

Studien zum europäischen

Privat- und Prozessrecht 14

Herausgegeben von Marina Wellenhofer

Gintautas Šulija

Standard Contract Terms in Cross-Border Business Transactions

A Comparative Study from the Perspective
of European Union Law



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Begründet von Manfred Wolf

Band 14



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VORWORT DER HERAUSGEBERIN

Die vorliegende Schriftenreihe zum europäischen Privat- und Prozessrecht wurde von Herrn Prof. Dr. Manfred Wolf begründet. Der erste Band der Reihe erschien 1999. Nach seinem Tod im Juni 2007 habe ich als seine Lehrstuhlnachfolgerin an der Universität Frankfurt am Main die Herausgeberschaft übernommen.

Die Schriftenreihe wird sich weiterhin sowohl dem materiellen Recht als auch dem Verfahrensrecht widmen. Bevorzugt werden wirtschaftsrechtliche Themen unter Berücksichtigung der europäischen und internationalen Zusammenhänge präsentiert werden. Der Begriff des Wirtschaftsrechts wird in einem weiten Sinne verstanden und auch bürgerlich-rechtliche Abhandlungen umfassen, soweit sie einen Bezug zum Wirtschaftsleben aufweisen. Beiträge hierzu sind willkommen.

Marina Wellenhofer

PREFACE

The title '*Standard Contract Terms in Cross-Border Business Transactions: a Comparative Study from the Perspective of European Union Law*' implies that this paper will offer research into European contract law and the law of the Union. The book is conventionally divided into two major parts. Part I presents an insight into the theory of European contract law, while Part II explains the possible influence of Union law on the further development of European civil law.

Part I presents an overview of regulation of standard form contracts in the selected jurisdictions of the Union. Generally, the term 'regulation of standard form contracts' refers to the techniques and procedures that are established by the government and case law to control the fairness and reasonableness of contracting or contractual arrangements. At the beginning, Chapter I of Part I deals with the theoretical justification for interfering in the freedom of contract. The necessity of regulating standard form contracts is explained by arguing that absolute freedom of contract does not contribute enough to the welfare of society, even if we assume that such freedom exists in reality. The issue of regulating freedom of contract is very complex in nature, and the rationale of such regulation often depends on the angle from which it is observed. It is commonplace in the modern law of contract that businesses are ordinarily considered as having stronger bargaining power and more experience than consumers in fixing their contractual relations as they choose. Chapter II goes further into details by explaining the regulation of unfair trade practices in the selected jurisdictions of the Union. Four jurisdictions of the Union – Germany, France, England, and Lithuania – have been selected for closer examination in order to build up a comprehensive view in the three major jurisdictions of the Union as well as in the 'new Europe'¹. Chapter III deals specifically with the regulation of exemption and limitation terms as they are mostly misused in standard form contracts. Accordingly, English and German legal systems are considered more closely by comparing the regulations on exemption and limitation terms and discussing the forthcoming reforms. Finally, peculiarities of international business-to-business contracts are observed in Chapter IV. This chapter deals with the issues of choice of law in order to ascertain what actual freedom the contracting parties have in choosing the preferred legal order and such national regulations with regard to standard contract terms.

Part II elucidates the links between national contract laws and the Union law. In particular, the paper discusses the on-going 'Europeanisation' of the

¹ This term became famous after the Donald Rumsfeld's speech on 22 January 2003 who answering *Charles Groenhuijsen*'s question broadly referred to the Eastern European countries liberated from the Soviet rule.

contract laws of the Member States. The legitimacy of national regulations on standard form contracts is observed in the light of the provisions of the Union law pertaining to the free movement of economic factors. Since 2001, the Union has made several significant steps toward unification of private law systems in Europe. Thus, Chapter I of Part II observes the implications of market freedoms on national private laws. It seems that the Court of Justice plays an important role not only by setting aside the rules not in line with the TFEU but by actually introducing new rules determining which trade obstacles in the internal market should be abolished. In this way, this book reflects the case law of the Court of Justice, interpreting and developing the concept of the free and unhindered movement of economic factors. Chapter II provides a somewhat more detailed insight into the interaction of national laws of contract with market freedoms. In view of the obstacles a trader may face in abiding by unknown foreign regulations, the national regulations are assessed in the light of so-called 'indistinctly applicable measures' that are prohibited under the Union law. Further, the research examines whether or not regulations on standard form contracts have an appreciable effect on trade among Member States and what kind of rules may be invoked to justify the application of such national regulations. Finally, Chapter III contemplates different options aimed at eliminating trade restrictions created by foreign regulations on standard form contracts.

I would like to express my sincere gratitude to Dr. Manfred Wolf, a Professor of Johann Wolfgang Goethe University (Frankfurt am Main), who inspired me to pursue research into the European contract law and advised on the preparation of this paper until the summer of 2007. Moreover, my warm thanks are due to Prof. Dr. Marina Wellenhofer who took over the supervision of the paper after the Professor suddenly passed away. I also thank Prof. Dr. Joachim Zekoll for his important insights into the area of European private law and corporate law. Finally, my grateful acknowledgements go to all my family, and friends, colleagues from Vilnius University and the University of Cambridge with whom I discussed the topics of European private law and the recent developments in European Union law. I am also greatly indebted to the DAAD (German Academic Exchange Service) for providing funding for this research project.

The main work was completed in October 2009; later developments, incorporating the consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union together with some other statutory and case law developments up to April 2010 were considered at the proof-reading stage.

Gintautas Šulija

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