Arbitration and the not unlimited party autonomy:

The impact of the applicable law on the interpretation of contracts

Date: 21 November 2011

Place: Statoil ASA, Drammensveien 264. Vækerø 0283 Oslo

(The programme is not final and subject to change)
The impact of the applicable law on the interpretation of contracts

Does international arbitration assume that contracts are written on their own terms or as an interplay with the applicable law?

8.45-9.00 Welcome and introduction

Hans Henrik Klouman, General Counsel, Statoil ASA

Giuditta Cordero-Moss, Professor, University of Oslo

9.00-10.30 The framework:

The wording of a contract may have different legal effects depending on the governing law

The interpretation of contracts in international arbitration: applicable rules

Panel participants (the list is not final):

Michele Graziadei, Fausto Pocar, Gustaf Möller, Anders Ryssdal, Aapo Sarikivi, Jerney Sekolec, Ivan Zykin

The discussion is open and not limited to the panel participants

10.30-10.45 Break

10.45-12.15 Expectations when drafting a contract:

Do (arbitrators expect that) drafters rely on an understanding of the contract as it emerges in international practice, rather than on the legal effects that the wording may have under the specific governing law?

Is (Do arbitrators expect that) every single term of a contract (is) the result of a careful assessment of its legal effects and of detailed negotiations between the parties, or do drafters sometimes take calculated legal risk and insert standardised terms without accurate assessment or negotiation?

To what extent does the prospective arbitrator’s view on the governing law’s role affect the decision to appoint an arbitrator?

Panel participants (the list is not final):

Are Brautaset, David Echenberg, James Hope, Knud Knudsen, Christian Fredrik Michelet, Sophie Nappert, Fredrik Norburg, Michael Schneider

The discussion is open and not limited to the panel participants
12.15-13.00  Lunch

13.00-14.30  Evaluations when interpreting a contract:

Do arbitrators interpret one and the same contract clause differently depending on the governing law, or do they develop a harmonised understanding based on the contract’s wording and on the arbitrators’ international experience?

Do arbitrators take into consideration how their interpretation of the contract may affect enforceability of the award?

Panel participants (the list is not final):

Lawrence Boo, James Castello, Luigi Fumagalli, Stephan Jervell, Cathrine Kessedjan, Kai Uwe Karl, Alexander Komarov, Petri Taikalkoski

The discussion is open and not limited to the panel participants

Panel Participants (the list is not yet complete):

- Are Brautaset, legal counsel, Statoil ASA
- Lawrence Boo, professor, head of arbitration chambers, Singapore
- James Castello, partner, King & Spalding
- David Echenberg, senior contract risk manager, General Electric Energy Services
- Luigi Fumagalli, professor, University of Milan
- Michele Graziaedei, professor, University of Turin
- James Hope, partner, Advoktafirman Vinge
- Stephan Jervell, partner, Wiersholm
- Kai Uwe Karl, senior counsel litigations, General Electric Oil & Gas
- Cathrine Kessedjian, professor, University of Paris II
- Alexander Komarov, Professor, Russian Academy of Foreign Trade
- Kund Knudsen, partner, DLAPiper
- Christian Fredrik Michelet, partner, Arntzen de Besche
- Gustaf Möller, Krogerus, and former justice, Supreme Court of Finland
- Sophie Nappert, Avocat, Bar of Quebec, Canada; Solicitor of the Supreme Court of England and Wales
- Fredrik Norburg, partner, Norburg advokatbyrå
• Fausto Pocar, professor, University of Milan and judge, International Criminal Tribunal for Rwanda
• Anders Ryssdal, partner, Wiersholm
• Aapo Sarikivi, attorney at law, Roschier
• Michael Schneider, partner, Lalive
• Jerney Sekolec, arbitrator and former secretary general, UNCITRAL
• Petri Taivalkoski, partner, Roschier
• Ivan Zykin, Professor, Andrey Gorodissky & Partners
With the aim of creating an autonomous regime for the interpretation and application of the contract, boilerplate clauses are often inserted into international commercial contracts without negotiations or regard for their legal effects. The assumption that a sufficiently detailed and clear language will ensure that the legal effects of the contract will only be based on the contract, as opposed to the applicable law, was originally encouraged by English courts, and today most international contracts have these clauses, irrespective of the governing law. This collection of essays demonstrates that
this assumption is not fully applicable under systems of civil law, because these systems are based on principles, such as good faith and loyalty, which contradict this approach.

Features

• Explains the most typical effects of boilerplate clauses under the law of a series of countries to assist practising lawyers who use them in commercial contracts • Demonstrates that international contracts are affected by the applicable law to a previously unsuspected extent, thus inducing practitioners and academics alike to reconsider their reliance on the possibility of uniformly interpreting and applying standard contract wording • Explains how contracts shall be interpreted if they are written on the basis of a law different from the law that governs them, thus providing practitioners with the instruments to write and interpret contracts in the awareness of the governing law

Table of Contents

Introduction
Part I. How Contracts Are Written In Practice: 1. Negotiating international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements? David Echenberg
2. Multinational companies and national contracts Maria Celeste Vettese
Part II. Methodological Challenges: 3. Does the use of common law contract models give rise to a tacit choice of law or to a harmonised, transnational interpretation? Giuditta Cordero Moss
4. Common law based contracts under German law Gerhard Dannemann
5. Comparing exculpatory clauses under Anglo-American law: testing total legal convergence Edward T. Canuel
6. Circulation of common law contract models in Europe: the impact of European Union system Jean-Sylvestre Bergé

Part III. The Applicable Law's Effects on Boilerplate Clauses: 7. The common law tradition: application of boilerplate clauses under English law Edwin Peel
8. The Germanic tradition: application of boilerplate clauses under German law Ulrich Magnus
9. The Romanistic tradition: application of boilerplate clauses under French law Xavier Lagarde, David Méheut and Jean-Michel Reversac
10. The Romanistic tradition: application of boilerplate clauses under Italian law Giorgio De Nova
11. The Nordic tradition: application of boilerplate clauses under Danish law Peter Møgelvang-Hansen
12. The Nordic tradition: application of boilerplate clauses under Finnish Law Gustaf Möller
13. The Nordic tradition: application of boilerplate clauses under Norwegian law Viggo Hagstrøm
14. The Nordic tradition: application of boilerplate clauses under Swedish law Lars Gorton
15. The East European tradition: application of boilerplate clauses under Hungarian law Attila Menyhárd
16. The East European tradition: application of boilerplate clauses under Russian law Ivan S. Zykin
17. Conclusion: the self-sufficient contract, uniformly interpreted on the basis of its own terms: an illusion, but not fully useless Giuditta Cordero Moss.
## APA Project

### Research Plan

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<th>Spring 10</th>
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