party, to the extent that new issues have been raised in such clarifications.

documents considered necessary to issue the determination, organise meetings, site visits and hearings, and question the Parties and witnesses[24].

## 9 Site visits

A 'permanent' DB (i.e. appointed at the beginning of the works and throughout their duration) periodically conducts site visits. In accordance with the provisions contained in the Annex on Procedural Rules of the Red Book, unless otherwise agreed between the contracting Party and the contractor, the DAB shall visit the site at least every 140 days upon the request of either Party[25].

Under the ICC Rules, during the meetings and site visits, the DB shall verify with the Parties the performance of the contract, and may provide informal assistance under Article 16 of the ICC Rules.

[24] ICC Dispute Board Rules, Article 15, comma 1: The proceedings before the DB shall be governed by the Rules and, where the Rules are silent, by any rules which the Parties or, failing them, the DB may settle on. In particular, in the absence of an agreement of the Parties with respect thereto, the DB shall have the power, inter alia, to: - determine the language or languages of the proceedings before the DB, due regard being given to all relevant circumstances, including the language of the Contract; - require the Parties to produce any documents that the DB deems necessary in order to issue a Determination; - call meetings, site visits and hearings; - decide on all procedural matters arising during any meeting, site visit or hearing; - question the Parties, their representatives and any witnesses they may call, in the sequence it chooses; - issue a Determination even if a Party fails to comply with a request of the DB; - take any measures necessary for it to fulfil its function as a DB.

[25] Cfr. subparagraph 1 Annex Procedural Rules, Red Book FIDIC: Unless otherwise agreed by the Employer and the Contractor, the DAB shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor. Unless otherwise agreed by the Employer, the Contractor and the DAB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing [...].

# 10 The determination issued by the DB and the possible subsequent appeal

The determination issued by the DB may be in the form of a recommendation or a decision.

With regards to the decision made by the DAB under the FIDIC Conditions, each Party, if dissatisfied with the decision, shall send to the other Party, within twenty eight days of receipt of the decision, a formal notice of dissatisfaction. This notice shall specify the object of the dispute and the reasons for dissatisfaction with the decision. In the absence of such notification, the decision shall become final and binding on both Parties. It should be stressed that a timely communication of the notice of dissatisfaction is required (excluding cases covered by the Sub-Clauses 20.7[26] and 20.8[27]) to allow to refer to arbitration[28].

Pursuant to the ICC Dispute Board Rules (see Article 4) the recommendation issued by the DRB is not binding on the Parties, which are therefore free to comply with it or not. However, the recommendation

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26 FIDIC Conditions (Red, Yellow, Silver Books) Sub-Clause 20.7 "Failure to Comply with Dispute Adjudication Board's Decision": In the event that : a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision], b) the DAB's related decision (if any) has become final and binding, and c) a Party fails to comply with this decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

27 FIDIC Conditions (Red, Yellow, Silver Books) Sub-Clause 20.8 "Expiry of Dispute Adjudication Board's Appointment": If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise: a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

28 FIDIC Conditions (Red, Yellow, Silver Books) Sub-Clause 20.4 "Obtaining Dispute Adjudication Board's Decision": […] neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

shall become binding if no Party has sent a written notice to the other Party and to the DB expressing its dissatisfaction with the recommendation within thirty days. If such notice has been timely sent, the dispute shall be referred to the ordinary jurisdiction or, if provided, to arbitration. A decision issued by the DAB, however, is immediately binding on the Parties. Any notice by a Party expressing its dissatisfaction with the decision shall not suspend the effectiveness of the determination, which must therefore also be observed by the Party expressing its dissatisfaction. In this case, the notice of dissatisfaction (to be served within thirty days) is necessary in order to avoid the DAB's decision from becoming final and binding. Even during the pendency of an ordinary trial or of arbitration proceedings (unless the court or arbitration panel otherwise decides) the decision continues to exert its effect until the ordinary trial or the arbitration proceedings have come to a conclusion.

Pursuant to Sub-Clause 20.5 of the FIDIC Conditions, before the commencement of an arbitration, it is necessary to observe a 56 days cooling-off period, during which the Parties shall try to reach an amicable solution of the dispute.

The FIDIC Conditions (see Sub-Clause 20.6) - while nothing is established in the ICC Rules - specify that, during an arbitration (which may be established either before the works are completed or after their completion), the Parties may also put forward different arguments with respect to the DB proceedings, and provide new evidence. Further, the Parties are not bound either to the critical reasons set out in the notice of dissatisfaction. Thus, an arbitration following a DB decision cannot be considered an appeal in the strict sense, but it rather takes the form of a new trial of the dispute (a new trial of the case).

# 11 Enforcement of the DB's determination

A few words must be spent on the possibility to enforce a binding DRB recommendation or a DAB decision.

As stated in the preamble to the ICC Dispute Board Rules, "Arbitration is the only one which results in an award by a tribunal that is enforceable at law. Determinations made by Dispute Boards are not enforceable at law as such, although they may become contractually binding on the Parties as described below. Hence, Dispute Board members do not act as Arbitrators"; art. 1 of the ICC Dispute Board Rules expressly states that "Dispute Boards are not arbitral tribunals and their Determinations are not enforceable like arbitral awards. Rather, the Parties contractually agree to be bound by the Determinations under certain specific conditions set forth herein".

Thus the DB's determination cannot be considered an arbitration award. This implies, among others, that it does not fall within the scope of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York' Convention).

The binding nature of the determination is grounded in the autonomy of the Parties, and must be considered of contractual nature. The remedies available to the Parties, in the event of failure to comply, will thus be those available in the event of breach of contract.

Some authors therefore suggest to use contractual types of sanctions such as, for example, the suspension of the services provided by the Party favored by the BD's determination[29].

As concerns failure to comply with a decision issued by the DAB, the FIDIC conditions provide the opportunity to propose a request for ar-

[29] For more information on this point, see C. DERING, Dispute Board: it's Time to move on, cit., p. 438 follow. ; R. PANETTA, *Pre-Arbitral Proceedings in Construction Disagreements: The Dispute Board*, cit., p. 57.

bitration[30], while the ICC Rules, with regards to non-compliance with a binding recommendation or a decision, establish that the Party concerned can refer to arbitration or, in the absence of an arbitration clause, before an ordinary court[31].

[30] FIDIC Conditions (Red, Yellow, Silver Books) Sub-Clause 20.7 "Failure to Comply with Dispute Adjudication Board's Decision": In the event that : a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision], b) the DAB's related decision (if any) has become final and binding, and c) a Party fails to comply with this decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

[31] ICC Dispute Board Rules, Article 4, 4° comma: If any Party fails to comply with a Recommendation when required to do so pursuant to this Article 4, the other Party may refer the failure itself to arbitration, if the Parties have so agreed, or, if not, to any court of competent jurisdiction. Article 5, comma 4°: If any Party fails to comply with a Decision when required to do so pursuant to this Article 5, the other Party may refer the failure itself to arbitration, if the Parties have so agreed, or, if not, to any court of competent jurisdiction.

# International contracts, English clauses and Norwegian governing law

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The purpose of this paper is to give an overview of the research that we are carrying out at the Department of Private Law on the field of international contracts, and thus to contribute to the discussion about further research topics in the framework of the research group on International Contracts.

The research that I will describe here stems from the observation that often, in international practice, commercial contracts are written using English contract models even though the contract is not governed by English law. The assumption seems to be that, if the contract is written in a sufficiently detailed way, there will be no need to consider the applicable law. As a consequence, legal terms and legal structures used in the contract are not adapted to the governing law. The impression (illusion) that national law is irrelevant is enhanced when the contract contains an arbitration clause – with the consequent exclusion of national courts' jurisdiction. The drafting style and the competence of an international arbitral tribunal lead sometimes the parties to assume that the contract is self-sufficient and completely detached from national law.

The research that will be described here aims at verifying to what extent these assumed self-sufficiency and detachment are compatible with the enforceability of a contract or of an arbitral award. Two main questions are analysed so far: (i) How do English contract terms work under Norwegian law?, and (ii) Is an arbitration clause sufficient to exclude relevance of any national law but the one chosen by the parties? The former will be discussed in section 1 below, the latter in section 2 below.

# 1 English contract terms and Norwegian law: the Anglo-project

The question of how English contract terms function in conjunction with Norwegian law was dealt with in the framework of the so-called Anglo-project http://www.jus.uio.no/ifp/english/research/projects/anglo/, that I ran from 2004 to 2010 at the law faculty of the Oslo University. The project has been financed by the Research Council of Norway and by the Department of Private Law of the Law Faculty, University of Oslo. A few 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, 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 in 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;[1] and on Force Majeure clauses, by Anders Mikelsen.[2]

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: Mr. Edwin Peel, Fellow and Tutor in Law, Keble College, Oxford University, 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, U.S. Embassy in Oslo.

Practicing lawyers, both 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 gain 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 http://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 the origin of the contract and the law governing

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1 Herman Bruserud, *Hardship-Klausuler* (Fagbokforlag, 2010).

2 Anders Mikelsen, *Hindringsfritak* (Gyldendal, 2011).

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 a book on boilerplate clauses and the governing law.[3] The observations made in the following sections are based mainly on this book on boilerplate.

## 1.1 International commerce fosters self-sufficient contracts

The research carried out in the Anglo-project shows that there is a gap between the way in which international contracts are written on the one hand, and the way in which they are interpreted and enforced on the other. Contracts are often written as if the only basis for their enforcement were their terms, and as if contract terms were capable of being interpreted solely on the basis of their own language. However, as Part 3 in the book on boilerplate shows, the enforcement of contract terms, as well as their interpretation, is the result of the interaction between the contract and the governing law. Considering contracts to be self-sufficient and not influenced by any national law, as if they enjoyed a uniform interpretation thanks to their own language and some international principles, thus, proves to be illusionary. This contract practice may lead to undesired legal effects and is not optimal when looked upon from a legal point of view. Seen in a larger perspective, however, it may turn out to be more advantageous than employing large resources in order to ensure legal certainty.

The gap between the parties' reliance on the self-sufficiency of the contract and the actual legal effects of the contract under the governing law, does not necessarily derive from the parties' unawareness of the legal framework surrounding the contract. More precisely: the parties may often be aware of the fact that they are unaware of the legal framework for the contract. The possibility that the wording of the contract is

[3] Giuditta Cordero-Moss, ed. *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge: Cambridge University Press, 2011).

interpreted and applied differently from what a literal application would seem to suggest, may be accepted by some parties as a calculated risk.

A contract is the result of a process, in which both parties participate from opposite starting points.[4] This means that the final result is necessarily a compromise. In addition, time and resources are often limited under negotiations. This means that the process of negotiating a contract not necessarily meets all requirements that would ideally characterise an optimal process under favourable conditions. What could be considered as an indispensible minimum in the abstract description of how a legal document should be drafted, does not necessarily match with the commercial understanding of the resources that should be spent on such a process. This may lead to contracts being signed without the parties having negotiated all the clauses, or without the parties having complete information regarding each clause's legal effects under the governing law. What may appear, from a purely legal point of view, as unreasonable conduct, is actually often a deliberate assumption of contractual risk.

Considerations regarding the internal organisation of the parties are also a part of the assessment of risk.[5] In large multinational companies, risk management may require a certain standardisation, which in turn prevents a high degree of flexibility in drafting the single contracts. In balancing the conflicting interests of ensuring internal standardisation and permitting local adjustment, large organisations may prefer to enhance the former.

It is in other words not necessarily the result of thoughtlessness, if a contract is drafted without having regard for the governing law. Neither is it the symptom of a refusal of the applicability of national laws. It is the result of a cost-benefit evaluation, leading to the acceptance of a calculated legal risk.

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4 See more extensively David Echenberg, "Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements? ," in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, ed. Giuditta Cordero-Moss (Cambridge University Press, 2011).

5 See more extensively, Maria Celeste Vettese, "Multinational Companies and National Contracts," ibid.

## 1.2 Detailed drafting as an attempt to enhance the contracts' self-sufficiency

To minimise the risk of the governing law interfering with the contract, international contracts are drafted in a style that aims at creating an exhaustive, and as precise as possible, regulation of the underlying contractual relationship, thus attempting to render redundant any interference by external elements, be it the interpreter's discretion or 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, is proven to be illusionary, and not only because governing laws may contain mandatory rules that may not be derogated from by contract.

As a matter of fact, not many mandatory rules affect international commercial contracts, therefore this is not the main aspect that the Anglo-project focused on (there are, however, important mandatory rules, for example in the field of limitation of liability, that are relevant also in the commercial context. These are dealt with the in the APA-project, see section 2 below). The Anglo-project focused mainly on the spirit underlying general contract law. This will vary from legal system to legal system and will inspire, 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, the existence and extent of a general principle of good faith – in short, the balance between certainty and justice. The

clauses analysed in the Anglo-project were chosen with the purpose of highlighting the relevance of the governing law in these respects. With these clauses, the parties try to take into their own hands those aspects where the balance between certainty and justice may be challenged.

The eagerness in drafting may reach excesses that are defined as "nonsensical" by Ed Peel in the chapter on English law,[6] such as when the ubiquitous clause of Representations and Warranties lists, among the matters that the parties represent to each other, that their respective obligations under the contract are valid, binding and enforceable. This Representation and Warranty is itself an obligation under the contract and is itself subject to any ground for invalidity or unenforceability that might affect the contract, so what value does it add? It is particularly interesting that this observation is made by an English lawyer, because it shows that the attempt to detach the contract from the governing law may go too far even for English law, and this is notwithstanding that the drafting style adopted for international contracts is no doubt based on the English and American drafting tradition. Extensive contracts do not reflect the tradition of civil law: a civilian judge reads the contract in the light of the numerous default rules provided in the governing law for that type of contract, therefore extensive regulations are not needed in the contact.[7] The common law drafting tradition, in turn, requires extensive contracts that spell out all obligations between the parties and leave little to the judge's discretion or interpretation, because the common law judge sees it as his or her function to enforce the bargain agreed upon between the parties, not to substitute for the bargain actually made by the parties, one which the interpreter deems to be more reasonable or commercially sensible.[8]

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6 Edwin Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law," ibid. footnote 160.

7 For a more extensive argumentation and references see Giuditta Cordero Moss, "International Contracts between Common Law and Civil Law: Is Non-State Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith, Article 3 Pp.1-38," *Global Jurist: Vol. 7: Iss. 1 (Advances)* 7, no. 1 (2007).

8 *Charter Reinsurance, Co. Ltd.* v. *Fagan* [1997] A.C. 313.

Thus, the English judge will be reluctant to read into the contract obligations that were not expressly agreed to by the parties. Since the English judge often affirms that a sufficiently clear contract wording will be enforced, parties are encouraged to increase the level of detail and to write around mechanisms that have proven to be problematic by formulating clauses that will not fall within the scope of the problem.[9] This enhances the impression that a well-thought formulation may solve all problems. When adopting the common law style, however, drafters may apparently be tempted to overdo and to write regulations that tend to elevate the contract to the level of law,[10] such as the above-mentioned Representation and Warranty. This clause, as noted above, seems nonsensical even in an English law context, because a contract obligation does not have the power of determining whether it is valid or enforceable - it is for the law to decide what is valid and enforceable. This clause is, though, symptomatic of the intense desire to detach the contract from the

[9] For example in respect of the liquidated damages clause, see the comments below.

