Commercial Contracts in an International Setting

Engelsk for jurister

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Outline

• International contracts and the use of English language
• Unconscious import of Common Law
• Unconscious superimposition of own legal tradition
• Do arbitration and transnational law provide a harmonised understanding?
Relevant reading material

  [https://www.journals.uio.no/index.php/oslawreview/article/view/979](https://www.journals.uio.no/index.php/oslawreview/article/view/979)

International contracts and the use of English language

• We understand the words in a contract written in English. Does it entail that we understand the legal terms?
• That we speak English does not mean we know English law
• That we speak English with the other party does not mean we have the same understanding of the legal terms
Unconscious import of Common Law

• English Drafting Style for International Contracts

• International contracts are lengthy and regulate all thinkable aspects:
  – Gender/Singular and Plural
  – Representations and Warranties
  – Notices
  – Amendments
  – Etc.
1.2.2 References in the singular shall include references in the plural and vice versa, and the words denoting natural persons shall include partnerships, firms, companies, corporations, joint ventures, trusts, associations, organisations or other entities (whether or not having a separate legal personality);
"Interpretation"

1.2.9 references to "construction" and "construct" include, unless the context otherwise requires, design, procurement, delivery, installation, testing, completion, commissioning, remedying of defects and other activities incidental to the process of construction;
"Interpretation"

1.2.11 any references to "parties" shall mean the Seller and the Purchaser and a "party" shall mean either of them;
"Representations and warranties"

Each Party represents and warrants to and for the benefit of the other Party as follows:

11.1 It is a company duly incorporated and validly existing under the laws of ...(in respect of the Seller) and of...(in respect of the Buyer), is a separate legal entity capable of suing and being sued and has the power and authority to own its assets and conduct the business which it conducts and/or proposes to conduct;
11.2 Each Party has the power to enter into and exercise its rights and perform and comply with its obligations under this Agreement;

11.3 All actions, conditions and things required by the laws of … to be taken, fulfilled and done in order to enable it lawfully to enter into, exercise its rights under and perform and comply with its obligations under this Agreement, to ensure that those obligations are valid, legally binding and enforceable and to make this Agreement admissible in evidence in the courts of… or before an arbitral tribunal, have been taken, fulfilled and done.
"Representations and warranties"

11.3 Its entry into, exercise of its rights under and/or performance of, or compliance with, its obligations under this Agreement do not and will not violate or exceed any power granted or restriction imposed by any law or regulation to which it is subject or any document defining its constitution and do not and will not violate any agreement to which it is a party or which is binding on it or its assets.
"Representations and warranties”

11.5 Its obligations under this Agreement are valid, binding and enforceable;

11.6 …

…

11.40
Contracts written to meet requirements of a contract law that:

- Interprets literally
- Does not imply terms
- Does not consider negotiations or subsequent conduct
- Does not integrate with good faith or loyalty
- Caveat emptor
- Fairness = Predictability
English contract models and Civilian governing laws

Written to meet the requirements of a law that:

- Interprets literally
- Does not imply terms
- Does not consider negotiations or subsequent conduct
- Does not integrate with good faith or loyalty
- Caveat emptor
- Fairness = Predictability

- Governing law interprets contracts:
  - According to their purpose and the parties’ intentions
  - Implies terms
  - Considers negotiations and subsequent conduct
  - Integrates with good faith and loyalty
  - Reasonableness
  - Fairness = balance in the specific case
Unconscious superimposition of own legal tradition

- "This document constitutes the entire agreement between the parties"
- "Failure to exercise a remedy does not constitute waiver thereof"
- "Failure to reach an agreement shall not expose any party to liability"
- "Notice of defect to be sent within reasonable time"

- Other documents may be considered to determine the content of the document
- Right to exercise the remedy may be lost for passivity
- If negotiations were entered into or continued in bad faith, that party is liable
- Notice of defect to be sent within reasonable time and it must specify which remedy is invoked
English-inspired drafting and National Governing Law

- Not always a clause is enforceable according to its terms
- Not always a lacking clause is unenforceable
- Contracts are not self-sufficient
- The law chosen by the parties is not necessarily the only relevant law
International Commercial Contracts

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Why do contracts have clauses that have not been evaluated or negotiated?

• Not (always) thoughtlessness
• Not refusal of national laws
• Calculated risk
  – Costs of adapting models
  – Likelihood that risk materialises
  – Consequences of risk materialisation
• Internal organisation
  • Risk management requires standardisation
• Circulation of documents
Do arbitration and transnational law contribute to harmonisation?

• A uniform regulation where national laws give different regulations?
  – Unidroit Principles of International Commercial Contracts

• A uniform interpretation in arbitration?
Good faith

- Unidroit: Good faith is general principle (1.7). To be understood as good faith in international trade

- PECL: General duty to act in good faith (1:201). Autonomous interpretation
Is termination upon immaterial breach against good faith?

- English law: No
- Norwegian law: Yes
Good faith in international trade

- General principle?
- Generally acknowledged trade usage?
- Contract practice
- www.trans-lex.org:
  - Good faith is general principle
    - Awards (no specific standard)
    - CISG (no good faith as duty between parties)
    - ...
    - UNIDROIT Principles and PECL
Faithful interpretation in arbitration as way to square the circle?

Arbitration and the not unlimited party autonomy
The impact of the applicable law on the interpretation of contracts

Nov 21, 2011


APA-prosjektet ("Arbitration and Party Autonomy)


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Multiple approaches

- Accurate application of governing law
- Application also of overriding mandatory rules from other systems
- Flexible application of governing law
- Application of transnational principles (with extensive good faith general clauses that override the terms of the contract)
- Application only of the terms of the contract
- Integration of the contract with parties’ interests and trade usages
- Guts feeling of what is right
- Splitting the baby.
Conclusion

• Use of English legal terminology is an unconscious vehicle to import Common Law
• Common Law reliance on the wording is imported
• Civilian governing law may create unexpected results
• Transnational law and arbitration do not guarantee uniformity
Recommendations

• To avoid misunderstandings:
  – Spell out the desired effects
  – Avoid “fancy” terminology you do not understand properly

• To avoid surprises:
  – Ascertain which law(s) govern(s)
  – Ascertain the governing law(s)’ content