Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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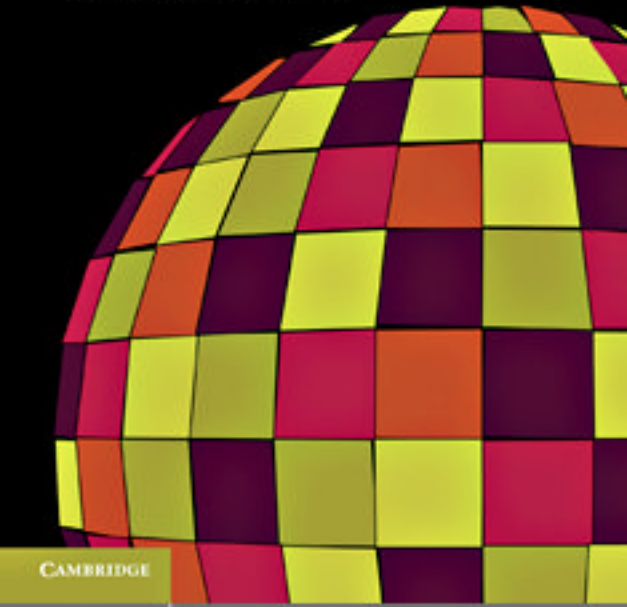

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PREFACE

This book applies the method of comparative law to the practice of international commercial contract drafting and therefore gives a quite unusual combination of theory and practice. The underlying idea reflects my own path in the world of international commercial contracts.

For the first part of my career I was, for more than a decade, an in-house lawyer of multinational companies, first in Italy and then in Norway. For all those years I have been drafting and negotiating financial and commercial contracts that were meant to be operative in a variety of countries, from various continental European countries to Russia and what has become the former Soviet Union. It struck me that all contracts were written mainly on the basis of the same models, quite irrespective of the law to which they would be subject. The models were obviously inspired by the common law contract practice, even though the contracts were not meant to be governed by English law. Queries arising out of this observation would be quickly dismissed on account of the expectation by the other contractual party, and even more by involved financial institutions, that recognisable models would be used. Also, these models were deemed to have proven successful in the past. Any ambition to verify the compatibility of the models with the applicable law would be limited to asking local lawyers to render a legal opinion on the enforceability of the contract. These legal opinions would focus on the absence of conflict with mandatory rules of the applicable law, but would normally not consider the drafting style. Any attempt to adjust the drafting style to the applicable legal tradition would be to no avail – in part because contracts are, most of the time, written under time pressure and in part due to the reluctance to modify proven models. Therefore, I went on drafting and negotiating clauses that I suspected would not always be enforceable according to their terms.

As soon as I started working full time in academia, I took up all the unanswered questions that had accumulated during my years as a

corporate lawyer. The result was a research project financed by the Norwegian Research Council that, in turn, resulted in this book.

The just-mentioned practice of structuring international contracts according to the common law legal tradition, and not according to the applicable law, is analysed here according to the following lines. First, it is explained how international contracts are written, and why the drafters often disregard the applicable law. This shows that the drafter does not necessarily intend to subject the contract to English law: rather, the drafter adopts the style typical for English contracts because, with its high degree of detail and apparent exhaustiveness, it suggests that the contract may be interpreted on the basis of its own terms and without having to take into consideration the applicable law. This impression of self-sufficiency is enhanced by the use of boilerplate clauses, contract regulations that recur in all types of contract and aim at creating an autonomous regime for the interpretation and application of the contract.

Secondly, some methodological questions are addressed: should the inspiring common law also be given a central role in the interpretation of international contracts? Should contracts be governed by general principles that do not belong to a specific national law, since national laws are not taken into particular consideration when contracts are drafted? The analysis will show that these alternatives are not feasible and that, therefore, international contracts have to be governed by the national law that is applicable according to the general conflict rules. This may lead to the applicability of a law not belonging to the common law tradition.

The third issue addressed is: will the governing law influence the interpretation and application of the contract? A series of boilerplate clauses often recurring in international contracts will be analysed first from the point of view of English law, which is the system underlying the original drafting style, and then from the point of view of a number of laws, representing various sub-families of the civilian tradition. The analysis will show how contract clauses may be affected by the governing law.

The material contained in this book is updated as of June 2010.