[10] A similar attempt to elevate the contract to the level of law may be found in the assumption that the contract's choice-of-law clause has the ability to move the whole legal relationship out of the scope of application of any law but the law chosen by the parties. The choice of law made by the parties, however, has effect mainly within the sphere of contract law. For areas that are relevant to the contractual relationship, but are outside the scope of contract law, the parties' choice does not have any effect. Areas such as the parties' own legal capacity, company law implications of the contract or the contract's effects towards third parties within property law are governed by the law applicable to those areas according to the respective conflict rule, and the parties' choice is not relevant. The APA-project assesses such limitations to party autonomy, particularly in connection with international arbitration: see section 2 below.

applicable law so that it becomes its own law.[11]

The Representation on the validity and enforceability of the contract is not the only attempt to detach the contract from the governing law: other clauses analysed in the Anglo-project regulate the interpretation of the contract and the application of remedies independently from the governing law.

Interestingly, some of these clauses do not seem to achieve the desired results even under English law. As noted by Ed Peel in the chapter on English law,[12] observers may tend to overestimate how literally English courts may interpret contracts. Be it as it may, contract practice shows that it is based on the illusion that it is possible, by writing sufficiently clear and precise wording, to draft around problems and circumvent any criteria of fairness that may inspire the court. The chapter on English law actually shows that this is supported indirectly by English courts themselves, who often found their decisions on the interpretation of the wording rather than on a control of the contract's substance. In respect of some contract clauses, that interestingly attempt

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[11] A Representation on the validity and enforceability of the contract is a typical part of boilerplate clauses. See, for example, Section 5.2, Article V, Form 8.4.01 (Form Asset Purchase Agreement), M. D. Fern, *Warren's forms of agreements*, Vol. 2, (LexisNexis, 2004). This is also the first representation recommended in the Private Equity Law Review, "Representations and Warranties in Purchase Agreements," Section 2.1 (http://www.privateequitylawreview.com/2007/03/articles/for-private-equity-sponsors/deal-documents/acquisition-agreement/representations-and-warranties-in-purchase-agreements/, last visited on 23 May 2010). See also Sample Representations and Warranties, Section 3.2, Documents for Small Businesses and Professionals, http://www.docstoc.com/docs/9515308/Sample-Representations-and-Warranties (last visited on 23 May 2010). Numerous examples of actual use of this Representation may be found in the contracts filed with the US Securities and Exchange Commission; for example, Section 25.1.3 of the contract dated November 21, 2004, between Rainbow DBS and Lockheed Martin Commercial Space Systems for the construction of up to five television satellites (http://www.wikinvest.com/stock/Cablevision_Systems_(CVC)/Filing/8-K/2005/F2355074, last visited on 23 May 2010) and Section 5.02 of the merger agreement dated May 14, 2007 between eCollege.com and Pearson Education, Inc. and Epsilon Acquisition Corp. (http://www.wikinvest.com/stock/ECollege.com_(ECLG)/Filing/DEFA14A/2007/F4972482, last visited on 23 May 2010).

[12] Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law."

to regulate precisely the interpretation of the contract, it seems that the drafting efforts are not likely to achieve results that might be considered unfair by the court, no matter how clear and precise the wording was drafted, and in spite of the courts' insisting on making this a question of interpretation. In respect of other clauses analysed in the Anglo-project, the criteria of certainty and consistency seem to be given primacy by the English courts. This ensures a literal application of the contract notwithstanding the result, as long as the clause is written in a sufficiently clear and precise manner. The clause of Liquidated Damages, for example, is designed to escape the common law prohibition of Penalty clauses. In addition, this clause and the possibility to convert it into a price-variation clause provide a significant example of how drafting may be used to achieve a result that otherwise would not be enforceable: this is defined as the possibility for the parties to manipulate the interpretation in order to avoid the intervention of the courts.[13]

The treatment of boilerplate clauses by English courts has great relevance to the subject-matter of this research: the assumption that a sufficiently detailed and clear language will ensure that the legal effects of the contract will be only based on the contract itself and not influenced by the applicable law, is originally encouraged by English courts, and then exported to contracts to which other laws apply. The Anglo-project was intended to demonstrate the thesis that this assumption is not fully applicable under systems of civil law, because these systems traditionally are held to be based on principles (of good faith, of loyalty) that contradict this approach. The research in the project not only demonstrated the thesis, but even showed that the assumption is not always correct even under English law.

## 1.3 No real alternative to the applicable law

Before some observations on the effects of the analysed clauses in the various legal systems, a brief comment should be made regarding the lack of alternatives to applying a national governing law.

[13] Ibid., section 2.7.

Legal models do circulate and the European integration enhances this circulation:[14] therefore, it is not necessarily negative that contracts modelled on a certain law are governed by another law. However, these contracts suffer a loss of context and may (not necessarily always) presume the existence of legal institutions that cannot be found in the governing law, write around problems that do not exist in the governing law (or vice versa), or write on the basis of certain remedies that may not be available under the governing law.[15]

The question of what can go wrong if a contract is based on a law but subject to the law of another system requires various observations regarding the method and the sources applied in the analysis. Courts seem to have had a less than consistent approach to the question, with results that may sometimes appear as artificial.[16]

The question of which law applies to a contract, is approached through private international law (conflict of laws). The simple use of a drafting style that is loosely inspired by the common law is not a sufficient connecting factor that may determine the governing law, nor is the use of the English language.[17] International contracts drafted according to the common law tradition and written in English, therefore, will not automatically be subject to English law. They will be subject to the law chosen on the basis of the applicable conflict rule, just like any other international contract. The main conflict rule for contracts is

[14] Jean-Sylvestre Bergé, "Circulation of Common Law Contract Models in Europe: The Impact of the European Union System," ibid.

[15] This incisive formulation is by Gerhard Dannemann, "Common Law Based Contracts under German Law," in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, ed. Giuditta Cordero-Moss (Cambridge University Press, 2011).

[16] Ibid., section 4.

[17] Giuditta Cordero-Moss, "Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harminised, Transnational Interpretation?," in *Boilerplate Clauses, International Contracts and the Applicable Law*, ed. Giuditta Cordero-Moss (Cambridge University Press, 2011)., section 1. This is confirmed also by Dannemann, "Common Law Based Contracts under German Law.", section 1 and Ulrich Magnus, "The Germanic Tradition: Application of Boilerplate Clauses under German Law," in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, ed. Giuditta Cordero-Moss (Cambridge University Press, 2011)., section 3.1.2.

party autonomy, that is the power that the parties have to determine the governing law. If the parties have not chosen the governing law, the contract will, as a general rule, be subject to the law of the place where the party that makes the characteristic performance has its habitual residence. Therefore, even a contract written in a common law a style may end up being subject to a law that does not belong to the common law legal family.

Research showed[18] that there are no real alternatives to a state governing law when it comes to principles of general contract law upon which the interpretation and application of the agreed wording is based. Restatements of soft law, compilations of trade usages, digests of transnational principles and other international instruments, sometimes invoked as appropriate sources for international contracts,[19] may be invaluable in determining the content of specific contract regulations, such as the INCOTERMS are for the definition of the place of delivery in international sales.[20] However, these sources do not, for the moment, provide a sufficiently precise basis for addressing questions such as 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 principle of good faith. As research shows, some of the mentioned transnational sources - in particular, the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL), as well as the various products of the ongoing work on a European contract law which are based on the PECL, such as the Draft Common Frame of Reference,

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18 Cordero-Moss, "Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harminised, Transnational Interpretation?."

19 See, for example, Magnus, "The Germanic Tradition: Application of Boilerplate Clauses under German Law.", Section 2.

20 The INCOTERMS, however, do not cover all legal effects relating to the delivery: for example, they do not determine the moment when title passes from the buyer to the seller, as pointed out by Maria Celeste Vettese, "Multinational Companies and National Contracts," ibid., Section 2.

(DCFR) and the proposal of a regulation on a common European sales law (CESL) - solve these questions by making extensive reference to good faith; however, good faith is a legal standard that needs specification and there does not seem to be any generally acknowledged legal standard of good faith that is sufficiently precise to be applied uniformly and irrespective of the governing law. The book on boilerplate contains an analysis of the material available on the Entire Agreement clause that proves this point.[21]

Not much help can be found in the observation that legal systems converge on an abstract level and that thus very similar results may be achieved in the various systems, albeit by applying different legal techniques. Firstly, convergence can rarely be said to be full. Even within one single legal family there are significant differences, for example between the US and English law regarding exculpatory clauses. Moreover, 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.[22] Reducing the divergence to a mere question of technicalities, moreover, misses the point: it is exactly 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 to obtain the same result by a different clause.

An observer may be tempted to dismiss these considerations with a pragmatic comment: most international contracts contain an arbitration clause, and therefore disputes arising in connection with them will be solved by arbitration and not by the courts. International arbitration

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21 Cordero-Moss, "Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harminised, Transnational Interpretation?.", Section 2.4

22 Edward T. Canuel, "Comparing Exculpatory Clauses under Anglo-American Law: Testing Total Legal Convergence," in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, ed. Giuditta Cordero-Moss (Cambridge University Press, 2011)., Section 2.

is a system based on the will of the parties, and arbitrators are expected to abide by the will of the parties and not apply undesired sources that bring unexpected results. Moreover, arbitral awards enjoy broad enforceability and the possibility of courts to interfere with them is extremely limited, so that the court's opinion on the legal effects of the contracts becomes irrelevant.[23] While all these observations are correct, they do not necessarily affect the research described here.

It is true that an arbitral award will be valid and enforceable even though it does not correctly apply the governing law. Not even the wrong application of mandatory rules of law is a sufficient ground to consider an award invalid or unenforceable. Therefore, arbitral tribunals are quite free to interpret contracts and to decide how and if at all these contracts shall interact with the governing law.

This, however, will not supply the arbitral tribunal with a sufficient answer to the question of how to interpret the contract. This is not a mere question of verifying whether mandatory rules have been complied with. It is a deeper and more subtle question, and it regards the values upon which interpretation should be based.

The interpreter's understanding of the relationship between certainty and justice (described above as 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, the existence and extent of a general principle of good faith) may lead to an interpretation of the contract that is more literal or more purposive. Some judges or interpreters may be unaware of the influence that the legal system exercises on them: they may have internalised the legal system's principles in such a way that interpretation based on them feels like the only possible interpretation. Others, and particularly experienced international arbitrators, may have been exposed to a variety of legal systems and thus have acquired a higher degree of awareness that the terms of a contract do not

[23] On the enforceability of international awards and the scope within which national courts may exercise a certain control see section 2 below.

have one natural meaning, but that their legal effects depend on the interaction with the governing law. These aware interpreters face a dilemma, when confronted with a contract drafted with a style extraneous to the governing law: on the one hand, they do not want to superimpose on the contract the principles of a law that the parties may not have considered during the negotiations. On the other hand, they have no uniform set of principles permitting them to interpret a contract independently from the governing law. Particularly if one of the parties invokes the governing law to prevent a literal application of the contract (notwithstanding that it might not have been aware of it during the negotiations), the dilemma is not easy to solve, not even for an arbitrator.

The clauses selected in the Anglo-project, and the cases proposed to highlight the interpretative challenges that may be faced, are meant as an illustration of the dilemma faced by the interpreter.

## 1.4 The differing legal effects of boilerplate clauses

The Anglo-Project analysed a series of 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 during the negotiations.

Despite the standardised form of these clauses, the research showed that it is not possible to rely on one uniform interpretation of boilerplate clauses. Having the purpose of highlighting the possible influence that the governing law has on the interpretation and application of their wording, the project has divided the selected clauses into three groups: (i) clauses aiming at creating a self-sufficient system that does not depend on the governing law for interpretation or exercise of remedies, (ii) clauses that regulate mechanisms or use terminology not part of the governing law, and (iii) clauses that regulate matters already regulated in the governing law. For all these groups, cases have been proposed that put a strain on the literal application of the wording and highlight

the impact of the governing law. The text of the clauses and the cases are listed in the Introduction to Part 3 of the book on boilerplate.[24] An analysis of these clauses' legal effects under the various laws is given in Part 3 of the same book.[25] Some observations follow below, all based on the findings published in the mentioned book on boilerplate clauses.

### 1.4.1 Clauses aiming at fully detaching the contract from the applicable law

#### a) Entire Agreement

The purpose of the Entire Agreement clause is to isolate the contract from any source or element that may be external to the document. This is also often emphasised by referring to the four corners of the document as the borderline for the interpretation or construction of the contract. The parties' aim is thus to exclude that the contract is integrated by terms or obligations that do not appear in the document.

The parties are obviously entitled to regulate their interests and to specify the sources of their regulation. However, many legal systems provide for ancillary obligations deriving from the contract type,[26] from a general principle of good faith[27] or from a principle preventing abuse

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[24] Cordero-Moss, *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*., pp. 115-128.

[25] Ibid., pp. 129-373.

[26] See, for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, ed. Giuditta Cordero-Moss (Cambridge University Press, 2011)., Section 2, as well as the general considerations on Article 1135 of the Civil Code in Section 1; for Italy, see Article 1347 of the Civil Code and Giorgio De Nova, "The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law," ibid., Section 1, for Denmark, see Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 1.

[27] See the general principle on good faith in the performance of contracts in §242 of the German BGB. See Dannemann, "Common Law Based Contracts under German Law.", Sections 3.2 and 3.3 for examples of its application by the Courts.

of right.[28] This means that a contract would always have to be understood not only on the basis of the obligations that are spelled out in it, but also in combination with the elements that, according to the applicable law, integrate it. A standard contract, therefore, risks having different content depending on the governing law; the Entire Agreement clause is meant to avoid this uncertainty by barring the possibility to invoke extrinsic elements. The Entire Agreement clause creates an illusion of exhaustiveness of the written obligations.

This is, however, only an illusion: first of all, ancillary obligations created by operation of law may not be excluded by contract.[29]

Moreover, some legal systems permit bringing evidence that the parties have agreed upon obligations different from those contained in the contract.[30]

Furthermore, many civilian legal systems openly permit the use of pre-contractual material to interpret the terms written in the

[28] See, for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, ed. Giuditta Cordero-Moss (Cambridge University Press, 2011)., Section 1.

[29] See, for France and Italy, footnote 26 above. For Finnish law, see Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.1.

[30] See, for Germany, §309 No 12, of the BGB, prohibiting clauses which change the burden of proof to the disadvantage of the other party: see Ulrich Magnus, "The Germanic Tradition: Application of Boilerplate Clauses under German Law," ibid., Section 5.1.1.a. Italy, on the contrary, does not allow oral evidence that contradicts a written agreement, see Giorgio De Nova, "The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law," ibid., Section 1.

contract.[31]

Finally, a strict adherence to the clause's wording may, under some circumstances, be looked upon as unsatisfactory even under English law. English courts, though insisting that a properly drafted Entire Agreement clause may actually succeed in preventing any extrinsic evidence from being taken into consideration when faced with such a clause, interpret it so as to avoid unreasonable results. The motivation given by the courts in the decisions may create the impression that a proper drafting may achieve the clause's purpose, but the ingenuity of the court's interpretation gives rise to the suspicion that a drafting would never be found to be proper if the result were deemed to be unfair.[32]

The Entire Agreement clause is an illustration of a clause by which the parties attempt to isolate the contract from its legal context, which is not completely successful and cannot be fully relied on.

