

APA-project ("Arbitration and Party Autonomy")

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UNIVERSITY OF OSLO
FACULTY OF LAW



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 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?

8.30-10.30 **Welcome and introduction**

Hans Henrik Klouman, General Counsel, Statoil ASA

Giuditta Cordero-Moss, Professor, University of Oslo

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:

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?

Panel:

Are Brautaset, David Echenberg, James Hope, 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:

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:

- Are Brautaset, legal counsel, Statoil ASA
- James Castello, partner, King & Spalding
- Giuditta Cordero-Moss, Professor, University of Oslo
- David Echenberg, senior contract risk manager, General Electric Energy Services
- Luigi Fumagalli, professor, University of Milan
- Michele Graziadei , 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
- 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

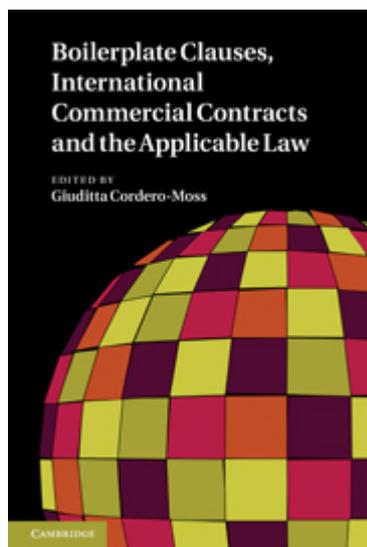
Participants:

- Ivar Alvik, Associate Professor, University of Oslo
- Borgar Berg, Partner, Thommessen
- Cathrine Bjoland, Attorney at law, Kluge

- Anne Botne, Attorney at law, Statoil
- Jan Ekeberg, Attorney at law, Statoil
- Ingvald Falch, Attorney at law, Schjødt
- Morten Foss, Attorney at law, Telenor
- Mads Fugelsang, Attorney at law, Selmer
- Olav Hasaas, Partner, Kluge
- Jørgen S. Heffermehl, Partner, Simonsen Law
- Sveinung Heggen, Attorney at law, Orkla
- Ragnar Holm, Attorney at law, Statoil
- Anne Hukkelaas-Gaustad, Attorney at law, Schjødt
- Knut Høivik, Attorney at law, Statoil
- Martin Jetlund, Attorney at law, Selmer
- Hege Kerlefsen, Attorney at law, Statoil
- Roar Klausen, Attorney at law, Statoil
- Harald Kobbe, Partner, Kluge
- Anders Mikelsen, Attorney at law, Kvale
- Tamar Morchiladze, Student, University of Oslo
- Marie Nesvik, Research Fellow, University of Oslo
- Nicolai René Nielsen, Attorney at law, Kluge
- Fredrik Lekven Nøss, Attorney at law, Statoil
- Linn Hoel Ringvoll, Attorney at law, Kluge
- Hedda Bjøralt Roald, Research assistant, University of Oslo
- Marte Røv, Attorney at law, Statoil
- Amalia Saftoiu, Attorney at law, Kværner
- Ulrik Tetzschner, Research assistant, University of Oslo
- Geir Woxholth, Professor, University of Oslo

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Boilerplate Clauses, International Commercial Contracts and the Applicable Law



Boilerplate Clauses, International Commercial Contracts and the Applicable Law

- Edited by: Giuditta Cordero-Moss, Universitetet i Oslo
- Hardback
- ISBN: 9780521197892
- Publication date: March 2011
- 426 pages
- Dimensions: 228 x 152 mm
- Weight: 0.77kg
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AVAILABLE WHEREVER BOOKS ARE SOLD

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

- 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

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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

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 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

	Autumn 09	Spring 10	Autumn 10	Spring 11	Autumn 11	Spring 12	Autumn 12	Spring 13
Company law	Cathrine Bjoland							
Competition Law	Nicolai Nielsen							
Property and Insolvency			Siri Hafeld					
Administrative Regulations			Tone Wetteland					
Arbitrability					Ulrik Tetzsch			
Intellectual Property					Hedda Bjøralt Roald			
Contract Law							XX	
Labour law							XX	

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Arbitration and the not unlimited party autonomy:

**The impact of intellectual property rules and of the arbitrability rule
on the enforceability of arbitral awards**

Date: 22 November 2011

Place: Statoil ASA, Drammensveien 264. Vækerø 0283 Oslo

The impact of intellectual property rules and of the arbitrability rule on the enforceability of arbitral awards

