

Anglo-American Contract Models

Department of Private Law / Scandinavian Institute of Maritime Law
University of Oslo

PROGRAMME

CONCLUDING CONFERENCE, 23 - 24 OCTOBER 2008

Venue:

Faculty of Law, University of Oslo - Juridisk eksamenssal, Domus Academica
Address: Karl Johans gate 47, Oslo

Thursday - 23 October

08.45-09.00 Registration and coffee

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| 09.00-12.00 | <p>1. Clauses that aim at detaching the contract from the governing law and rendering it self-sufficient:</p> <p>a) What is the original purpose of these clauses in the common law? Do they achieve the purpose as it appears from their wording when they are governed by English law? (<i>Common Law project advisors – Approximately 45 minutes</i>)</p> <p>b) Specific features of the clauses and their use that may require coordination with the governing law if the clauses are transplanted into a non-Common Law system. (<i>Former and present project participants – Approximately 45 minutes</i>)</p> <p>c) May these clauses achieve their purpose as it appears from their wording when they are governed by another Civilian law? Are there any mandatory rules or general principles in the governing law or its interpretation doctrine that prevent a full achievement of their purpose? (<i>Civil Law jurisdiction representatives and practicing lawyers – Approximately 90 minutes</i>)</p> |
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12.00-13.00 Lunch – Domus Academica

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| 13.00-14.30 | <p>2. Clauses that reflect a specific regulation in the Common Law, whereby the corresponding regulation in a Civilian law is different:</p> <p>a) What is the original purpose of these clauses in the common law? Do they achieve the purpose as it appears from their wording when they are governed by English law? (<i>Common Law project advisors – Approximately 20 minutes</i>)</p> <p>b) Specific features of the clauses and their use that may require coordination with the governing law if the clauses are transplanted into a non-Common Law system. (<i>Former and present project participants – Approximately 20 minutes</i>)</p> <p>c) May these clauses achieve their purpose as it appears from their wording when they are governed by another Civilian law? Are there any mandatory rules or general principles in the governing law or its interpretation doctrine that prevent a full achievement of their purpose? (<i>Civil Law jurisdiction representatives and practicing lawyers – Approximately 50 minutes</i>)</p> |
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14.30-15.00	Break
15.00-16.30	3. Clauses that regulate in detail matters that are not regulated in the Common Law but are already regulated in the Civilian governing law: <ol style="list-style-type: none"> What is the original purpose of these clauses in the common law? Do they achieve the purpose as it appears from their wording when they are governed by English law? (<i>Common Law project advisors – Approximately 20 minutes</i>) Specific features of the clauses and their use that may require coordination with the governing law if the clauses are transplanted into a non-Common Law system. (<i>Former and present project participants – Approximately 20 minutes</i>) May these clauses achieve their purpose as it appears from their wording when they are governed by another Civilian law? Are there any mandatory rules or general principles in the governing law or its interpretation doctrine that prevent a full achievement of their purpose? (<i>Civil Law jurisdiction representatives and practicing lawyers – Approximately 50 minutes</i>)
19.00	Conference Dinner – Restaurant Argent, Opera House Address: Kirsten Flagstads plass 1, Oslo

Friday - 24 October

09.30-12.00	Discussion regarding the book.
12.00	Lunch – Theatercaféen, Hotel Continental Address: Stortingsgaten 24 -26

More information on the parts into which each session is divided and on the clauses to be discussed in each session is attached hereto.

Anglo-American Contract Models
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ON PART A) OF THE SESSIONS

In this part the Common Law advisors to the project will explain the purpose of the clauses from the particular point of view of their necessity when the contract is governed by English law (what would happen if the clause was not there?) and their adequacy to meet English law requirements (what is the reason for the clauses' wording?).

ON PART B) OF THE SESSIONS

In this part the (former) project participants will highlight the features of each clause and their use that may create interpretative problems or may collide with applicable rules or principles if the clauses appear in a contract that is regulated by a law not belonging to the Common Law family.

ON PART C) OF THE SESSIONS

In this part the scholars and practicing lawyers will discuss the compatibility of the clauses with their respective legal systems.

It is not necessary to comment in detail every single clause from the point of view of each and every represented jurisdiction.

However, it would be useful to make, for every jurisdiction, a presentation of the most important mandatory rules, general principles, doctrine of interpretation or other feature that is relevant to each of the three groups of clauses:

- Are there any principles that prevent the full implementation of clauses aiming at detaching fully the contract from the governing law (session 1.)?
- Are there any rules that regulate the remedies for breach of contract and reimbursement of damages and that may interfere with the regulation made by the parties in the contract? (session 2.)?
- Are there any rules and general principles that regulate matters regulated by the parties in the contract, and how do these two regulations interact with each other: do they integrate each other, do they exclude each other (session 3)?

SESSION 1
EXAMPLES OF CLAUSES
WITH THE AIM OF DETACHING THE CONTRACT
FROM THE GOVERNING LAW

Entire Agreement

The Contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract.

No waiver

Failure by a party to exercise a right or remedy that it has under this contract does not constitute a waiver thereof.

No Oral Amendment

No amendment or variation to this Agreement shall take effect unless it is in writing, signed by authorised representatives of each of the Parties.

Conditions

The obligations regulated in section 13 are fundamental and any breach thereof shall amount to a fundamental breach of this contract

Sole remedy

The remedies regulated in section 27 represent the sole remedies available to the parties in case of breach of contract.

Subject to contract

This document does not represent a binding agreement between the parties and neither party shall be under any liability to the other party in case of failure to enter into the final agreement.

Material Adverse Change

Conditions precedent to Closing

Since the date of [the Agreement], there has not been any Material Adverse Change in the condition (financial or otherwise), business, assets, liabilities or results of operations of [the Party and its Subsidiaries taken as a whole...]