Incidentally, a literal application of this clause would not be allowed under the UPICC or the PECL either, both of which are based on a strong general principle of good faith, that furthermore is specified by an express rule for the Entire Agreement clause.[33]

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31 In addition to Germany (see previous footnote), see for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 2; for Italy, Giorgio De Nova, "The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law," ibid., Section 4; for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.1; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 3.1; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.1. The situation seems to be more uncertain in Sweden, see Lars Gorton, "The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law," ibid., Section 5.4.2.d, and more restrictive is Finland, see Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.1.

32 See Edwin Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law," ibid., Section 2.1.

33 See Cordero-Moss, "Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harminised, Transnational Interpretation?.", Section 2.4.

**b) No Waiver**

The purpose of a No Waiver clause is to ensure that the remedies described in the contract may be exercised in accordance with their wording at any time and irrespective of the parties' conduct. The parties try, with this clause, to create a contractual regime for the exercise of remedies without regard to any rules that the applicable law may have on the time frame within which remedies may be exercised and the conditions for such exercise. Many legal systems have principles that protect one party's expectations and prevent abuse of formal rights. These rules may affect the exercise of remedies in a way that is not visible on the language of the contract. The No Waiver clause is inserted to avoid these "invisible" restrictions to the possibility of exercising contractual remedies.

The parties are, of course, at liberty to regulate the effect of their conduct. However, under some circumstances this regulation could be used by one party for speculative purposes, such as when a party fails for a long time to exercise its right to terminate, and then exercises it when it sees that new market conditions make it profitable to terminate the contract. The real reason for the termination is not the other party's old default that originally was the basis for the right of termination, but the change in the market. The No Waiver clause, if applied literally, permits this conduct. A literal interpretation of the clause in such a situation, however, would in many legal systems contradict principles that cannot be derogated from by contract: the principle of good faith in German law that prevents abuses of right,[34] the same principle in French law that prevents a party from taking advantage of a behaviour inconsistent with that party's rights,[35] and the principle of loyalty in the

[34] See footnote 27 above. Interestingly, the principle of abuse of right in Russian law would not have the effect of depriving a party from its remedy in spite of considerable delay in exercising the remedy: see Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law.", Section 2.2.

[35] See Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 3.

Nordic countries[36] that prevents interpretations that would lead to an unreasonable result in view of the conduct of the parties.[37] The clause may have the effect of raising the threshold for when a party's conduct may be deemed to be disloyal,[38] but it will not be able to displace the requirement of loyalty in full. Also in this context, a literal application of the clause would also be prevented by the UPICC and by the PECL, both of which assume good faith in the exercise of remedies.[39]

Also in the case of this clause, as seen above in connection with the Entire Agreement clause, English courts argue as if it were possible for the parties to draft the wording in such a way as to permit results that would be prevented in the civilian systems as contrary to good faith or loyalty. The English courts' decisions, however, leave the suspicion that even an extremely clear and detailed wording would not be deemed to be proper, if its application would lead to unfair results.[40]

The No Waiver clause, thus, promises self-sufficiency in the regime for remedies that may not be relied on.

### c) No Oral Amendment

The purpose of this clause is to ensure that the contract is implemented at any time according to its wording and irrespective of what the parties may have agreed later, unless recorded in writing. This clause is useful particularly when the contract is going to be exposed to third parties, either because it is meant to circulate, for example, in connection with the raising of financing or because its performance requires the invol-

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36 See for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.3; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.2; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 3.2.

37 See Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.3.

38 See Chapter 12, Section 2.2.

39 See Cordero-Moss, "Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harminised, Transnational Interpretation?.", Section 2.4.

40 See Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law.", Section 2.2.

vement of numerous officers of the parties, not necessarily all authorised to represent the respective party. In the former scenario, third parties who assess the value of the contract must be ensured that they can rely on the contract's wording. If oral amendments were possible, an accurate assessment of the contract's value could not be made simply on the basis of the document. In the latter scenario, the parties must be ensured that the contract may not be changed by agreement given by some representatives who are not duly authorised. In a large organisation it is essential that the ability to make certain decisions is reserved for the bodies or people with the relevant formal competence.

The clause, therefore, has a legitimate purpose and the parties are free to agree to it. Under some circumstances, however, the clause could be abused – such as if the parties agree on an oral amendment, and afterwards one party invokes the clause to refuse performance because it is no longer interested in the contract after the market has changed.

A strict application of the written form requirement is imposed in Russia by mandatory legislation.[41] An application of the clause, even for a speculative purpose, would be acceptable under French law, that has a rule excluding the possibility of bringing oral evidence in contradiction to a written agreement.[42] A similar rule is present also in Italian law, although case law on the matter seems to be unsettled.[43] In German law, the opposite approach applies: German law does not allow excluding evidence that could prove a different agreement by the parties and does not permit terms of contract that disfavour the other party in an unreasonable way.[44] The Nordic systems would give effect to the wording of the clause by raising the threshold for when it can be considered as proven that an oral amendment was agreed upon. However, once such

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41 See Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.3.

42 See Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 4.

43 See Giorgio De Nova, "The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law," ibid., Section 3.

44 See Ulrich Magnus, "The Germanic Tradition: Application of Boilerplate Clauses under German Law," ibid., Section 5.1.2.a.

an oral agreement is proven, it would be considered enforceable out of the principle of *lex posterior*,[45] of loyalty[46] or of good faith.[47]

Even under English law, in spite of the alleged primacy of the contract's wording, it is uncertain whether the clause would be enforced if there was evidence that the parties had agreed to an oral variation.[48]

The No Oral Amendment clause is yet one more example of clause that not necessarily always will be applied in strict accordance with its terms.

### d) Severability

The purpose of this clause is to regulate the consequences for the contract, if one or more provisions of the contract are deemed to be invalid or illegal under the applicable law. The clause aims at excluding that the effects of an external source rendering a provision ineffective spread to the rest of the contract. As already mentioned in respect of the previous clauses, the parties are free to determine the effects of their contract. However, a literal application of this clause may have effects that seem unfair, if the provision that became ineffective had significance for the interests of only one of the parties, and the result is that the remaining contract is unbalanced.

There does not seem to be abundant case law on this matter; the material analysed in Part 3, however, shows that the clause would be disregarded in France, in case the invalid provision should be deemed to be essential, or if the situation affected the economic balance of the

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45 See, for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.2.

46 See, for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.3, and for Norway Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid. Section 3.3.

47 See, for Sweden, Lars Gorton, "The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law," ibid., Section 5.3.2.

48 See Edwin Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law," ibid., Section 2.3.

contract.[49] Also in the Nordic systems, the general power of the courts to determine in their discretion the consequences of the inefficacy of a provision, cannot be derogated from by contract if this creates an unbalance.[50]

### e) Conditions

The purpose of this clause is to give one party the power to terminate the contract early upon breach by the other party of specific obligations, irrespective of the consequences of the breach or of the early termination. By this clause, the parties attempt to avoid the uncertainty connected with the evaluation of how serious the breach is and what impact it has on the contract. This evaluation is due to the requirement, to be found in most applicable laws, that a breach must be fundamental if the innocent party shall be entitled to terminate the contract. By defining in the contract certain breaches as fundamental, or by spelling out that certain breaches give the innocent party the power to terminate the contract, the parties attempt to create an automatism instead of allowing an evaluation that takes all circumstances into consideration.

As already mentioned above, it falls within the parties' contractual freedom to regulate their respective interests and to allocate risk and liability. Among other things, this means that the parties are free to determine on which conditions the contract may be terminated early. However, a literal interpretation of the clause may lead to unfair results, such as when the breach under the circumstances does not have any consequences for the innocent party, but this party uses the breach as a basis to terminate a contract that it no longer considered profitable, for example, after the market changed.

In this context, the assumed primacy of the contract's language

[49] See Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 5.

[50] See for Denmark Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.4, for Finland Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.4, for Norway Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 3.4.

seems to be confirmed by English courts. If it is not possible to avoid unfair results by simply interpreting the clause, English courts are inclined to give effect to the clause according to its terms, even though the result under the circumstances may be deemed to be unfair. English courts do so, even if with evident reluctance, to ensure consistency in the law underlying the repudiation and termination of the contract.[51] In this context, therefore, a properly drafted language achieves the effects that follow from a literal application of the clause even if these effects are unfair.

The other systems analysed here, on the contrary, would not allow a literal application of the clause if this had consequences that may be deemed to be unfair, because of the general principle of good faith and loyalty[52] or under the assumption that parties cannot have intended to achieve such unfair results.[53]

This clause is an illustration of contractual regulation that may be applied literally when subject to English law, whereas it has to be applied in combination with the governing law when subject to a civilian law.

### f) Sole Remedy

The purpose of this clause is to ensure that no other remedies but those regulated in the contract will be available in case of breach of contract. Like the clauses mentioned earlier, this is also an attempt to insulate the contract from the legal system it is subject to. Rather than relating to the

[51] See Edwin Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law," ibid., Section 2.4.

[52] See, for Germany, the principle on good faith in the performance contained in §242 of the BGB; for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 6; for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.5; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.5. The same would be obtained under Russian law, based on the principle prohibiting abuse of rights: see Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.4.

[53] See, for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 3.5.

applicable law's remedies and the conditions for their exercise, which may differ from country to country, the parties define the applicable remedies, the conditions for their exercise and their effects in the contract, for so excluding the applicability of any other remedies. Also in respect of this clause, it must be first recognised that it is up to the parties to agree on what remedy to exercise. However, a literal interpretation of this clause could lead to a situation where one party is prevented from claiming satisfactory remedies: assume, for example, that the sole remedy defined in the contract is the reimbursement of damages; if the amount of the damage is quantified in advance in a Liquidated Damages clause, and the amount is very low, the innocent party would not have any satisfactory remedy available.

This is another illustration of clauses that, in civil law, may not be applied literally but have to be integrated by the applicable law. In particular, the clause may be disregarded if the default was due to gross negligence or wilful misconduct by the defaulting party;[54] moreover, the clause may be disregarded if it has the effect of limiting the defaulting party's liability in such a way that it deprives the contract's essential obligations of their substance.[55] Another line of argumentation is that the clause may not deprive the innocent party of adequate remedies, in which case the remedies available by operation of law will be applicable

[54] See, for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 7; for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.6; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.6; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.6.

[55] See, for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 7.

notwithstanding the clause's attempt to exclude them.[56]

Under English law, assuming that the clause is drafted in such a clear and precise language that the courts do not have leeway in the interpretation, nothing at common law will limit the parties' freedom to regulate their interests in this context. However, under statutory law the clause may be subject to control as if it was a limitation of liability clause.[57]

### g) Subject to Contract

The purpose of this clause is to free the negotiating parties from any liability in case they do not reach a final agreement. This clause, like those that were seen above, protects important interests in international commerce: it must be possible for the parties to wait until they have completed all negotiations before they make a decision on whether to enter into the contract. Often negotiations are complicated and are carried out in various phases covering different areas of the prospective transaction, whereby partial agreements on the respective area are recorded and made "subject to contract." When all partial negotiations are concluded, the parties will be able to have a full evaluation and only then, they will be in a position to finally accept the terms of the deal.

The parties may freely agree when and under what circumstances they will be bound. However, a literal application of the clause may lead to abusive conducts, such as if one of the parties never really intended to enter into a final agreement and used the negotiations only to prevent the other party from entering into a contract with a third party.

In this case, as in respect of the clause on termination of the contract,

[56] See, for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.6. See also, for Sweden, Lars Gorton, "The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law," ibid., Section 6.3, and, for Italy, Maria Celeste Vettese, "Multinational Companies and National Contracts," ibid., Section 3.2. More restrictive is Norway, where the clause may be set aside only under exceptional conditions as unfair, see Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 3.6.

[57] See Edwin Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law," ibid., Section 2.5.

there is a dichotomy between the common law approach and the civil law approach. English law seems to permit the parties to negate the intention to be bound, without being concerned with the circumstances under which the clause will be applied. A certain sense of unease may be detected with the English courts at permitting to go back on a deal, but it seems that a very strong and exceptional context is needed to override the clause.[58] Civil law, on the contrary, is concerned with the possibility that such a clause may be abused by a party to enter into or continue negotiations without having a serious intention to finalise the deal. Therefore, such conduct is prevented, either by defining the clause as a potestative condition and therefore null,[59] or by assuming a duty to act in good faith during the negotiations.[60]

Parties, therefore, may generally rely on the possibility of negating the intention to be bound if the relationship is subject to English law. If the applicable law belongs to a civilian system, however, the parties will be subject to the principle of good faith under the negotiations irrespective of what language they have used to avoid it.

### h) Material Adverse Change

The purpose of this clause is to give one of the parties the discretion to withdraw from its obligations in case of change in circumstances that significantly affect the creditworthiness of the other party or in case of other defined circumstances. As above, this clause serves useful purposes by per-

58 See ibid., Section 2.6.

59 See, for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 8. Potestative conditions are null also under Italian law, see Article 1355 of the Civil Code.

60 See, for France, ibid., Section 8; for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.7; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.7; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 3.7; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.7. The duty to act in good faith during the negotiations is spelled out also in §311 of the German BGB and in Article 1337 of the Italian Civil Code.

mitting agreement in advance, on all terms of the transaction, though reserving for events that may have a negative effect and that may supervene between the time of the agreement and the time at which the obligations are to become effective. The parties are free to define the list of events that are included in the clause. A widely formulated clause, however, may lead to abuses if a party invokes it to avoid a deal that it has lost interest in.

Case law on this clause is not abundant; therefore it may be difficult to express a definite opinion on the enforceability of the clause under all circumstances.[61] What is clear is that under French law the clause should be formulated in an objective way, so as to exclude the possibility that a party applies purely subjective criteria thus rendering it a potestative condition.[62] In the Nordic systems, the principle of good faith[63] would impose a restrictive interpretation of the clause[64] in order to avoid abuse in its application.

The language of the clause, therefore, may not be understood purely on the basis of its terms, and it must be integrated with the principles of the applicable law.

### 1.4.2 Clauses using a terminology with legal effects not known to the applicable law

#### a) Liquidated Damages

This clause quantifies the amount of damages that will be compensated, and has the purpose of creating certainty regarding what payments shall be due, in case of breach of certain obligations. In many civilian systems, this may achieved by agreeing on contractual penalties. The

[61] On the difficulty to predict the outcome of a case involving this clause under Swedish law, see Lars Gorton, "The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law," ibid., Section 5.3.3.d.

[62] See Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 9.

[63] See, for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 2.8. Also Germany has a principle on good faith in the performance of the contract, see §242 of the BGB.

[64] See, for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 2.8.

