JUS 5230 –2022
Exam question

Industrimaskin AS is a Norwegian company active in the production of industrial equipment. For the past ten years, Industrimaskin AS has been purchasing components from an English component producer, Components Ltd, under a long-term supply agreement that is about to expire.

Some weeks before the supply agreement expires, the CEOs of the two companies have a meeting to discuss renewal of the contract for five new years. The two CEOs agree that the renewed contract will have the same terms and conditions as the supply agreement that is about to expire, with an adjustment of the price.

However, the CEO of Industrimaskin AS requests to change the frequency of the deliveries: instead of monthly deliveries (on the 1st of every month), deliveries should be made twice a month: on the 1st and on the 15th of every month.

The CEO of Components Ltd finds it difficult to meet this request, because it would require that the production plan be changed, and this would affect deliveries to other clients.

After intense negotiations, the two CEOs agree to deliveries twice a month. This is recorded in the minutes of the meeting, which are signed by both parties.

After the meeting, Industrimaskin AS sends a signed renewed contract to Components Ltd; Components Ltd signs it and sends it back.

The text of the renewed contract reflects most of what the two CEOs had agreed in their meeting, but does not reflect the change in the frequency of the deliveries. The renewed contract still provides for deliveries once a month.

Components Ltd assumes that Industrimaskin AS at last understood all the good arguments that the CEO of Components Ltd had presented to avoid changing the frequency of the deliveries, and that it therefore decided to not request more frequent deliveries after all. Therefore, Components Ltd does not change its production plan and prepares to perform the renewed contract with monthly frequency.

The renewed contract enters into force, and the first delivery is made in accordance with the contract on the 1st of the month. Industrimaskin AS expects a new delivery on the 15th, but the delivery does not arrive.

Industrimaskin AS requests delivery in accordance with the agreement contained in the signed minutes of the meeting between the two CEOs. The minutes of the meeting are a binding agreement between the parties, that supplements the renewed contract.

Components Ltd replies that deliveries shall be made in accordance with the renewed contract, and that the renewed contract does not reflect the minutes of the meeting.

The renewed contract contains an Entire Agreement clause with the following wording: "This Contract contains the entire agreement between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract."

The renewed contract does not contain a choice of law clause.

Please answer the following questions:

- Which law governs the contract? Please describe what sources shall be used to determine the governing law. You can assume that the content of these sources is equivalent to the Rome I Regulation.
- Would deliveries have to be made twice a month if the contract was subject to English law?

- Would deliveries have to be made twice a month if the contract was subject to Norwegian law?
- Would deliveries have to be made twice a month if the contract was subject to transnational law?
- Assuming that the dispute is resolved in arbitration: the arbitral tribunal determines that English law is applicable, but applies it wrongly and comes to a result that is not correct under English law. Does the losing party have remedies against the award? You can assume that the UNCITRAL Model Law applies.
- Assuming that the dispute is resolved in arbitration: the arbitral tribunal determines that the relevant national laws give inconsistent results, and decides the dispute in equity, without having regard to any law. Does the losing party have remedies against the award? You can assume that the UNCITRAL Model Law applies.

Guidelines - Introduction

This exam was held at home with all books and material available to the students.

The learning outcome for this subject is described as follows:

- Identify sources of regulation that are applicable to international business transactions: international conventions, national law, commercial practices and other forms of "soft law";
- Evaluate the extent to which the parties may derogate from the above mentioned rules in their contracts;
- Understand the mechanisms of choice of forum and choice of law, permitting to identify the law applicable to the contract;
- Appreciate the effectiveness of these rules in case the parties have chosen to submit any dispute regarding their transaction to international arbitration.

Guidelines specific to the exam questions

The exam asks students to answer some questions on issues that are central throughout the lectures and the reading material.
For the purpose of grading, the answers should be weighed so that the first question on choice of law contributes with 30% to the final grade, the second, third and fourth questions on comparative contract law contribute with 10% each, the fifth and the sixth questions on arbitration contribute with 15% each. The remaining 10% should reflect the structure and the language of the answer.

Students are not expected to give lengthy explanations, as their papers should not exceed 2500 words.

1. The first question asks to explain how the governing law is to be determined. Students should explain that the governing law is determined on the basis of conflict rules (private international law), and that each legal system has its own conflict rules. Therefore, it is first necessary to identify the forum, i.e. which courts would have jurisdiction on a dispute. It is the conflict rules of that country that will determine the governing law. This is explained on pages 153f of the book which is obligatory reading for this subject (GCM, International Commercial Contracts, 2014).

   The question invites to assume that the content of the applicable conflict rules is equivalent to Rome I. It is positive if students nevertheless explain that England has, after Brexit, enacted a law corresponding to Rome I, and that courts in Norway give consideration to Rome I even though the regulation is not formally binding in Norway.

   If the parties have not made a choice, under Rome I a contract is subject to the law in the country in which the party making the characteristic performance (here: the seller) has its habitual residence. Hence, the contract is subject to English law. This is explained on pages 171f and 175f of the book which is obligatory reading for this subject (GCM, International Commercial Contracts, 2014).

2. The second, third and fourth questions regard the interpretation of an Entire Agreement clause. This is explained on pages 18f. of the book which is obligatory reading for this subject (GCM, International Commercial Contracts, 2014). The result is quite open; however, generally, English law assumes a more literal interpretation than Norwegian law. Hence, if the contract is subject to English law, the Entire Agreement clause is likely to prevent that the signed minutes of the meeting correct the delivery schedule contained in the contract, see pages 91f of the book.

   Regarding the transnational law, students may briefly explain that it is not a unitary system of law. The most relevant source in this case are the UNIDROIT Principles of international contracts. Under article 2.1.17 of these Principles, it is not clear whether the wording of the contract may be overridden by the minutes of the meeting if the contract has an Entire Agreement clause. Case law is not consistent on this issue, see pages 47f of the book.

3. The fifth question invites the students to explain that courts have the possibility to exercise control on arbitral awards, but that this control is not a review of the merits. That the law was applied incorrectly is not a ground to set aside or to refuse enforcement of an award, unless the public policy of the court would be infringed (which is not the case here). This is explained on pages 226, 246, 255f. and 282f of the book which is obligatory reading for this subject (GCM, International Commercial Contracts, 2014).

4. The sixth question assumes that the arbitral tribunal decided the dispute in equity without having been empowered by the parties to do so. This is a ground to set aside an award or refuse its enforcement. This is explained on pages 229f of the book which is obligatory reading for this subject (GCM, International Commercial Contracts, 2014).