- 9.00-9.45 **The framework: Arbitration law and the New York Convention as limits to party autonomy** – Professor *Giuditta Cordero-Moss*, University of Oslo
- Ongoing research on intellectual property law as a limit to party autonomy in arbitration** – Research Assistant *Hedda Bjøralt Roald*, University of Oslo
- Ongoing research on arbitrability as a limit to party autonomy in arbitration** – Research Assistant *Ulrik Tetzschner*, University of Oslo
- 9.45-10.00 **Break**
- 10.00-11.30 Panel discussion.
- 11.30-12.00 Extended discussion (questions and comments from all participants)
- 12.00-13.00 **Lunch**

Panel:

- Ivar Alvik, University of Oslo
- Are Brautaset, legal counsel, Statoil ASA
- Giuditta Cordero-Moss, Professor, University of Oslo
- David Echenberg, senior contract risk manager, General Electric Energy Services
- Michele Graziadei , professor, University of Turin
- James Hope, partner, Advoktafirman Vinge
- 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
- 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

- Hedda Bjøralt Roald, Research assistant, University of Oslo
- Ole-Andreas Rognstad, Univerisity of Oslo
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- Petri Taivalkoski, partner, Roschier
- Ulrik Tetzschner, Research assistant, University of Oslo
- Ivan Zykin, Professor, Andrey Gorodissky & Partners

Participants:

- Mads Fugelsang, Attorney at law, Selmer
- Per Helset, Attorney at law, Orkla
- Martin Jetlund, Attorney at law, Selmer
- Hilde, Myrberg, Senior Vice President Corporate Governance, Orkla
- Marie Nesvik, Research Fellow, University of Oslo
- Geir Woxholth, Professor, University of Oslo

List of topics for discussion

Intellectual Property:

Assumptions:

- Parties are free to choose the law governing their contracts;
- Contracts may have implications beyond the area of contract law. These legal effects will be subject not to the law chosen by the parties, but to the law applicable according to the relevant choice-of-law rule;
- Arbitral tribunals are bound to follow the will of the parties;
- Arbitral awards must be recognised and enforced without review of the merits or of the application of law;
- If the arbitral tribunal applies the law chosen by the parties instead of the applicable law, it is an error of law that does not affect the validity or enforceability of the award;
- Under certain circumstances, an award may be declared invalid or unenforceable (i.a., if the award is in contrast with the public policy of the court);
- Under certain circumstances, disregard of the applicable law may lead to conflict with public policy (if the award conflicts with some rules of company law, competition law) or other grounds for invalidity or unenforceability (non-compliance with rules on legal capacity).

Thesis:

Within the law of intellectual property some rules protect so important interests, that an award following the parties' choice and disregarding these applicable rules will risk being declared invalid or unenforceable.

Discussion to demonstrate the thesis:

- Examples (not necessarily involving Norwegian law) of contracts with intellectual property law implications, where the parties try to circumvent the applicable law by choosing a more liberal law/ have not taken into account the consequences of choosing another law: Patent- and trademark licenses
- Explanation of what interests are affected by applying a foreign law
- Explanation of which infringements of these interests may be considered as a violation of public policy

List of topics for discussion

Arbitrability:

Arbitration clauses and arbitrability

Assumptions:

- Courts shall not accept jurisdiction on dispute where there is a valid arbitration agreement between the parties
- If a dispute is on a matter that is not arbitrable, courts have jurisdiction
- If an arbitral award was rendered in a dispute on a matter that is not arbitrable, the award may be set aside or refused enforcement
- Arbitrability is determined by the internal law of the court that is deciding on the validity of the award (the court of the place of arbitration) and of the law of the court that is deciding on the enforcement of the award (the court of the place of enforcement)
- The purpose of the arbitrability rule is to ensure accurate application of rules by the courts in areas where states do not consider it appropriate to delegate the resolution of disputes to private mechanisms

Thesis:

- The arbitrability rule is traditionally a general rule containing abstract criteria restricting access to arbitration for certain types of claim.
- The arbitrability rule is increasingly being used at a pre-award stage to restrict access to arbitration in case it likely, in the specific case, that the arbitral tribunal will not grant an award in accordance with relevant overriding mandatory rules or public policy rules.

Discussion to demonstrate the thesis:

- Comparison of the arbitrability rule, the public policy rule and of the overriding mandatory rules.
- The Second Look doctrine's role in allowing disputes with public policy implications to be referred to arbitration.
- The impact public policy rules and overriding mandatory rules of the forum state may have on the effectiveness of arbitration agreements.

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