Liquidated Damages clause has its origin in the common law, where contractual penalties are not permitted. The main remedy available for breach of contract in common law is compensation of damages. In order to achieve certainty in this respect, contracts contain clauses that quantify the damages in advance. As long as the clause makes a genuine estimate of the possible damages, and it is not used as a punitive mechanism, it will be enforceable. The agreed amount will thus be paid irrespective of the size of the actual damage. The common law terminology is also adopted in contracts governed by other laws, even when the applicable law permits contractual penalties. In the intention of the parties to these contracts, these clauses are often assumed to work as penalty clauses. This means that they are not necessarily meant to be the only possible compensation for breach of contract and to be paid irrespective of the size of the actual damage. Questions may arise, however, as to the effects of the clause: shall they have the same effects as in English law and make the agreed sum payable in spite of the fact that there was no damage at all, or that the damage had a much larger value, or that the clause was meant to be cumulated with reimbursement of damages calculated according to the general criteria?

It must be first pointed out that this is one of the clauses that demonstrate the primacy of the contract language in the eyes of English courts. Structuring the clause as liquidated damages rather than as penalty, permits avoiding the penalty rule under English law. This effect follows appropriate drafting rather than the substance of the regulation. Although the courts have the power to exert control on whether the quantification may be deemed to be a genuine evaluation of the potential damage, they are very cautious in making use of this power, under the assumption that the parties know best how to assess any possible damages.[65] Moreover, the penalty rule applies to sums payable upon breach of contract; an appropriate drafting will permit circumventing these limitations by regulating payments as a consequence of events

[65] See Edwin Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law," ibid., Section 2.7.

other than breach, thus excluding the applicability of the penalty rule.[66] This is a good example of how far the appropriate drafting may reach under English law.

In civil law, on the contrary, no matter how clear and detailed the drafting is, there are some principles that may not be excluded by contract. Thus, the agreed amount of liquidated damages will be disregarded if it can be proven that the loss actually suffered by the innocent party is much lower[67] or much higher.[68] Contractual penalties may, under certain circumstances, be cumulated with other remedies, including also reimbursement of damages.[69] The English terminology that refers to "damages" may create a presumption that the parties did not intend to cumulate that payment with other compensation. This may come as a surprise to the parties that used the terminology on the assumption that it is the proper terminology for a contractual penalty; however, if it is possible to prove that the parties intended to regulate a penalty and did not intend to exclude compensation for damages in

66 *Ibid.*

67 See, for Germany, Magnus, "The Germanic Tradition: Application of Boilerplate Clauses under German Law.", Section 5.2.2.a.; for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 10; for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 3.1; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.5.

68 See, for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 10; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 3.1; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 4.1; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.5.

69 See, for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 3.1; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 4.1; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.5.

spite of the terminology they used, the presumption may be rebutted.[70]

Relying simply on the language of the contract, and particularly if the contract also contains a Sole Remedy clause, a party could be deemed to be entitled to walk out of the contract if it pays the agreed amount of liquidated damages. The Liquidated Damages clause could thus be considered as the price that a party has to pay for its default, and as an incentive to commit one if the agreed amount is lower than the benefit that would have been derived from terminating the contract. In many countries, however, the principle of good faith prevents the defaulting party from invoking the Liquidated Damages clause in case the default was due to that party's gross negligence or wilful misconduct.[71]

The Liquidated Damages clause is one more example of the different approach to drafting and interpretation in the common law and in the civil law traditions. Whereas the former permits circumventing the law's rules by appropriate drafting, the latter integrates the language of the contract with the law's rules and principles.

### b) Indemnity

Indemnity clauses have a technical meaning under English law and, among other things, they assume that there is a liability and that damage actually occurred. However, some contracts use the term "indemnity" or "indemnify" to designate a guaranteed payment. The analysis made in Part 3 shows that the simple use of the term does not imply that it shall be understood with the technical meaning that follows from

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70 See, for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 3.1; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 4.1.

71 See, for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 10; for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 3.1; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 3.1. The law seems to be unsettled on this matter in Sweden, see Lars Gorton, "The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law," ibid., Section 6.3.

English law. If the parties intended the payment to be made irrespective of the occurrence of a damage, therefore, it will not be possible to avoid it by invoking the requirements that the technical meaning of Indemnities have under English law. The clause will be interpreted in accordance with the substance regulated by the parties and the applicable law.

### 1.4.3 1.4.3 Clauses regulating matters already regulated in the applicable law

#### a) Representations and Warranties

This clause contains a long list of circumstances that the parties guarantee to each other – from the validity of the parties' respective incorporation to the validity of the obligations assumed in the contract and the characteristics and specifications of the contract's object. As was seen above, some of these Representations and Warranties may not be deemed to have any legal effect, because they fall outside of the parties' contractual power;[72] most of the circumstances that are represented or warranted, however, relate to specifications or characteristics of the contract's object. These Representations and Warranties create an obligation for the party making them, and, if breached, will either permit the other party to repudiate the contract, or to claim compensation for damages. The clause, therefore, has an important function. The function is particularly important in common law, where the parties are expected to spell out in the agreement the respective assumptions and obligations, and it may be difficult to convince a court to imply specifications or characteristics that were not mentioned in the contract. A party during contract negotiations, is under no duty to disclose matters relating to the contract's object, and the clause of Representation and Warranties is usually the occasion for the parties to list all information that they consider relevant, and where they expect the other party to assume responsibility. Without the Representation and Warranties, there would be no basis for a claim.

[72] See Section 1.2 above.

In civilian systems, on the contrary, the parties are under extensive duties to disclose any circumstances that may be of relevance in the other party's appreciation of its interest in the bargain. It is not the party interested in receiving the information that shall request the other party to make a list of specific disclosures; it is the party possessing the information that is under a general duty to disclose matters that are relevant to the other party's assessment of the risk and its interest in the deal. This duty of information exists by operation of law even if the contract has no Representations and Warranties.

When the parties insert a long and detailed Representations and Warranties clause, and carefully negotiate its wording, they may be under the impression that this long list exhaustively reflects what they represent and warrant to each other. This impression is in compliance with the effects of the clause under English law, where an accurate wording is crucial for deciding whether a party has a claim or not.[73]

Under civil law, the clause also has effects: if a certain characteristic was expressly represented or warranted in the contract, failure to comply with it will more easily be qualified as a defect in the consent or a breach of contract, without the need to verify whether it had been relied on, whether it was essential, etc. The clause, therefore, creates certainty regarding the consequences of the breach of the Representations and Warranties that were made.

However, the clause does not have the reverse effect: if a certain characteristic was not included in the Representations and Warranties, it does not mean that it may not be deemed to be among the matters that the parties have to disclose or bear responsibility for. The parties may have spent considerable energy in negotiating the list and one party may intentionally have omitted certain matters, in the illusion that this would have been sufficient to avoid any liability in that connection. However, if the matter left out is material, the other party may be entit-

[73] See Peel, "The Common Law Tradition: Application of Boilerplate Clauses under English Law.", Section 2.9.

led to claim the nullity of the contract[74] or compensation for damages.[75] The duty of disclosure may not be contracted out[76] and is considered to be such a cornerstone, that it applies even to sales that are made "as is."[77]

This clause is an example where an accurate drafting may obtain results if the contract is subject to English law, because English law leaves it to the parties to determine the content of their bargain. Civil law, on the contrary, regulates this area extensively, and the drafting of the parties may not affect this regulation, no matter how clear and detailed it is.

### b) Hardship

This clause regulates, sometimes in detail, under what circumstances, and with what consequences, the parties may be entitled to renegotiate their contract because of a supervened and unexpected unbalance in the respective obligations. Neither English nor French law provides for any mechanism to suspend or discharge the parties from obligations in case the performance, though still possible, becomes more onerous for one party. Other civilian systems, on the contrary, permit a party to request a modification of the obligations if changed circumstances seri-

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74 See, for France, Xavier Lagarde, David Méheut, and Jean-Michel Reversac, "The Romanistic Tradition: Application of Boilerplate Clauses under French Law," ibid., Section 12; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.8.

75 See, for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 4.1; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.8.

76 See, for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 4.1; for Russia, Ivan S. Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law," ibid., Section 2.8.

77 Under Norwegian law: see Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 5.1 - although in the case of sale "as is," the duty extends only to what the seller had knowledge of.

ously affect the balance in the contract.[78] The clause, thus, gives the parties larger rights than they would have under English or French law, while at the same time it may restrict the rights that the affected party would have under other laws. The parties may have introduced a hardship clause in the attempt to take into their hands the regulation of supervening circumstances and to exclude the application of corresponding rules in the governing law. A clause permitting the affected party to request renegotiations will be enforced in a system where such right is not recognised by the general law, because it will simply create a new regulation, based on contract but not prohibited by law. The reverse, however, is more problematic: a detailed Hardship clause may restrict the right that the affected party has under the applicable law. For example, the clause may contain an intentionally restrictive definition of the events that trigger the remedy, significantly more restrictive than the applicable law's standard of "more burdensome performance." Also, the clause may regulate that the only possible remedy is the request of renegotiation without suspending the duty to perform, and thus exclude other remedies, such as withholding the performance, which may be permitted by the applicable law.

The parties may actually have written such a restrictive Hardship clause with the purpose of limiting the application of the governing law's generous rules. In these situations, the clause will not be understood as the sole regulation in case of supervened unbalance in the

[78] See, for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 4.2; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 4.2; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 5.2. For Germany, see §313 of the BGB and for Italy see Articles 1467-1469.

contract and will thus be cumulated with the applicable law's rules.[79]

**c) Force Majeure**

This clause is meant to regulate, in detail, under what circumstances a party may be excused for non- performance of its obligations under the contract in case the performance becomes impossible. Corresponding regulations may be found not only in the legal systems that, as seen immediately above, have a regulation for hardship, but also in English and French law. Force Majeure clauses, thus, regulate matters that are already regulated in the applicable law. The law's regulation, however, is not mandatory; therefore, it is fully possible for the parties to create a separate contractual regime and allocate the risk of supervened impediments differently from the allocation that follows from the governing law.

Often Force Majeure clauses are detailed and extensive. This, combined with the above-mentioned non-mandatory nature of the legal regime, gives the impression that these clauses will be applied equally irrespective of the governing law. However, the principles of the applicable law are likely to influence the understanding of the clause. For example, many Force Majeure clauses describe the excusing impediment as an event beyond the control of the parties that may not be foreseen or reasonably overcome. Different legal systems may have differing understandings of what is deemed to be beyond the control of one party: whereas many systems will consider this wording as an allocation of the risk in the sphere of either party (what is not under the control of one party is under the control of the other one), others may focus more on the conduct of the affected party: if the non-performing

[79] See, for Denmark, Peter Møgelvang-Hansen, "The Nordic Tradition: Application of Boilerplate Clauses under Danish Law," ibid., Section 4.2; for Finland, Gustaf Möller, "The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law," ibid., Section 4.2; for Norway, Viggo Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law," ibid., Section 5.2. See, however, German law, that permits the parties to derogate from the statutory regulation in §313 of the BGB: Ulrich Magnus, "The Germanic Tradition: Application of Boilerplate Clauses under German Law," ibid., Section 5.3.2.a.

party has been diligent and cannot be blamed for the occurrence of the impediment, it will be excused. In the former approach, it may happen that a party is not excused even though it has acted diligently and cannot be blamed – the basis for liability is that the risk that materialised was deemed to have been assumed by that party. This approach is typical of the common law, and may be also found in the CISG.[80] In the latter approach, the party will be excused if it did not have the actual possibility to influence the circumstances that caused the impediment. This approach may be found in some civilian systems.[81]

The different approaches to what is beyond the control of the parties may be illustrated by the example of a performance that is prevented by a failure made by the seller's supplier. In the CISG, if the seller is not able to perform because of a failure by its supplier, it will not be excused.[82] The choice of supplier is within the control of the seller, therefore failure by a supplier may not be deemed to be beyond the control of the seller. Under Norwegian law, on the contrary, failure by the seller's supplier is deemed to be an external event that excuses the seller.[83] As long as the supplier was chosen in a diligent way, the seller may not be blamed for supplier's failure because it does not have any actual possibility to influence the supplier's conduct.

This different understanding of the rule on the supplier's failure is a good illustration of how different legal traditions may affect the inter-

[80] For a more extensive explanation and bibliographic references, see G. Cordero Moss, *Lectures on Comparative Law*, Publications Series of the Institute of Private Law No 166, (University of Oslo, 2004), pp. 156-159, retrievable at http://folk.uio.no/giudittm/GCM_List%20of%20Publications.htm

[81] See, for Russia, Zykin, "The East European Tradition: Application of Boilerplate Clauses under Russian Law.", Section 2.9. See, for further references, G. Cordero Moss, *Lectures on Comparative Law*, cit., pp. 151-156.

[82] The United Nations Secretariat's *Commentary to the UNCITRAL Draft Convention*, adopted at the United Nations Conference on Contracts for International Sale of Goods, Vienna 10 March-11 April 1980 (A/CONF./97/5), available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_travaux.html, is the closest to an official report to the CISG. It specifies, in the comment to the second paragraph of Article 79 on use of sub-contractors, that the rule does not include suppliers of raw material or of goods to the seller: see Commentary, cit., p. 172.

[83] See Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law.", Section 5.3.

pretation of the same wording. The basis for excusing the seller's non-performance is the same in Norwegian law and in the CISG: the Norwegian Sales of Goods Act is the implementation of the CISG, and its §27 translated the rule contained in Article 79 of the CISG. In spite of the same wording, the interpretation of the rule is so different,[84] and this is due to the subtle influence exercised by the legal tradition of the interpreter, which is the main subject-matter of the Anglo-project.

## 1.5 The drafting style does not achieve self-sufficiency, but has a certain merit

The research made in the Anglo-project shows that the terms of a contract are not detached from the governing law: the governing law will influence interpretation and application of these terms. To what extent the legal effects differ from what a literal application would suggest, varies depending on the governing law.

There is, therefore, no reason to rely on a full and literal application of the contract's wording as if it was isolated from the governing law.

If this is so, why do contract parties go on drafting detailed (and sometimes, as seen above, nonsensical) clauses without adjusting them to the governing law? Why do they engage in extensive negotiations of specific wording without even having discussed which law will govern the contract?

Each of the parties may repeatedly send numerous delegations consisting of financial, marketing, technical, commercial and legal experts to meet and negotiate specific contractual mechanisms and wording to be inserted in the contract; all these people may spend hours and days negotiating whether the penalty for a delay in the performance shall be 10.000 or 15.000 US Dollars a day, or fighting on whether the contract

[84] The interpretation referred to ibid., Section 5.3 is based on a Supreme Court decision rendered in 1970, long before the implementation of the CISG in the Norwegian system. However, the Supreme Court's decision is still referred to as correctly incorporating Norwegian law after the enactment of the Sales of Goods Act, as the reference made ibid. confirms (see, for further references, G. Cordero Moss, *Lectures on Comparative Law*, cit., pp. 152f.).

shall include the word "reasonable" in the clause permitting early termination of the contract in case the other party fails to perform certain obligations. All these negotiations are usually made without even having addressed the question of the governing law. The contract may end up[85] being governed by English law, in which case the clause on penalties will be unenforceable, or by German law, in which case the concept of reasonableness will be part of the contract irrespective of the appearance of the word. All the efforts in negotiating the amount of the penalty, or in rendering the early termination clause stricter, will have been in vain. Unfortunately, it is not at all seldom that the choice-of-law clause is left as the last point in the negotiations, and that it is not given the attention that it deserves.