“Material Adverse Change” means any result, occurrence, condition, fact, change, violation, event or effect that, individually or in the aggregate with any such other results, occurrences, conditions, facts, changes, violations, events or effects, is materially adverse to:

- (A) the financial condition, business, assets, liabilities or results of operations of the Company and its Subsidiaries, taken as a whole,
 - (B) the ability of the Company to perform its obligations under this Agreement or
 - (C) the ability of the Company to consummate the Merger; provided, however, that in no event shall any of the following constitute a Company Material Adverse Change:
 - (1) any change or effect resulting from changes in general economic, regulatory or political conditions, conditions in the United States or worldwide capital markets;
 - (2) any change or effect that affects the oil and gas exploration and development industry generally (including changes in commodity prices, general market prices and regulatory changes affecting the oil and gas industry generally);
 - (3) any effect, change, event, occurrence or circumstance relating to fluctuations in the value of currencies;
 - (4) the outbreak or escalation of hostilities involving the United States, the declaration by the United States of a national emergency or war or the occurrence of any other calamity or crisis, including acts of terrorism;
- [...]
- (14) any of the matters referred to in Schedule 3.1(a)...

SESSION 2
EXAMPLES OF CLAUSES
TAILORED TO MEET REQUIREMENTS
OF COMMON LAW SYSTEMS

Liquidated Damages

In case of failure by the Constructor to comply with the obligations regulated in section 17, the Constructor shall pay liquidated damages in the amount of for every day of delay.

Indemnity

30.1 Contractor shall indemnify Company Group from and against any claim concerning:

- a) personal injury to or loss of life of any employee of Contractor Group, and
- b) loss of or damage to any property of Contractor Group,

and arising out of or in connection with the Work or caused by the Contract Object in its lifetime. This applies regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Company Group.

Contractor shall, as far as practicable, ensure that other companies in Contractor Group waive their right to make any claim against Company Group when such claims are covered by Contractor's obligation to indemnify under the provisions of this Art. 30.1.

30.3 Until the issue of the Acceptance Certificate, Contractor shall indemnify Company Group from:

- a) costs resulting from the requirements of public authorities in connection with the removal of wrecks, or pollution from vessels or other floating devices provided by Contractor Group for use in connection with the Work, and
- b) claims arising out of loss or damage suffered by anyone other than Contractor Group and Company Group in connection with the Work or caused by the Contract Object,

even if the loss or damage is the result of any form of liability, whether strict or by negligence in whatever form by Company Group.

Contractor's liability for loss or damage arising out of each accident shall be limited to NOK 5 million. This does not apply to Contractor's liability for loss or damage for each accident covered by insurances provided in accordance with Art. 31.2.a) and b), where Contractor's liability extends to the sum recovered under the insurance for the loss or damage.

Company shall indemnify Contractor Group from and against claims mentioned in the first paragraph above, to the extent that they exceed the limitations of liability mentioned above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.

After issue of the Acceptance Certificate, Company shall indemnify Contractor Group from and against any claims of the kind mentioned in the first paragraph above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.

SESSION 3
EXAMPLES OF CLAUSES
REGULATING MATTERS ALREADY REGULATED
BY CIVILIAN LAW

Representations and Warranties

Each Party represents and warrants to and for the benefit of the other Party as follows:

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;
2. Each Party has the power to enter into and exercise its rights and perform and comply with its obligations under this Agreement;
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;
4. 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.
5. Its obligations under this Agreement are valid, binding and enforceable;
6. ...
7. ...
40. ...

Hardship

1. Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.
2. There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
 - (a) the event was beyond its reasonable control and was one which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
 - (b) the event or its consequences could not reasonably be avoided or overcome.

If such hardship occurs the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

Alternative regulations:

Alternative I:

- 3 Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

Alternative II:

- 3 Where paragraph 2 of this Clause applies, but where alternative contractual terms are not agreed the contract remains in force in accordance with its original terms

Alternative III:

- 3 Where paragraph 2 of this Clause applies, but where alternative contractual terms are not agreed the party invoking this Clause may bring the issue of revision before the arbitral forum, if any, provided for in the contract, or otherwise the competent courts.

Force majeure

Alternative 1:

The Supplier shall not be liable for delay in performing or for failure to perform its obligations if the delay or failure results from any of the following: (i) Acts of God, (ii) outbreak of hostilities, riot, civil disturbance, acts of terrorism, (iii) the act of any government or authority (including refusal or revocation of any licence or consent), (iv) fire, explosion, flood, fog or bad weather, (v) power failure, failure of telecommunications lines, failure or breakdown of plant, machinery or vehicles, (vi) default of suppliers or sub-contractors, (vii) theft, malicious damage, strike, lock-out or industrial action of any kind, and (viii) any cause or circumstance whatsoever beyond the Supplier's reasonable control.

Alternative 2:

1. Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:
[a] that its failure to perform was caused by an impediment beyond its reasonable control; and
[b] that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and
[c] that it could not reasonably have avoided or overcome the effects of the impediment.
2. Where a contracting party fails to perform one or more of its contractual duties because of default by a third party whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party:
[a] if and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and
[b] if and to the extent that the contracting party proves that the same requirements apply to the third party.

3. In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1 [a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:
 - [a] war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;
 - [b] civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
 - [c] act of terrorism, sabotage or piracy;
 - [d] act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;
 - [e] act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
 - [f] explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
 - [g] general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.
4. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.
5. A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages or any other contractual remedy for breach of contract from the time indicated in paragraph 4.
6. Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties.
7. A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.
8. Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.
9. Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay to the other party a sum of money equivalent to the value of such benefit.