International Commercial Contracts

GIUDITTA CORDERO-MOSS

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INTERNATIONAL COMMERCIAL CONTRACTS

APPLICABLE SOURCES AND ENFORCEABILITY

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PREFACE

This is the book that I would have liked to have read when I started my career as an in-house lawyer in an Italian multinational company about thirty years ago. Working with international contracts, I soon started wondering about various aspects of contract drafting. Why are international contracts written in a style that is completely different from their domestic counterparts and why are they written in the same style irrespective of the law that governs them? Is there some sort of transnational law that allows for the governing law to be disregarded and requires that contracts be written in a certain way, independently of the jurisdiction in which they will be implemented? Is national law made redundant by the extremely detailed style of the contracts? Does the choice-of-law clause written in the contract mean that the parties may exclude the applicability of any other rules from any other laws? Does the arbitration clause written in the contract mean that the parties may rely fully on the terms of the contract and the choice of law made therein, and need not be concerned with any other sources?

These questions continued presenting themselves after I went over to a Norwegian multinational company, and became even more pressing when I started following this company's legal interests in what was soon to become the former Soviet Union.

After numerous years as a corporate lawyer, in which a thorough analysis of these questions inevitably had to yield to new projects and more urgent matters, my generous employer gave me the opportunity to spend some time researching some of these issues. The result was a PhD thesis at the Institute of State and Law in the Russian Academy of Sciences, Moscow, under the knowledgeable supervision of Professor August A. Rubanov. This was the introduction to my academic career: the Russian PhD was followed by a PhD at the University of Oslo, under the invaluable supervision of Professors Sjur Brækhus and Helge J. Thue. Since then, about fifteen years have elapsed, during which I have devoted my research and teaching at the University of Oslo to the list of questions that I had compiled in my nearly fifteen years as a corporate lawyer, and to the additional questions that continue to arise in connection with arbitration proceedings that I am involved in or legal advice that I am requested to render.

The results of these almost thirty years of dwelling on the practical and academic aspects of international contracts, their sources and their enforceability are reflected in this book. Academically, the questions arising from international contracts fall into

separate disciplines: contract law, comparative contract law, private international law, civil procedure and international arbitration. Scholars may specialise in a couple of these disciplines, but rarely in all of them. Therefore, it is not very common for all of the implications of international contracts to be dealt with in one book. In practice, however, questions arise out of international contracts in their complexity, irrespective of the academic discipline within which they fall. This explains the opening sentence of this preface, stating that this is the book that I would have liked to have read when I started working with international contracts.

In addition to the text being based on my own research and my practical experience, the material presented here takes advantage of the results of two research projects that I have organised at the University of Oslo.

The first project, the so-called 'Anglo project', was financed by the Norwegian Research Council and it ran from 2004 to 2009. It started from the observation that international contracts are written on the basis of common law models, even when they are subject to a civil governing law, and a series of so-called boilerplate clauses were analysed to assess their function in the original common law models and to verify what legal effects these clauses could achieve under civil laws. The project produced three PhD theses and a series of master's theses (a list may be found at www.jus.uio.no/ifp/english/research/projects/anglo/index.html) and resulted in a book: Giuditta Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (2011).

The second research project, the so-called 'APA' (Arbitration and Party Autonomy) project, is still running, and is financed by the University of Oslo and the Norwegian multinational companies Statoil ASA, Orkla ASA, Yara ASA, as well as the law firms Selmer and DLAPiper. This project verifies to what extent party autonomy meets restrictions when a contract contains an arbitration clause. The project has so far resulted in various international conferences and a series of masters theses (a list may be found at www.jus.uio.no/ifp/english/research/projects/choice-of-law/), as well as in a book: Giuditta Cordero-Moss (ed.), *International Commercial Arbitration: Different Forms and their Features* (2013).