However, this does not necessarily mean that the practice of negotiating detailed wording without regard to the governing law is always unreasonable. From a merely legal point of view it makes little sense, but from the overall economic perspective it is more understandable.

Thus, it is true that clauses, originally meant to create certainty, upon the interaction with the governing law, may create uncertainty.[86] The uncertainty about how exactly a clause will be interpreted by a judge is deleterious from a merely legal point of view. However, this uncertainty may turn out to be less harmful from a commercial perspective: faced with the prospects of employing time and resources to pursue a result that is unforeseeable from a legal point of view, the parties may be encouraged to find a commercial solution. Rather than maximising the legal conflict, they may be forced to find a mutually agreeable solution. This may turn out to be a better use of resources once the conflict has arisen.

In addition, this kind of legal uncertainty is evaluated as a risk, just like other risks that relate to the transaction. Commercial parties know that not all risks will materialise, and this will also apply to the legal

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85 Either because the parties chose it, or because the applicable conflict rule pointed at it.

86 This observation is made by Hagstrøm, "The Nordic Tradition: Application of Boilerplate Clauses under Norwegian Law.", Section 2.

risk: not all clauses with uncertain legal effects will actually have to be invoked or enforced. In the majority of contracts, the parties comply with their respective obligations and there is no need to invoke application of specific clauses. In the situations where a contract clause actually has to be invoked, the simple fact that the clause is invoked may induce the other party to comply with it, irrespective of the actual enforceability of the clause. An invoked clause is not necessarily always contested. There will be, thus, only a small percentage of clauses that will actually be the basis of a conflict between the parties. Of these conflicts, we have seen that some may be solved amicably, exactly because of the uncertainty of the clause's legal effects. This leaves a quite small percentage of clauses upon which the parties may eventually litigate. Some of these litigations will be won, some will be lost. The commercial thinking requires a party to assess the value of this risk of losing a law suit on enforceability of a clause (considering also the likelihood that it materialises), and compare this value with the costs of the alternative conduct. The alternative conduct would be to assess every single clause of each contract that is entered into, verify its compatibility with the law that will govern each of these contracts and propose adjustments to each of these clauses to the various other contracting parties. This, in turn, requires the employment of internal resources to revise standard documentation and external resources to adjust to the applicable law, and possibly engaging in negotiations to convince the other contracting parties to change a model of contract that they are well acquainted with. In many situations, the costs of adjusting each contract to its applicable law will exceed the value of the risk that is run by entering into a contract with uncertain legal effects.

The sophisticated party, aware of the implications of adopting contract models that are not adjusted to the governing law and consciously assessing the connected risk, will identify the clauses that matter the most, and concentrate its negotiations on those, leaving the other clauses untouched and accepting the corresponding risk.

## 1.6 Conclusion

The contract practice described above does not mean that the parties have opted out of the governing law for the benefit of a transnational set of rules that is not easy to define. Just because the parties decided to take the risk of legal uncertainty for some clauses does not mean that the interpreter has to refrain from applying the governing law or that the legal evaluation of these clauses should be made in a less stringent way than for any other clauses.

Taking the risk of legal uncertainty also does not justify that the drafters neglect being aware of the legal effects that their clause may have under the governing law: a calculated risk assumes a certain understanding of what risk is being faced. Being fully unaware would not permit the drafters to assess the risk and decide which clauses should be adjusted and which ones do not justify using resources in negotiating. In the examples made above, the clause on penalty should certainly be adjusted to the governing law in order to permit enforcement, whereas the clause on reasonable early termination does not deserve being negotiated because a change in the wording will not affect its enforcement. Knowing the legal effects under the governing law will permit the parties to apply their resources reasonably during the negotiations. This permits taking a calculated risk. Ignoring the problems and blindly trusting the effectiveness of the contract's wording, on the contrary, resembles more recklessness than a deliberate assumption of risk.

## 2 Is an arbitration clause sufficient to exclude relevance of national law? The APA-project (Arbitration and Party Autonomy)

The question of the relevance of national law in the context of international arbitration is dealt with in the framework of the research project Arbitration and Party Autonomy (APA): http://www.jus.uio.no/ifp/

english/research/projects/choice-of-law/

The project, that is ongoing, is carried out at the Department of Private Law under my management, and is financed by the Department of private Law, Orkla ASA, Statoil ASA, the law firms Selmer and DLA Piper, and Yara ASA. The project has a steering committee with representatives from the sponsors and an extensive international network consisting of highly regarded practitioners and academics (http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/members/), who participate in the project's workshops and seminars (http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/events/). So far the project has resulted in various publications (http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/publications/ ), among others a book on the features of different forms of arbitration[87] and a series of master theses: Ulrik Tetzschner, Grenser for hva som kan være gjenstand for voldgift - internasjonale utviklingstrekk og forholdet til ordre public (2012), Hedda Bjøralt Roald, Avtaler med patentrettslige implikasjoner: Lovvalg og voldgift (2012), Tone Wetteland, Investeringskontrakter, lokal rett og voldgift (2011), Siri Hafeld, Avtaler om pant med implikasjoner for kreditorene: Lovvalg og voldgift (2011), Nicolai Nielsen, Avtaler med konkurranserettslige implikasjoner: voldgift og lovvalg (2010), Cathrine Bjoland, Aksjonæravtaler og selskapsrettslige implikasjoner: Lovvalg og voldgift (2010).

## 2.1 The aim of the project

International contracts often contain a choice of law clause, and often the law that is chosen does not belong to the country of either party or of the place of performance, but is a neutral, third law. The reasons for choosing a third law to govern the contract are various, ranging from the intention not to give any of the parties the "advantage" of having the contract governed by "that party's" law, to the desire to avoid being subject to laws that are perceived as unstable, difficult to assess or other-

[87] Giuditta Cordero-Moss, *International Commercial Arbitration. Different Forms and Their Features* (Cambridge University Press, 2013).

wise unsatisfactory. Often the parties insert an arbitration clause as well, and they perceive that this strengthens the effects of their choice of law and excludes any interference by any other laws.

However, choice of law clauses are not always capable of fully achieving the results desired by the parties. There are several limits to their effects, that may depend on various elements: (i) the scope of application of the choice of law clause may be restricted by various rules of the applicable private international law, (ii) certain rules belonging to laws different from the law chosen by the parties may be applicable because of their overriding character, or (iii) the law chosen by the parties may give effect to rules belonging to a foreign law.

In these situations, the parties' expectations may be disappointed, as the contract will be subject to rules that were intended to be excluded. In particular, the parties may have drafted a contract that is enforceable under the law chosen by the parties, yet some of the terms may turn out to be unenforceable because rules belonging to another law are applicable.

The arbitration clause does not necessarily prevent the applicability of rules belonging to a law different from the one chosen by the parties: some of these rules cannot be disregarded even by an international arbitral tribunal and, if they are, the award will be invalid or unenforceable.

The project aims at clarifying which contract terms run the risk of being governed by a law different from the law chosen by the parties and to what extent these restrictions to party autonomy are of a kind that makes them applicable not only to a court of law, but even to international arbitration.

## 2.2 The legal framework

As long as arbitral awards are complied with voluntarily by the losing party, there is no point of contact between the national courts and the arbitration. Consequently, there will be no national judge that decides to override the parties' contract or expectations by considering an

agreement invalid because, for example, it violates EU competition law.[88] The arbitrators may or may not decide to apply competition rules, but, as long as the losing party accepts the result of the arbitration, there will be no possibility for any judge to verify the arbitrator's acts.

If the losing party does not voluntarily accept the award, there are two possibilities of obtaining judicial control on an award: (i) the losing party may challenge the validity of an arbitral award before the courts of the place where the award was rendered, and (ii) the losing party may abstain from carrying out the award, so inducing the winning party to seek enforcement of an arbitral award by the courts of the country (or countries) where the losing party has assets.The validity of an award may be challenged before the courts of the place where the award was rendered. Because the challenge is regulated by national arbitration law, and may differ from country to country, it is impossible to make an analysis with a general validity. Suffice here look at the discipline contained in the UNCITRAL Model Law on International Commercial Arbitration, which is acknowledged as embodying a general consensus in the matter of arbitration, is adopted more or less literally in circa 70 countries (including Norway),[89] and is used a term of reference even in many countries that have not formally adopted it.[90]

The grounds that may be invoked under article 34 of the UNCITRAL Model Law (and under article 43 of the Norwegian Arbitration Act) to make an award invalid are the same grounds that may be invoked under article 36 of the Model Law (and under article 46 of the Norwegian Arbitration Act) as defences against the enforcement of an award. These are, in turn, the same grounds that are listed in the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral

[88] Violation of EU competition law is, according to a much discussed European Court of Justice decision, to be deemed as a violation of public policy, see below.

[89] A list of the countries that have adopted the Model Law may be found on UNCITRAL's homepage,http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[90] For example, Sweden and England have Arbitration Acts that follow their respective legislative tradition and cannot be considered as having adopted the Model Law. However, the Model Law has consistently been taken into consideration in the drafting work.

Awards as the only possible defences against enforcement of an award. In the interest of harmonisation, that in a field like international arbitration is extremely important and fully complies with the purposes of both the UNCITRAL Model Law and the New York Convention, both instruments shall be interpreted autonomously. This applies also to interpretation of articles 43 and 46 of the Norwegian Arbitration Act.[91] An autonomous interpretation aims at construing and applying a rule in a uniform way, common to all countries that have adopted or ratified the instrument. It assumes that a court avoids special interpretations due to peculiarities of its specific national system, as well as that it takes into consideration construction and application of the instrument in other countries, as a parameter for its own interpretation. Because of the identity of the criteria for challenging the validity and resisting the enforcement of an award, interpretation or application of articles 34 and 36 of the UNCITRAL Model (and articles 43 and 46 of the Norwegian Arbitration Act), as well as of article V of the New York Convention, are relevant to each other. Therefore, we will deal with the grounds for invalidity and the grounds for unenforceability jointly, and the comments made on the Model Law (and the Norwegian Arbitration Act) will be applicable also to the New York Convention, and vice versa.

It is, however, important to bear in mind that, as mentioned above, invalidity of an arbitral award is regulated by the various national laws, and that there may be further grounds for invalidity in the countries that have not adopted the UNCITRAL Model Law. Norway has adopted the UNCITRAL Model Law without significant changes in this respect, therefore the considerations made here are relevant also for Norwegian law.

Enforcement of an arbitral award is regulated, in the about 150 countries that have ratified it, by the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. In article V the New York Convention contains an exhaustive list of the grounds that may be invoked to prevent enforcement of an award. There is large consensus on the opportunity to interpret these grounds restrictively,

[91] NOU 2001:33, 8.4.

i.e. to restrict the scope of judicial control.[92]

The analysis below will show to what extent the rules on choice of law may affect the validity or enforceability of an arbitral award.

### 2.2.1 No review of the application of law

The list of grounds for invalidity or unenforceability is, as mentioned, exhaustive and must be interpreted restrictively. Nothing in the wording of this list suggests that the courts have the authority to review the merits of the arbitral decision, either in respect of the evaluation of the fact, or in respect of the application of the law. Judicial control under the UNCITRAL Model Law and under the New York Convention, in other words, may not be used as a vehicle for the court to act upon an error in law incurred by the arbitral tribunal, no matter how evident the error is. The impossibility to control the arbitral award in the merits, including also the application of the law, is generally acknowledged both in theory and in judicial practice.[93]

### 2.2.2 Legal capacity

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92 Gary Born, *International Commercial Arbitration*, vol. II (Wolters Kluwer, 2009). p. 2711ff.; A. J. van den Berg, *Consolidated Commentary on the New York Convention*, (2003) *ICCA Yearbook Commercial Arbitration* XXVIII, 501 A, for various decades the most authoritative commentary on the New York Convention, with extensive reference to judicial practice. For a thorough analysis of the role of overriding mandatory rules within arbitration see L.G. Radicati di Brozolo, *Arbitrage Commercial International et Lois de Police: Considérations sur les Conflits de Jurisdictions dans le Commerce International*, in (2006) *Collected Courses of the Hague Academy of International Law*, vol. 315, 265ff., with extensive references to literature. See also G. Cordero Moss, *International Commercial Arbitration. Party Autonomy and Mandatory Rules*, Tano Aschehoug 1999.

93 See van den Berg, cit., 2003, 501 B and C. In Common Law countries there is a tradition for permitting a certain control of error in law in the phase of challenge of the validity of an award, although it has been considerably restricted in modern legislation (see, for example, section 69 of the English Arbitration Act). This, however, does not affect the enforceability of a foreign award that is governed by the New York Convention. See G Born, *International Commercial Arbitration: Commentary and Materials,* 2.ed., 181, with references to the US doctrine of manifest disregard of the law, which may be used as a defence against enforcement of a US award, but not of a foreign award.

Suppose a contract between a Norwegian and a Russian party contains a choice of law clause that designates Swedish law to govern the relationship. The Russian party, by its statutes or the law that governs it, has a requirement that certain types of contract become binding on the company only if they have been signed by two authorised persons – one signature is not sufficient to create obligations. Swedish law, chosen by the parties to govern the contract, does not contain the same requirement. If the contract is signed only by one person, which criterion applies to determine whether the company is bound - the criterion set by the chosen Swedish law (one signature, the contract is binding) or that set by the Russian law (two signatures, the contract is not binding)?

There is no uniform conflict rule to identify which law governs the legal capacity of the party to a contract. In states of Common Law, the legal capacity is sometimes considered a question of contract, and is therefore governed by the law that governs the contract.[94] More generally, however, the capacity to enter into a contract is regulated by the law governing the company.[95] According to private international law, thus, the choice of law made by the parties does not cover the question of legal capacity. What would be the consequences for the award, if the arbitral tribunal nevertheless disregarded the law of the legal capacity

[94] See for the US Restatement, Second, Conflict of Laws, § 198 and Eugene Scoles et al., *Conflict of Laws*, 4 ed. (2004)., § 18.2. A similar approach has English law, although only in respect of restrictions to the legal capacity, and without taking into consideration the law chosen by the parties: see Lawrence Collins et al., *Dicey, Morris and Collins on the Conflict of Laws*, 14 ed. (Sweet & Maxwell Ltd, 2006)., §§ 30-021ff.

[95] See, for Germany, Jan Kropholler, *Internationales Privatrecht* (Mohr Siebeck, 2006)., 581 and for Switzerland the Private International Law Act, article 155(c). The Rome I Regulation on the Law Applicable to Contractual Obligations, that represents the private international law in the European Union, excludes from its scope of application the choice of law relating to whether an organ may bind a company, which means that within Europe there is no harmonisation of the conflict rule applicable to the legal capacity of the parties, and each state has its own conflict rules to determine the law deciding whether the parties had the competence to enter into a contract. See, however, article 13 of the Regulation, according to which, in the event of a contract entered into by persons located in the same state, the foreign party cannot invoke the foreign applicable law on legal capacity to assert his or her own legal incapacity, if that person had legal capacity under the law of the state where the contract was entered into (unless the other party was aware of the incapacity of that party). It is controversial whether this can be extended to companies, see Kropholler, cit., 581.

and followed the will of the parties?

