

# International Commercial Law

## The Myth of Transnational Commercial Law

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# International Contracts and the Myth of a Transnational Contract Law

- International Contracts: How do they differ from domestic contracts?
- Drafting is in legalese – English jargon handed down from contract to contract
- References to non national sets of rules – INCOTERMS, UNIDROIT, UCP 600 etc.
- Is there a transnational commercial law based on English law?

# The Style of International Contracts

- International contracts are written in English
- International contracts are lengthy and regulate all thinkable aspects:
  - Gender/Singular and Plural
  - Representations and Warranties
  - Notices
  - Amendments
  - Etc.

# ”Interpretation”

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;

# ”Representations and warranties”

- 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

# Is the contract self-sufficient?

- Detailed
- Unnecessarily detailed
- Exhaustive

# English contract models and Civilian governing laws

- 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
- 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

# Differing interpretation of clauses - Examples

[http://www.jus.uio.no/ifp/anglo\\_project/essays.html](http://www.jus.uio.no/ifp/anglo_project/essays.html)

- "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"
- 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

**Boilerplate Clauses,  
International  
Commercial Contracts  
and the Applicable Law**

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# The governing law may influence also the substance of the contract

- Rules on the formation of contracts
- Rules on liability
- Rules on remedies
- Penalties
- ...

# Irrevocable offer

”This offer is binding on the Offeror and cannot be revoked before 30 days have elapsed from the date hereof”

- May the offer be revoked within the 30 days term?



# Firm Offer and National Law

- Romanistic systems of law - Art. 1329 Italian Civil Code: Firm offer is binding. Revocation is ineffective
- Germanic systems of law - § 145 German BGB: Firm offer is binding. Revocation is ineffective
- Common Law systems
  - USA: Promissory estoppel (irrevocable to the extent it has induced offeree's action)
  - England: Revocable if there is no consideration

# Force Majeure

”The usual Force Majeure clauses to apply”

# Definition of Force Majeure and National Law

- Romanistic systems: Art. 1218, 1463 Italian Civil Code
- Germanic systems: § 275 German BGB
- Common Law: Clause is void for uncertainty – force majeure is not a legal term under English law. Contractual obligations are absolute; exception: frustration

# Partial Impediment

”Non performance by a party of its obligations hereunder is excused if such party was prevented from fulfilling its obligations by an event beyond that party’s control, that was not foreseen at the date hereof and that could not be reasonably avoided or overcome.”

- Impediment reduces the debtor’s capacity by 50%
- If plurality of creditors, how is the reduction allocated?

# Partial Impediment and National Law

- Norwegian law: Full delivery to the first creditor in time (Rt 1970 s. 1059)
- German law: Delivery to all creditors reduced pro rata (§ 275(1) BGB)
- Common Law: Full delivery to all creditors (*J. Lauritzen A.S. v. Wijsmuller B.V. (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1 )

# Amendments to a contract

” The parties hereby agree to modify clause XX of the contract entered into by and between the parties hereto on [date] for the sale of YY (hereinafter the ”Contract”), so that the price to be paid by the Buyer shall be ZZ instead of WW. All other terms and conditions of the Contract remain unchanged and continue to be fully valid and binding on the parties.”

- Is the amendment valid?

# Amendments to a Contract and National Law

- Romanistic systems: amendment is valid
- Germanic systems: amendment is valid
- Common law systems: amendment is valid only if there is consideration

# Possible Implications of the Contract Style

- Parties may assume that all aspects of transactions are regulated by the contract
- Parties may assume that the contract is the only regulation
- Parties may rely on transnational commercial law
- Parties may draft the contract irrespective of the governing law (chosen at the end)



# International Contracts and National Governing Law

- Not always a clause is enforceable or self-sufficient
- Not always a lacking clause is unenforceable
- Contracts are not self-sufficient

# Int. contracts – How do they differ from domestic contracts?

- Assessment of parties' interests is the same
- Clauses to protect parties' interests are (mostly) the same
- Drafting should be on the basis of the governing law, as for domestic contracts
  - Need: accommodate to g.l.'s requirements
  - Need: intergrate g.l.
  - Need: avoid violations

# Int. contracts – How do they differ from domestic contracts? II

- Determine scope of soft law
- Determine international treaties
- Determine governing law
- Determine dispute resolution (forum, enforcement)