In addition, this book benefits from my lecturing activity, first of all at the University of Oslo, but also at the Centre for Energy, Petroleum and Mineral Law and Policy, Dundee, at the LLM in International Trade Law organised by the ILO, the University of Turin and the University Institute of European Studies, at The Hague Academy of International Law, as well as at the numerous universities and organisations where I have lectured as a guest. The questions and discussions following a lecture or the presentation of a paper are often useful to illustrate or clarify matters, and can give inspiration for new issues.

Another important source that this book takes advantage of is my participation in the UNCITRAL Working Group on Arbitration, where I was the delegate for Norway during the revision of the UNCITRAL Arbitration Rules and the preparation of a standard of transparency for treaty-based arbitration. The discussions in the Working

Group and the assistance given by the UNCITRAL Secretariat have provided an invaluable insight into the different approaches to various aspects of arbitration, as well as into the logic of international cooperation.

I would like to thank the members of the Department of Private Law of the Law Faculty, University of Oslo, of which I am presently the Director, for their support and for having borne with me while I was finalising this book. Thanks also to research assistants Nanette Christine Flatby Arvesen and Øivind K. Foss, of the APA-project, who have compiled the bibliography.

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GIUDITTA CORDERO-MOSS
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Introduction

It may seem intuitive to some observers as to what an international commercial contract is, yet it is difficult to find an accepted definition for the term. What is even more difficult is identifying the legal rules to which international commercial contracts are subject. Are international contracts subject to some sort of international law? What are the sources of this law and what is its scope of application? To the extent that international contracts are subject to national rules, which law's rules are applicable? These questions become even more pressing when the practice of international contracting is taken into consideration: contracts are often written as if their terms were the only source with which to regulate the parties' relationship and as if any sources of law were irrelevant. This self-sufficiency is attempted through drafting the contract in great detail, by writing clauses that attempt to exclude any interference from external sources and by stipulating that disputes between the parties shall be solved out of court via arbitration. Contracts tend to be drafted in the same way, irrespective of the legal system in which they will be implemented. Ambitions regarding self-sufficiency, standardisation and arbitration clauses make one wonder about the relationship between the contract and the governing law.

This book will analyse the interaction between international commercial contracts and the sources that govern them.

In the first chapter, I will present the practice of international contract drafting and will highlight how its peculiarities may fit with the applicable sources of law when the contract has to be interpreted and enforced.

In Chapter 2, I will go through the most important sources of non-national law and will analyse to what extent they may contribute to the harmonised interpretation and regulation of international contracts.

In Chapter 3, I will examine how international contracts may be influenced by the national governing law.

In Chapter 4, I will discuss how the governing law is chosen and what role the will of the parties has in this process.

In Chapter 5, I will analyse the extent to which the role of the parties' will is enhanced when the contract stipulates that any disputes arising between the parties out of the contract shall be solved by arbitration.

Before starting the analysis of the role played by the parties' will and by the applicable sources of law in the interpretation and enforcement of international

contracts, however, it is necessary to define the starting point of the analysis; namely, international commercial contracts.

Two elements require explanation: the term 'commercial' and the term 'international'.

1 Explanation of the term 'commercial'

To explain the term 'commercial', it will be sufficient here to specify that it refers to transactions entered into between parties in the course of their business activities. This leaves consumer contracts outside of the scope of the subject, as well as other aspects of private law, such as family or inheritance law. It is not the intention here to contribute to the old and extensive debate, which particularly seems to characterise some civil law legal traditions, concerning the difference between private law and commercial law; the difficulty in precisely defining the term 'commercial' appears clearly in the explanation of the term provided by the Model Law on International Commercial Arbitration made by the United Nations Commission on International Trade Law (UNCITRAL), which, in footnote 2 relating to Article 1, uses a tautology; that is, it explains the term 'commercial' by referring to the same concept, without imparting any additional explanation other than a long, non-exclusive list of transactions that are deemed to be of a commercial nature:

> The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.[1]

As unsatisfactory as it may be to operate with a non-exhaustive list rather than with a clear definition of the scope of the content, we will follow the guidelines laid down by UNCITRAL, and will consider the kinds of transactions listed above as the objects for this book.