Article 34(2)(a)(i) of the UNCITRAL Model Law and article V(1)(a) of the New York Convention provide, as a ground for setting aside or refusing enforcement of an arbitral award, that a party to the arbitration agreement was under some incapacity under the law applicable to it. The law applicable to a party, as just seen, is not the law that the parties chose to govern the contract. If the arbitral award follows the choice of law made by the parties and considers the contract as binding in spite of the Russian law requirement, then the award may be set aside or refused enforcement because the arbitral agreement has not come into existence properly. A recent decision of the Stockholm Court of Appeal set aside an arbitral award affirming, among other things, that the law of Ukraine is applicable to the question of the legal capacity of the Ukrainian party, notwithstanding that the contract contained a governing law clause choosing Swedish law.[96]

### 2.2.3 Arbitrability

An award may be set aside or refused enforcement if the subject-matter of the dispute may not be subject to arbitration according to the law of the court of the place where the award was rendered or, as the case may be, where the award is sought enforced (see Article 34(2)(b)(i) of the UNCITRAL Model Law and article V(2)(a) of the New York Convention.

National arbitration laws usually determine the arbitrability of disputes by making reference to concepts such as the possibility by the parties to freely dispose of the claims that the dispute is based on, or by defining the claims as commercial, contractual or having the character of private law. This would exclude from the scope of commercial arbitration matters such as taxation, import and export regulations, cur-

[96] State of Ukraine v Norsk Hydro ASA, Svea Hovrätt, 17 December 2007. For a more extensive analysis, see Giuditta Cordero Moss, "Legal Capacity, Arbitration and Private International Law," in *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, ed. K. Boele-Woelki, Girsberger, D., Einhorn, T. and S. Symeonides (The Hague: Eleven International Publishing, 2010).

rency or security exchange, concession of rights by administrative authorities, bankruptcy, the protection of intellectual property, etc. These matters are mostly regulated by mandatory rules from which the parties cannot derogate and must be decided upon by courts of justice - unless they are subject to special arbitration, for example based on treaties or special legislation. Disputes concerning the other aspects of commercial transactions, which fall within the scope of the freedom to contract, are usually arbitrable.

The rationale for restricting arbitrability is to reserve the decision of disputes regarding particularly important interests and policies to courts of law, which are deemed to be more accurate than arbitral tribunals in the consideration and application of the relevant rules. In the course of the last decades, arbitration laws and court practice have become more and more liberal in their definition of what is arbitrable; broadly speaking, the scope of applicability of the rule on arbitrability may be seen to largely overlap the rule on public policy, that will be examined immediately below.[97] More recently, however, some court decisions have applied the rule on arbitrability to assume jurisdiction notwithstanding the existence of an arbitration agreement (thus denying arbitrability of the dispute) to ensure that mandatory rules on the protection of the weaker party in commercial agency agreements be applied.[98]

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[97] For a more extensive substantiation of this line of thought see G. Cordero Moss, *National Rules on Arbitrability and the Validity of an International Arbitral Award: The Example of Disputes Regarding Russian Petroleum Investments*, (2001) *Stockholm Arbitration Report*, 7ff.

[98] The cases had arbitration clauses and choice of law clauses that, if enforced according to their terms, would have led to disregarding EU rules protecting the commercial agent: Belgian Supreme Court, Van Hopplynus S.A. v. Coherent Inc. (2007) Revue de Droit Commercial Belge 889; English High Court Accentuate Ltd v Asigra Inc (2009) EWHC 2655 (QB); German Court of Appeal OLG München 17.5.2006. See also the European Court of Justice decision in the casw C-381/98 (Ingmar).

### 2.2.4 Public policy

A highly relevant ground for setting aside an award or refusing its enforcement is that the award violates the public policy of the forum (article 34(2)(b)(ii) of the UNCITRAL Model Law and article V(2)(b) of the New York Convention). The exception of public policy (or ordre public) is, in the context of international arbitration, unanimously interpreted very narrowly. Its rationale is not to permit a judge to refuse enforcement or annul an international award on the basis of any difference between the result of the award and the result to which the judge would have come applying his or her own law. This would run counter the spirit of the New York Convention, of the UNCITRAL Model Law, all practice that is generally recognised and legal doctrine in the international scale, as seen below.

#### 2.2.4.1 Restrictive application

Many court decisions in the various states annulling an award or refusing to enforce it because the award is in contrast with the court's public policy, are reported in the ICCA Yearbook, Commercial Arbitration. A survey of these decisions, from the first volume in the mid seventies to our days, shows that such decisions are not numerous. In some cases there is relative uniformity of consensus from state to state: awards that violate rules on bribery or smuggling, for example, are usually considered in the international legal doctrine as being against public policy.

As known, there is no absolute criterion to determine public policy: what is fundamental may vary from state to state, and, even within the same state, the conceptions develop, and what was deemed public policy a decade earlier, may not be it any more few years later. Mention should be made here of the notion of "truly international public policy", a concept primarily recognised in some academic circles and sometimes proposed as more adequate to be applied to international transactions and international arbitration than the national public policy is: the usefulness of this concept, however, may be questioned. The concept aims at avoiding that a legal system uses its own fundamental principles

to declare a foreign award invalid or to refuse its enforcement (or to restrict application of the governing foreign law), if such principles are particular to that specific legal system and do not enjoy recognition internationally. In such a situation, the peculiarity of that legal system undermines the ideals of international uniformity that inspire international commercial law and international arbitration. The aim of the theory underlying the truly international public policy, therefore, is to disregard the fundamental principles that are proper only of one legal system, even if they represent the basic values upon which that society is relying. Instead, that legal system should look at what basic principles are recognised on a more international level, and prefer those principles to its own. It seems too ambitious to me, however, to expect that a state waives application of its own fundamental principles in the name of an ideal of harmonisation in international commerce. As long as the validity of an arbitral award is regulated by national arbitration laws implemented by national courts, and the enforceability of an award is regulated by the New York Convention which refers to national laws implemented by national courts, the standard of reference will be the fundamental principles of the lex fori (though in the narrow sense described above).[99]

Not every principle inspiring a mandatory rule can be considered a public policy principle. Not even every principle inspiring an overriding mandatory rule can be considered of public policy. It is only the fundamental ones, those that constitute the basis of the society. Rules that would at first sight seem to be of public policy, like embargo, have in several cases not been considered as such, under the consideration that, even if embargo are important from a foreign policy point of view, they

[99] See, corroborating this position, A. Sheppard, *Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?*, in 2004 *Transnational Dispute Management*, vol I, issue 01, 7f., commenting the work on public policy made in the frame of the International Law Association, International Commercial Arbitration Committee.

cannot be considered of public policy.[100] Moreover, not any discrepancy with the text or technicalities of a rule based on such fundamental principle may be deemed a violation of public policy.[101]

The sections below will discuss case law relating to the determination of public policy in respect of some of the rules were private international law designates as applicable a law different form the law chosen by the parties. If the arbitral tribunal decides to follow the will of the parties and disregards the law that is applicable according to the private international law, is the award valid and enforceable, or does it run the risk to be set aside or refused enforcement for contrast with public policy?

#### 2.2.4.2 Company law

Suppose that a Norwegian and a Russian company enter into various agreements regulating a co-operation between them: the two companies establish and jointly own a company in Latvia, which shall have its main place of business and its central administration in Russia. To regulate their cooperation, they enter into a shareholders agreement: the shareholders agreement contains a governing law clause choosing Swedish law and an arbitration clause submitting any disputes arising out of the contract to arbitration before the Stockholm Chamber of Commerce.

The shareholders agreement contains various commitments for each of the parties, such as the obligation not to disclose to third parties specific information, the obligation to meet periodically to ascertain

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[100] National Oil Corporation (Libya) v. Libyan Nun Oil Company, 733 F.Supp. (1990), 800, and Belship Navigation, Inc. v. Sealift, Inc., 1995, in (1997) *Yearbook Commercial Arbitration* XXII, 789 ff. See, however, Karen Maritime Limited v Omar International Incorporated, 322 Federal Supplement, Second Series, 224 ff., in (2005) *Yearbook Commercial Arbitration* XXX, 789 ff., where the District Court affirmed that "it might have found it appropriate to deny enforcement if the breach of contract had to do with the Arab boycott" (at p. 790). The contract in dispute contained a clause that referred to the boycott of Israel by Arab countries, but the court found that the dispute did not concern that clause and its compatibility with US public policy.

[101] See, for a parallel restrictive use of the public policy defence in respect of recognition of civil court decisions under the Brussels convention, the European Court of Justice decision in Renault (C-38/98).

the progress of the cooperation, the obligation to make available funds under certain circumstances, etc.

The shareholders agreement contains also some obligations regarding the jointly owned company, the operation or competence of its corporate bodies, its capitalisation, etc. For example, the shareholders agree to each appoint a certain number of members to the company's board of directors, they specify the areas of competence that each member of the Board shall have and they commit to have the remaining Board members vote in the way that the competent Board member indicated. The shareholders agreement may further contain rules assessing the value of the respective contributions to the capital of the company and assigning a percentage of the shares in capital increases that corresponds to the agreed assessment. The shareholders agreement may, finally, contain rules on the transfer of shares to third parties or pre-emptive rights for the existing shareholders.

While the commitments between the parties have a contractual nature and will thus be subject to the chosen Swedish law, the rules of the shareholders agreement that affect the role and responsibility of the members of the Board of Directors, the capitalisation of the company or the transfer of shares have a different nature. Although the parties to the shareholders agreement have contractually committed themselves to a certain conduct in the Board, to a certain evaluation of the capital contributions and to a certain restriction in the sale of shares, these obligations do not only have a contractual nature. As known, the function of the Board of Directors, the capital of a company and the transferability of its shares (at least under certain circumstances) have a larger significance than the mere balance of interests between the two contracting parties: they affect aspects of the legal personality of an entity that has implications towards third parties, such as the entity's employees, its creditors or the other shareholders.

There are, therefore, reasons for preventing that an agreement between two parties (the shareholders who signed the shareholders agreement) modifies third parties' position by changing the governing company law. In other words, party autonomy should not cover the

matters that may affect third parties' interests; these matters are subject to the law identified on the basis of other connecting factors.

There is no generally acknowledged rule on what law governs the establishment and organisation of legal entities. Broadly speaking, there are two different approaches: the conflict rule that designates the law of the state where the legal entity is incorporated or registered,[102] and the conflict rule that designates the law of the state where the legal entity has its central administration or main place of business (the so-called "real seat").[103] In the case described here, therefore, the applicable company law would be that of Latvia (place of registration) or of Russia (real seat) depending on the applicable private international law.[104]

Assuming that the arbitral award gives effect to the agreement of the parties, thus violating the applicable company law: will the award be valid and enforceable in the country to which the applicable company law belongs?

The nature of the public policy defence prevents to make general assertions as to the quality as public policy for a whole area of the law:

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[102] Such as English law, see Collins et al., *Dicey, Morris and Collins on the Conflict of Laws*., §§ 30-002ff., US law, see the Restatement, Second, Conflict of Laws §§ 296 f. (1971) and Scoles et al., *Conflict of Laws*., § 23.2ff., the Swiss Private International Law Act, article 154, the Italian Private International Law Act, article 25.

[103] See Kropholler, *Internationales Privatrecht*., 568ff. Where the real seat is deemed to be is not necessarily evident: While the Brussels Convention on Jurisdiction and The Recognition of Judgements, as well as the parallel original Lugano Convention, left the criteria for determining where the seat is to the law of the forum, the Regulation Brussel I EC 44/2001 and the parallel new Lugano Convention have adopted a compromise solution for the purpose of determining where a legal entity is deemed to have a domicile, and makes reference to the state or states where the entity has any of its statutory seat, its central administration or its principal place of business.

[104] Traditionally, the place of registration is used as the connecting factor particularly in the Common Law countries, whereas conflict rules in many Civil Law systems, particularly those inspired by German law, are traditionally based on the main place of business. Within the European Union and the EFTA, however, a conflict rule based on the place of business has been deemed to be against the freedom of establishment if it restricts the possibility to establish the seat of a company in another member state, see Daily Mail (C-81/87), Cartesio (C-210/06) andNational Grid (C-371/10). However, this connecting factor is not totally incompatible with freedom of establishment, see Centros (C-212/97), Überseering (C-208/00) and Inspire Art (C-167/01).

while some rules of company law may protect interests that are deemed to be so fundamental that their disregard may contradict public policy, it will depend on the circumstances of the case to what extent the result of a specific violation actually is in contrast with such fundamental principles. On a general basis, however, it seems legitimate to affirm that the policy upon which various rules of company law are based may be deemed so strong, that a serious breach of those rules may represent a violation of public policy.

Thus, an award disregarding the applicable company law to give effect to the parties' agreement may run the risk of being ineffective, if it is challenged or sought enforced before the courts of the place to which the disregarded company law belongs.[105]

#### 2.2.4.3 Insolvency

Suppose that the Russian and the Norwegian party have a wider cooperation, that creates various mutual payment obligations. The agreement provides that each party's payment obligations shall be set-off against the other party's payment obligation, so that only the net amount shall be due. If one of the parties becomes insolvent, will its creditors be able to claim from the other party payment in full of the outstanding obligations, or will the set-off agreement be respected so that only the net amount exceeding the other party's claims will have to be paid?

Suppose that the agreement contains a so-called close-out netting arrangement, according to which all obligations of the debtor become immediately due and payable (even prior to their maturity) upon the

[105] See for example the decision of 31 December 2006 by the Federal Commercial Court of West Siberia regarding an arbitral award on a shareholder agreement between, among others, OAO Telecominvest, Sonera Holding B.V., Telia International AB, Avenue Ltd, Santel Ltd, Janao Properties Ltd, and IPOC International Growth Fund Ltd. The Court affirmed that the parties to a shareholders agreement may not choose a foreign law (in that case, Swedish law) to govern the status of a legal entity, its legal capacity, the function of its corporate bodies or the relationship to and within its shareholders. These matters are, according to the court, governed by mandatory rules of the law of the place of registration (in that case, Russian law). Violation of these Russian rules was defined as a violation of Russian public policy.

default by that party of one of its obligations; a variation of this arrangement is the so-called acceleration, particularly wide-spread for loan agreements, according to which the loan shall be terminated and the whole outstanding amount shall become immediately payable if the borrower "threatens to become insolvent". The reason for these mechanisms is evident: the creditor wishes to ensure that the debtor has sufficient means to comply with its obligations; if the financial situation of the debtor is such that there is an imminent risk that it becomes insolvent, the repayment of the loan may be affected. Moreover, if the borrower becomes insolvent, the insolvency proceeding will aim at redeeming all the borrower's liabilities, and there may not be sufficient means to repay the loan in its totality. To avoid this situation, the close-out netting aims at obtaining payment of all outstanding obligations prior to any financial difficulties that may arise as a consequence of the default and possible subsequent cross-defaults in other contracts, and the loan agreement has a mechanism that provides for repayment of the outstanding amount prior to the initiation of an insolvency proceeding, so that the lender does not have to divide the borrower's assets with the other creditors. Many legal systems have insolvency regulations that aim at preventing these mechanisms, and that permit to reverse payments that were made within a certain period prior to the initiation of the insolvency proceeding. Can the lender avoid the application of these rules by submitting the close-out netting or the loan agreement to a foreign law? If this was possible, the equality of treatment among the creditors, which is a fundamental principle of most insolvency regulations, would be considerably weakened, and the creditors would not be able to assess the assets that are available. This is not a recommendable situation, and for this reason the choice of law contained in the agreement, while fully effective for the contractual aspects of the legal relationship, may not have full effect for the part that has implications on the winding up or insolvency proceeding.

As a general approach, the dissolution of a company is governed by the company law that is applicable to that company. In case of companies having activity in more than one state, this raises the question of

how to ensure a just and equal treatment of all creditors in respect of assets that may be located in various countries. The two opposite approaches are the territorial and the universal: according to the former, a state's law and jurisdiction extends only to the assets that are located in the state's territory. According to the latter, the competent state's law and jurisdiction is to be recognised by foreign states.[106]

To harmonise this area, the EU issued the European Insolvency Regulation (1346/2000), which determines that for a company with cross-border activities insolvency is governed by law of the place where the main proceeding is carried out. In turn, the main proceeding is to be conducted in the country where the company has the centre of its main interests ("COMI"). The rebuttable presumption is that the COMI is where the company is registered.[107] The insolvency regulation, however, carves out from the application of this connecting factor a series of situations that involve vested rights by third parties, such as property and security rights, set-off and retention of title, and confirms for them the applicability of the governing law determined according to the respective conflict rule (which is not necessarily the law chosen by the parties, as will be seen below). To what extent this will be sufficient to prevent applicability of the insolvency rule reversing payments or transactions made in the last months or years(s) prior to the insolvency, depends on whether the rule is deemed to override the proper law or not.[108]

Do the same reasons for considering matters relating to insolvency as not subject to the law chosen by the parties constitute a sufficient basis for invoking the defence of pubic policy to set aside or refuse enforcement of an award that gives effect to the parties' agreement and thus violates the applicable insolvency law?

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[106] See Scoles et al., *Conflict of Laws*.§ 23.17, Collins et al., *Dicey, Morris and Collins on the Conflict of Laws*. §§ 30-010ff., Kropholler, *Internationales Privatrecht*. 582f., the Swiss Private International Law Act article 155 (b).

[107] It is to be noted that the same connecting factor is suggested in the the UNCITRAL Model Law on Cross-border Insolvency of 1997.

[108] More generally on overriding mandatory rules, and with further references, see Giuditta Cordero Moss, "International Arbitration and the Quest for the Applicable Law," *Global Jurist (Advances)* 8, no. 3 (2008)., part II, section 2.

The question was answered affirmatively in the United States in a case regarding the enforcement of an arbitral award rendered in London that ordered a Swedish party to effect a certain payment. The debtor was subject to insolvency proceedings in Sweden, and the Court of Appeal found that "in light of Salen's bankruptcy, [the] enforcement would conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt".[109] The court balanced against each other, on one hand the interest in ensuring enforcement to international awards, and, on the other hand, the interest in ensuring an equal treatment to the creditors when an insolvency procedure has been opened. The court resolved not to enforce the award, thus preventing that one creditor be preferred to the detriment of the others.

Other court decisions have enforced awards in spite of pending bankruptcy proceedings, because the circumstances of the cases were not making enforcement incompatible with the principles underlying the bankruptcy proceedings.[110]

#### 2.2.4.4 Property and Encumbrances

Suppose that an English company transfers to a Russian company the possession of certain raw material, for example alumina, so that the Russian company may process it and produce aluminium of a certain quality, for so making it available again to the English company against payment of a fee – a so called tolling agreement. The tolling agreement specifies that title to the material does not pass at any time and that the English company remains the owner of the material even when this is located in the Russian party's premises. Suppose that the Russian party,

[109] Salen Dry Cargo AB v. Victrix Streanship Co, in (1990) *Yearbook Commercial Arbitration* XV, 534 ff., 825 F.2d 709 (2nd. Cir 1987). See also the French Supreme Court decision Cour Cassation, 6.5.09 09-10.281.

[110] State Property Fund of Ukraine v TMR Energy Limited, United States Court of Appeals, District of Columbia Circuit, 17.6.2005, 2005 U.S. App. Lexis 11540, in (2005) *Yearbook Commercial Arbitration* XXX, 1178 ff., where the award was not directed at the party that was the object of bankruptcy proceedings. See also German Court of Appeal, Brandenburg, 2.9.1999, in (2004) *Yearbook Commercial Arbitration* XXIX, 696 ff., where the enforcement was deemed not to be an execution proceeding, but merely a preliminary measure without executory effect.

while in possession of the material, goes bankrupt. Suppose that the trustee receives claims from various parties in respect of this material: from the English party, that according to the tolling agreement always had title to the material; from a Russian bank, that in the time during which the material was in the possession of the Russian party had granted a loan to this party and obtained a first priority pledge on the material as security; and from a trader, that had entered into a contract for the purchase of the material on the assumption that the Russian party was the owner and had the right to dispose of it.

There are, thus, potentially four claims on the same volume of material: (i) by the original owner, because the tolling agreement never transferred title, (ii) by the bank, because it registered a legal pledge on the material, (iii) by the purchaser, because it entered into a binding contract of purchase, and (iv) by the generality of the Russian party's creditors, because the material is in the possession of the debtor.

Which of these claims prevails, will depend on whether title to the material actually never passed; in turn, this will depend on the law governing the passage of title.

The law governing the passage of title is not necessarily the law that the parties chose to govern the contract regulating the transfer. The choice of law made in the contract has effects for the obligations of the parties towards each other, but it does not necessarily have the ability to affect vested rights or legitimate expectations by third parties. For the effects towards third parties, the applicable law is not the law chosen to govern the contract, but the law of the place where the goods are located, so called lex rei sitae.[111]

Suppose that the parties agree that the debtor shall secure its obligations by pledging in favour of the creditor, the English party, all future products of the debtor's manufacturing plant in Russia, or the future proceeds that the Russian party will have for the sale of its future pro-

[111] See, for example, articles 100 and 104 of the Swiss Private International Law Act and the comments made in H. Honsell, N.P. Vogt, A.K. Schnyder, S.V. Berti (eds.), *Basler Kommentar Internationales Privatrecht* 2nd ed. 2007, 648ff.; § 43(1) of the German EGBGB and Kropholler, *Internationales Privatrecht*. 559ff.; for English law, see Collins et al., *Dicey, Morris and Collins on the Conflict of Laws*., §§24-029ff.

ducts. The parties choose to submit the contract to a law that permits the pledge of future (bulk) things or, as the case may be, of future income. Are the parties justified in relying simply on the chosen law and disregarding Russian law on pledge? If the pledge of bulk things or the pledge of future things or claims is not allowed under Russian law, is the choice of law made in the pledge sufficient to render the pledge valid between the parties and effective towards third parties?

A further method to create a security interest is to assign to the creditor a claim that the debtor has towards another party (for example, the manufacturer assigns to its raw material supplier, as payment of the raw materials, the claims that the manufacturer will have in the future against the purchasers of the manufacturer's products). To consider the assignment valid in respect of third parties (the manufacturer's clients or the manufacturer's other creditors) is it sufficient to comply with the law chosen by the parties, or is the law governing the assigned claim also relevant?

Another method to create security interests is to deliver to the creditor, as so-called collateral, certain assets (usually cash or securities), providing that the creditor will be entitled to retain them upon default by the debtor of the secured obligation. Because the creditor already has the availability of the assets, this arrangement minimises the risk of loss in case of default. Will the collateral need to be recognised as such under the law of the place where the assets are located, or is the recognition by the law chosen by the parties sufficient?

An encumbrance on an asset ensures the beneficiary that the proceeds from the sale of that asset will be used to satisfy its claim; consequently, the encumbrance restricts the availability of that asset for the other creditors, who will be able to apply to their respective credits only that part of the asset's value that remains after the beneficiary has satisfied its claim. The general rule in respect of creditors is that they shall be treated equally, and the priorities that are given via pledges or other encumbrances are an exception regulated by mandatory rules of law and generally subject to publicity and registration. If a bank is considering giving a loan to a party and requires security, it must be

allowed to rely on the formalities and procedures of the applicable law when verifying whether the debtor's assets are already subject to encumbrances in favour of other creditors. If it was possible for a debtor to avoid these requirements by choosing a foreign law for a contract containing an encumbrance, the bank would have to verify the status of the assets in all the world's jurisdictions in order to satisfy itself that the assets are free form encumbrances. This is obviously not a recommendable situation, and this is the reason why the creation of encumbrances or other security rights that may affect the position of third parties is not subject to the choice of law made by the parties in the agreement. The rights and obligations of the parties between each other are regulated by the law that they have chosen, but the enforceability of security rights that may affect third parties is not. Should the encumbrance turn out not to be effective under its proper law, the consequences between the parties will be determined by the law chosen by them: while in some systems the debtor may be deemed to be in breach of its contractual commitment towards the creditor even though the performance of the obligation is illegal or ineffective under its proper law, under other systems the invalidity of one obligation may affect the validity of the whole contract, thus rendering the encumbrance a nullity even between the parties.

The law governing encumbrances on tangible goods is generally determined by the same conflict rule as the law of property seen above, i.e. the connecting factor is the state where the goods are located [112]

The law governing assignability of claims or receivables and the effect of the assignment towards third parties and between the assigned debtor and the assignee is, generally, the law governing the claim that is being assigned, whereas the effect of the assignment between the assignor and the assignee are governed by the law governing the contract of

[112] See, for Swiss law, article 100 of the Private International Law Act; for English law, *Dicey, Morris and Collins on the Conflict of Laws*., §§ 24-035ff.; for US law, Uniform Commercial Code, article 9-103(1); for Norwegian law, Berte-Elen Reinertsen Konow, *Løsørepant over Landegrenser* (Fagbokforlaget, 2006)., 1999.

assignment, see for example article 14 of the Rome I Regulation.[113] However, the law of the place where the debtor is located is seen as applicable in some private international laws.[114] In other systems, the connecting factor determining the applicable law is the place of the creditor.[115] To harmonise this area, the UNCITRAL has prepared the 2001 Convention on the Assignment of Receivables in International Trade, but the instrument has so far not entered into force.

For the eventuality that the security interest or collateral is created with securities or other financial instruments, specific rules may be recommendable: therefore, the EU has issued two directives,[116] and various other initiatives are being pursued by international organisations such as the Hague Conference, the UNCITRAL and the UNIDROIT.

Would an award that disregards these conflict rules and applies instead the law chosen by the parties be valid and enforceable? Lacking any specific case law on the effectiveness of arbitral awards that give effect to the parties' agreement and violate applicable law on property, encumbrances or security interests, it seems advisable to refer to the reasoning made above in respect of company law and insolvency proceedings, that respond to the same logic.

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113 See the opposite applications by the German and Dutch courts of the two parts of the predecessor of this provision, article 12 of the Rome Convention: BGH 8.12.1998, XI ZR 302/97, IPRax 2000, 128f., and Brandsma g.g. v Hansa Chemie AG, Hoge Raad, 16 May 1997, Nederlands Internationaal Privaatrecht (1997) 15, 254ff.. See also Raiffeisen Zentralbank Oesterreich AG v Five Star General Trading LLC and others [2001] EWCA Civ 68, (2001).Q.B. 825, following the German approach. Extensively, see A. Flessner, H. Verhagen, *Assignment in European Private International Law*, 2006. See also Collins et al., *Dicey, Morris and Collins on the Conflict of Laws*., §§ 24-058ff.

114 See the US 2001 reform of the Uniform Commercial Code, art. 9-103(3), and Scoles et al., *Conflict of Laws*., §§ 19.17ff.

115 See article 105 of the Swiss Private International Law Act and the notes on it in the *Basler Kommentar*, cit., nn. 14ff.

116 See, for a clear analysis of the implementation of the Collateral Directive 2002/47, the Commission Evaluation at http://ec.europa.eu/internal_market/financial-markets/collateral/index_en.htm and, in particular, the response to the questionnaire to the private sector on the implementation of the Directive written by ISDA, the branch association for the privately negotiated derivative industry, at http://ec.europa.eu/internal_market/financial-markets/docs/collateral/2006-consultation/isda_en.pdf

#### 2.2.4.5 Competition law

Suppose that two competing manufacturers enter into a contract for the licensing of certain technology, and that the transfer of technology is accompanied by a system for sharing the market between the two competitors, which violates European competition law. The contract contains a choice of law clause, according to which the governing law is a foreign law. If a dispute arises between the two parties, and one of the two parties alleges that the contract is null and void because it violates European competition law, the other party will allege that EC competition law is not applicable to the contract, that the choice of the foreign governing law was meant specifically to avoid applicability of EC law and that the will of the parties shall be respected.

The purpose of the EC rules on competition is to ensure that business parties do not distort the market by, for example, sharing it between themselves. Practices such as market sharing have negative effect on the offer and on the prices, and this negatively affects the buyers. If the parties could avoid applicability of these rules by subjecting the contract to a third law, their party autonomy would affect the position of the buyers, and this is not desirable. Hence, competition rules will apply to agreements and market practices that have effect on the relevant territory, irrespective of the law that governs the contract. Competition law is one of the fields with rules that override the rules of the otherwise applicable law.

The European Court of Justice determined that European Competition rules have to be considered part of public policy.[117] The European Court was acting upon a reference made by the Dutch Supreme Court in a case for the annulment of an arbitral award. The award had given effect to the agreement between the parties, that violated the provision on competition of the EC Treaty, then art. 85. The Dutch Supreme Court had affirmed that an award violating Dutch competition rules would not be deemed against Dutch public policy, and requested a decision of the European Court as to whether European competition

[117] Eco Swiss China Time Ltd. v. Benetton International N.V. C-126/97.

policy could be treated in the same way or not. The ECJ ruled that the rule on competition contained in the then art 85 of the EC Treaty is a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. Based on this, the Court explicitly affirmed: "The provisions of article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention."[118]

The ECJ decision in Eco Swiss means, therefore, that the arbitral tribunal risks to render an award that will be deemed invalid and refused enforcement by European courts if the award gives effect to the choice of law made by the parties in the contract, and this leads to violating the otherwise applicable European competition law: the award will be deemed to conflict with European public policy. This, in turn, is a ground for setting aside the award if the award was rendered in a European country and was challenged before the court of that place, and a ground for refusing enforcement if this is sought before a European court.