This seems to cover only private law matters and leave out questions of public law. However, this distinction is not clear cut. Leaving aside that the private–public law divide is not necessarily recognised in all legal systems

[1] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration 1985, as amended in 2006, (www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)

(notably, not in the common law tradition), there are aspects of public international law that may well be relevant to commercial activity, as mentioned in Section 3 of this Introduction.

2 Explanation of the term 'international'

As far as the term 'international' in the name 'international commercial law' is concerned, there are two possible interpretations: (i) the law is international because it stems from international sources; or (ii) it is not the law that is international, but the object that the law regulates which is international. Although the former is not completely irrelevant, as mentioned in Section 3 of this Introduction, it is the latter construction that correctly describes the subject of this book. We will focus on the law that governs international commercial relationships; however, the definition of 'international' varies according to the criteria used by the interpreter. Different state laws and different international conventions have different definitions of what international is.

For example, the Vienna Convention on the International Sale of Goods of 1980 (also known as the CISG) specifies, in Article 1.1, that a sale falls within the scope of the Convention (and therefore is to be deemed as international) if the parties have their place of business in different states:

> This Convention applies to contracts of sale of goods between parties whose places of business are in different States.

Therefore, under the CISG, a contract between, for example, a French seller and a Norwegian buyer, is considered as an international contract. A contract between two companies based in France, however, would not be considered as international under the CISG, even if the contract requires one party to import certain goods from a foreign state to sell them to the other party.

The Hague Convention on the Law Applicable to the International Sale of Goods of 1955[2] does not define the term international, and simply states in Article 1 that the mere determination by the parties is not sufficient to give a sale international character (indirectly accepting that a sale may be international if there are some foreign elements to the transaction, but that this is not necessarily the place of business of the parties):

> The mere declaration of the parties, relative to the application of a law or the competence of a judge or arbitrator, shall not be sufficient to confer upon a sale the international character provided for in the first paragraph of this Article.

[2] This Convention has been ratified by eleven European states, and is largely absorbed, as between EU member states, by the EU Rome I Regulation on the Law Applicable to Contractual Obligations (Regulation EC 593/2008 of 17 June 2008). The Convention is applicable when one of the parties belongs to a signatory state, which is not an EU member state, notably, Norway. The Hague Conference in 1986 drafted a more modern convention on the same subject; this convention, however, never entered into force.

Therefore, a contract between two Italian parties for the sale of a product manufactured in Italy according to which both delivery and payment will be made in Italy, will not qualify as international under The Hague Convention, even if the contract has a clause choosing German law as the law governing the transaction. However, the above-mentioned contract between two French companies for the import and successive domestic sale of certain goods might be considered as international for the purpose of The Hague Convention because there is a foreign element involved in the import of the goods.

The EU Rome I Regulation on the Law Applicable to Contractual Obligations (Regulation EC 593/2008 of 17 June 2008), which is the European Union's (EU's) instrument regulating the choice of law for contracts, speaks in Article 1.1 of any situation involving a conflict between the laws of different states; thus, indirectly, it opens the door even for the eventuality that the only foreign element to a transaction is the choice made by the parties of a foreign law – although, in such situations, the applicability of party autonomy, which is the most important conflict rule contained in the Convention, is limited by Article 3.3 thereof:

> 3.3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

Therefore, the above-mentioned import and subsequent domestic sale between two companies based in France would fall within the scope of Article 1.1 of the Rome I Regulation and allow for a wide choice of law, as regulated for in Article 3.1, because the import of the goods is an element that connects the situation with more than one state. The domestic contract between the two Italian companies mentioned above, however, even though it falls within the scope of Article 1.1, would be subject to Article 3.3 of the Rome I Regulation, and would allow a more restricted party autonomy.

The UNCITRAL Model Law on International Arbitration defines, in Article 1.3, an arbitration as international if one or more conditions are met, also including the mere determination by the parties that the subject matter of the dispute relates to more than one state:

> An arbitration is international if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
> (b) one of the following places is situated outside the state in which the parties have their places of business:
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or