That the European Court of Justice has defined European competition law as public policy does not mean that other systems outside of Europe will do the same. In the United States, for example, a Court of Appeal enforced an award that gave effect to a market allocation agreement on the basis that the compatibility with US competition law had already been evaluated by the arbitral tribunal and the court could not review such evaluation.[119]

### 2.2.4.6 Agency

Suppose that an Italian producer enters into a contract with a Norwegian agent for the promotion of the producer's products and the development of a market on the Norwegian territory. The parties provide in the contract that the agreement may be terminated at the discretion

[118] Ivi, Par 39

[119] United States Court of Appeals, Seventh Circuit, 16.1.2003, 315 Federal Reporter, Third Series (7th Cir. 2003), 829ff, in (2003) *Yearbook Commercial Arbitration* XXVIII, 1153 ff., but see the dissenting opinion by Cudahy, CJ, 1159 ff.

of the producer and that no compensation shall be paid to the agent upon such termination. The contract contains a choice of law clause determining the law of New York as governing, because this regulation of the parties' interests is allowed under that law. Under Norwegian law, however (as well as under Italian law), the agent is entitled to compensation upon termination of the relationship. Is the choice of law clause sufficient to exclude application of the Norwegian rule on compensation?

The rule on compensation is part of a set of rules designed to protect the agent, which is deemed to be the weaker party in the relationship. An agency assumes that the agent exercises its activity for the benefit of the principal; on termination of the relationship, the results of the agent's activity fall to the principal's benefit, that will enjoy the market and the goodwill developed for it by the agent. The agent, on the contrary, will not have any benefit from the activity carried out for the principal. Hence, the compensation upon termination is meant to balance the parties' interests. The protection regime is deemed to regard all commercial agents carrying out their activity within the territory, and the circumstance that the parties chose a different law to govern the contract should not exclude its application.[120]

Does this affect the validity and enforceability of an award that gives effect to the will of the parties and disregards the applicable rule on compensation upon termination?

Applying the rationale of Eco Swiss might lead to considering also the European rules protecting commercial agents as public policy. This is because the European Court of Justice affirmed in the Ingmar case that these rules have as a purpose to "protect freedom of establishment and the protection of undistorted competition in the internal market".[121] This reminds of the formula of Eco Swiss, that defined as public policy all essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.

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[120] See the European Court of Justice decision in Ingmar (C-381/98), where the question arose because the principal was located outside Europe. See also section 2.2.3 above.

[121] Ingmar (C-381/98), par 24.

On the recent application of the rule on arbitrability to disputes involving agency agreements, see above in section 2.2.3

### 2.2.4.7 Labour law, Insurance

Other areas where European directives provide for mandatory rules that protect weaker contractual parties and therefore are deemed to override the otherwise applicable law, are the areas of insurance and labour law.[122] For want of specific case law on these rules, it may be useful to refer to the rationale of the above mentioned Eco Swiss and Ingmar decisions: to the extent that mandatory rules of labour law and of insurance law may be deemed to be essential for the functioning of the internal market (including freedom of establishment and of movement), an award that gives effect to the parties' agreement and thus violates these rules might run the risk to be ineffective if it is presented to a court within the European Community or the EFTA.

### 2.2.4.8 Good faith and fair dealing

As was seen in section1 above, some legal systems base their contract laws on the principle of good faith and fair dealing. This principle may be used to guide the interpretation of the contract, its performance, to create ancillary obligations for the parties in spite of their not being expressly provided for in the contract or even to correct the regulation contained in the contract. Contract clauses that expressly permit an interpretation or a performance that violate the principle of good faith and fair dealing, for example exempting from liability even in case of gross negligence or wilful misconduct or permitting termination of the contract for capricious reasons, might be deemed to violate the principle of good faith and fair dealing. If the contract is subject to, for example, English law, which has no general principle of good faith for commercial contracts, there are no obstacles to a literal implementation of the

[122] For more details and further references see Cordero Moss, "International Arbitration and the Quest for the Applicable Law." part II, sections 2.2 and 2.4.

contract's provisions, as long as they are sufficiently clear.[123]

Would the literal implementation of these clauses be affected by an overriding principle of good faith and fair dealing in the law that would have been applicable if the parties had not chosen English law to govern the contract? The principle of good faith and fair dealing is considered to be central in the contract laws of civil law systems, and it has been transferred from there into various restatements of principles of contract law that have the ambition of being applicable to international contracts, such as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. The overriding rules based on good faith that have so far been applicable to consumer protection, but are extended to certain commercial contracts under the proposal of a Regulation a Common European Sales Law.[124] There are some indications that rules expressing this principle might have an overriding character and thus remain applicable in spite of a different choice of law made by the parties.[125]

The principle of good faith and fair dealing is also the basis for many

[123] For a substantiation of this statement see, with further references, "Commercial Contracts between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law," in *Common Frame of Reference and Existing Ec Contract Law* ed. Reinar Schulze (Sellier. European Law Publishers, 2008).65ff., 72ff.

[124] (COM(2011) 635 final). See also the Principles of EC Contract Law issued by the European Research Group on Existing EC Private Law (so-called "Acquis principles"), extend to commercial contracts various rules based on the protection of the consumer, for example imposing liability for having carried out negotiations in bad faith (article 2: 103), imposing a duty of information in the pre-contractual phase (article 2:201), imposing performance in good faith (article 7:101), providing that a right or a remedy shall be exercised in good faith (article 7:102), providing that the terms of a contract are not binding if they have not been individually negotiated and if they have been incorporated by reference made in the contract (article 6:201). Criticising these articles see ibid. 66f., 71, 72, 74f.

[125] The preparatory works to the Norwegian Act on Choice of Law in Insurance Contracts (Ot.prp.nr. 72 (1991-1992), pkt. 13.1), commenting on the act's provision about overriding mandatory rules (a provision modelled on article 7 of the Rome Convention, since the act is the implementation in Norway of the EC Directive on the same subject-matter), affirm that one of the rules of Norwegian law that might be deemed to have an overriding character according to that provision is § 36 of the Norwegian Contracts Act, imposing the principle of good faith and fair dealing on contracts.

provisions of the EEC Directive 93/13 on unfair consumer terms. In the Claro case,[126] the European Court of Justice ruled on the question whether article 6 of the Directive represents public policy and thus can be a basis for setting aside an arbitral award. Article 6 of the Directive provides that contract terms that are defined as unfair under the Directive shall not be binding on the consumer.

The ECJ found that, "as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory".[127] The ECJ concluded thus that the rule on unfair contract terms is to be deemed of public policy.

The Claro decision was rendered in a case involving a consumer, and its rationale is based on consumer protection. It is, therefore, quite doubtful, whether corresponding rules may be deemed to be public policy when the award regards a commercial dispute.[128]

There is a certain case-law in support of the restrictive approach recommended here.[129]

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126 C-168/05

127 Ivi, Par 37

128 More extensively on this subject-matter, see Cordero Moss, "Commercial Contracts between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law."., and "Harmonised Contract Clauses in Different Business Cultures " in *Private Law and the Many Cultures of Europe*, ed. Thomas Wilhelmsson and Elina Paunio (Kluwer Law International, 2007).221ff.

129 See a United States court decision, affirming that it did not have the power to review whether the arbitral tribunal had correctly applied the Illinois Beer Industry Fair Dealing Act: United States District Court, Northern District of Illinois, Eastern Division, 29.9.2004, 2004 U.S. Dist. LEXIS 19728, in (2005) *Yearbook Commercial Arbitration* XXX, 922 ff. The Supreme Court of Canada, Province of Prince Edward Island, 23.3.2001, in (2005) *Yearbook Commercial Arbitration* XXX, 459 ff., dismissed (albeit on an evaluation of the specific circumstances of the case) that it would be against public policy to give effect to certain agreements entered into by a franchisee because of the unequal bargaining power of the parties. A German Court dismissed that the size of a fee requested for certain services was excessive and against good morals, Hamburg Court of Appeal, 12.3.1998, IPRspr 1999No 178, in (2004) *Yearbook Commercial Arbitration* XXIX, 663 ff. See, however, an Austrian decision considering an interest rate too high and therefore in contrast with public policy: Supreme Court of Austria, 26.1.2005, in (2005) *Yearbook Commercial Arbitration* XXX, 420 ff.

## 2.3 The tribunal disregards the parties' choice in favour of the applicable law: is the award valid and enforceable?

Generally, the parties (or, rather than both of them, the party that would have an advantage from it) expect that their will is respected by the arbitral tribunal; in the situations described in the sections above, however, following the choice of law made by the parties may mean that the award is not effective. Consequently, the tribunal might be inclined to take into consideration the applicable law, thus avoiding rendering an invalid or unenforceable award.

Does the tribunal have the power to disregard the will of the parties? Normally, an arbitral tribunal runs the risk to exceed its power or to incur in a procedural irregularity, if it disregards the parties' instructions. Excess of power and procedural irregularity are both grounds for setting aside or refusing to enforce and arbitral award (respectively, articles 34(2)(a)(iii) and 34(2)(a)(iv) of the UNCITRAL Model Law and article V(1)(c) and V(i)(d) of the New York Convention).

In other words: is the arbitral tribunal forced to choose between two grounds for invalidity or unenforceability of the award, i.e. conflict with public policy or inexistence of the arbitral agreements on one hand and excess of power or procedural irregularity on the other hand? Or is there a legitimate basis for the tribunal to apply a law different from the one chosen by the parties without incurring in excess of power or procedural irregularity?

As seen above, private international law permits to apply the proper law in spite of what the parties might have chosen in their contract, because it determines the scope of application of the parties' choice. Within the party autonomy's scope of application, arbitral tribunals do not have the power to disregard the parties' instructions. Beyond the party autonomy's scope of application, the parties' instructions do not have effect and do not limit the arbitral tribunal's power to determine the applicable law.

Private international law, thus, gives a solution to the arbitrator's

dilemma by redefining it: it is not a question of having to choose between conflict with public policy and excess of power, it is a question of recognising how far party autonomy reaches.[130]

## 2.4 The tribunal wishes to apply the applicable law: how shall it choose it?

We have seen that a choice of law made by the parties in a contract that contains an arbitration clause is not totally independent from the applicable private international law. The next question is, therefore, how to determine which private international law is applicable in international commercial arbitration.

The overview made above showed that it is in no way indifferent which private international law is applied. Conflict rules vary from system to system, and consequently the law designated as applicable varies depending on which country's conflict rules are applied. Therefore, it is necessary but not sufficient to refer to private international law as a tool to avoid surprises in respect of the enforceability of the award. In addition, it is also necessary to specify which private international law the arbitral tribunal shall use in order to assess the party autonomy's borders and the applicability of other laws in specific areas of the legal relationship in dispute.

In respect of courts of law it is generally recognised that judges always apply the private international law of their own country to designate the applicable substantive law. In respect of international commercial arbitration there is not a corresponding automatic and absolute reference to the private international law of the place where the arbitral tribunal has its venue. The arbitration law of the place of arbitration has, as a matter of fact, a considerable significance for the arbitration proceeding, in that it governs important aspects such as the arbitrability of the dispute, the regularity of the arbitral procedure, the powers of the

[130] For a more extensive analysis of this question see G. Cordero Moss, *Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?*, in *Stockholm International Arbitration Review*, 2005:1, 1ff.

arbitrators, the possibility by the courts to interfere, the validity of the award, the fundamental principles of public policy. Therefore, it seems only natural to look to the law of the place of arbitration even when it comes to finding the applicable conflict rules. However, the eagerness to enhance the international character of international arbitration has led various legislatures and arbitral institutions to loosen the link between the place of arbitration and the applicable private international law. Hence, there is no uniform answer to the question of which private international law is applicable to an arbitral dispute. The various arbitration laws and rules of institutional arbitrations present a series of solutions, ranging from the application of the private international law of the place of arbitration,[131] to the application of the private international law that the arbitral tribunal deems most appropriate,[132] the application of conflict rules specifically designed for arbitration,[133] or the direct application of a substantive law without considering choice-of-law rules.[134]

If the applicable arbitration law or arbitration rules do not give precise guidelines as to which private international law is applicable to the arbitration, it will be up to the tribunal to decide. The various solutions outlined above give a sliding scale from the most predictable (and thus preferable) regime where the applicable private international law is determined in advance, via the mixed solutions where the identification

[131] This is the traditional approach, that is still followed in some modern arbitration legislation, for example art. 31 of the 2004 Norwegian Arbitration Act.

[132] This approach is followed, among others, by the UNCITRAL Model Law and the English Arbitration Act, and it can result into application of the private international law of the country where the arbitral tribunal has its venue, of another law that seems to be more appropriate, or even, of no specific law (sometimes arbitrators compare the choice of law rules of all laws that might be relevant, and apply a minimum common denominator).

[133] For example, the Swiss arbitration law contains a choice of law rule that designates as applicable the law of the country with which the subject-matter of the dispute has the closest connection.

[134] French arbitration law, as well as the rules of the International Chamber of Commerce, of the London Court of International Arbitration and of the Arbitration Institute of the Stockholm Chamber of Commerce, give the arbitral tribunal the authority to apply directly the substantive law that it seems more appropriate, without going through the mediation of a choice of law rule.

of the applicable private international law is left to the discretion of the tribunal or is only implicitly mentioned by stating a conflict rule, to the least predictable regime that does not mention private international law at all. It is not unusual that arbitral tribunals exercise their discretion so as to enhance predictability and look to the private international law of the place of arbitration. However, in the systems that do not make express reference to the applicability of the conflict rules of the lex loci arbitri, this depends on the tribunal's discretion and it cannot be excluded that the tribunal decides to apply other conflict rules. This has a negative effect on the predictability of the applicable law, which in turn may be decisive for the outcome of the dispute. As long as a private international law is in the picture, however, the interpreter will have in any case to choose the proper law by applying a conflict rule; the determination of the law, in other words, will be based on the application of a connecting factor. While the a priori identification of the applicable private international law is preferable because it permits to create certainty as to which connecting factor that will be used (for example, the place of registration or the seat in case of company the law), a discretionary choice of which private international law is applicable will at least ensure that the proper law will be chosen on the basis of a connecting factor. In the absence of any reference to a private international law, there is no indication that the tribunal will apply a conflict rule to identify the proper law; it may identify the proper law on the basis of completely different criteria, such as, for example, the law that the members of the tribunal happen to know best. This is certainly not a recommendable solution from the point of view of predictability.

# 3 Conclusion

In international commercial contract practice, the approach to national law that is sometimes considered to be the most progressive is an approach of denial: the purpose and the method of choice of law rules are

looked upon as some relics of the past that do not belong in modern commercial and arbitration instruments. This is based on the assumption that international commercial transactions do not need national laws but are better served by transnational uniform laws, and that international arbitration is delocalised and is based simply on the will of the parties without the interference by any national laws.

The first assumption, about the prevalence of transnational uniform law for commercial transactions and the consequent irrelevance of national laws and of mechanisms to choose the applicable national laws, was addressed in section 1.

The second assumption, about the delocalisation of arbitration and the consequent irrelevance of rules of national laws, has been analysed in section 2. While this assumption is correct whenever the party that loses the arbitration voluntarily carries out the award, it must be considerably qualified when such voluntary compliance does not take place. Private international may be a useful and even necessary tool to avoid rendering awards that, albeit fully reflecting the will of the parties, may be set aside or refused enforcement.

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