Giuditta Cordero-Moss

Introduction

GIUDITTA CORDERO-MOSS

1 Overview of the book

This book addresses the question of whether the drafting style of international contracts may actually achieve rendering the contract self-sufficient. The drafting style, including the recurrence of boilerplate clauses in all types of contracts and irrespective of the governing law, seems to aim at detaching the contract from any elements external to the contract itself, including the applicable law. This drafting style is originally based on the common law approach to contracts, but is now adopted in most international contracts even when they are not subject to a law belonging to the common law family.The analysis follows three different stages, each dealt with in a different part of the book.

Part 1 of this book contains contributions by attorneys practising in international business, who explain the circumstances that lead to writing commercial contracts in a way that disregards the structure and tradition of the applicable law. This may be explained first of all in light of the fact that commercial contracts are often the result of an extensive process of negotiations. In Chapter 1, David Echenberg describes how the dynamics of negotiations contribute to the development of contracts that are not tailored to any specific state law. Lawyers drafting contracts for multinational companies will often be subject to the company's internal policy that tends to be standardised in order to facilitate internal risk assessment and knowledge management. An internal standardisation opposes adjustments of model contracts even though they might be necessary in order to comply with the applicable law. Maria Celeste Vettese reports in Chapter 2 on the internal standardisation and the impact that it has on contract drafting.

Part 2 of this book analyses some methodological questions that arise out of the described contract practice. If international contracts are written without giving much consideration to the applicable law, it

may seem legitimate to enquire whether they have to be interpreted under principles that do not belong to the applicable law. There are two possible approaches to this situation, each traditionally dealt with in a different branch of the law: private international law and international commercial law. The former makes it possible to verify whether adopting a contract model developed under a certain legal system may imply that that system's law governs the contract. The latter aims at giving a uniform interpretation to contracts, irrespective of the governing law. In Chapter 3, Giuditta Cordero-Moss analyses the implications that the style of contract drafting may have when choosing the governing law. The chapter then verifies whether, and if so to what extent, generally acknowledged rules, trade usages or transnational restatements of principles may contribute to overcome the tension between the style of the contract and the law governing it. Gerhard Dannemann reports in Chapter 4 how German courts have been coping with the methodological challenges of contracts modelled on a foreign legal tradition. In Chapter 5, Edward T. Canuel verifies whether convergence among different legal systems may be relied upon to such an extent that contracts may be drafted without needing to have regard to the governing law. He analyses how common law courts interpret and apply the contractual mechanism of exculpatory clauses and finds that these clauses have varying legal effects even within the same legal family. Jean-Sylvestre Bergé observes in Chapter 6 that the circulation of legal models is a phenomenon occurring on different levels and shows that the system of the European Union forces the acceptance of legal concepts belonging to different legal traditions.

The analysis undertaken in Part 2 shows that contracts have to be interpreted under the domestic law that is applicable to them. Hence, contract terms that were originally developed to meet the requirements and criteria of the common law often have to be interpreted under an applicable law belonging to the civil law family. As is well known, common law and civil law systems present various differences in respect of regulation and interpretation of contracts. Therefore, when an international contract governed by a civil law system is written in the common law style, a tension may arise between the different legal traditions.

Part 3 of this book thus analyses how the wording of the contract terms (inspired by the common law) reacts when it is subject to a civilian governing law: will it be interpreted literally or in the light of underlying principles of the governing law? Will it have legal effects comparable to those that it would have under the common law? Will the same wording

have different legal effects depending on the applicable law? The analysis is made on the basis of a series of so-called boilerplate clauses, common contract terms and recurring legal concepts that are frequently found in commercial contracts irrespective of the type of legal relationship regulated by the contract. These are listed in the introduction to Part 3. The criteria for the analysis, also listed in the introduction to Part 3, are intended to highlight the possible tension between the contract's language and the applicable law. In Chapter 7, Edwin Peel analyses the originally intended effects of the listed clauses and verifies to what extent these effects may actually be achieved under English law.

Because within the civil law there is no uniform approach to many aspects of contract law, the effects that the listed clauses may achieve under a civilian governing law will be analysed from the point of view of several legal systems deemed to represent the various sub-families of the civil law: the Germanic, Romanistic, Scandinavian and East European families. Thus, in Chapter 8, the analysis is made under German law by Ulrich Magnus; in Chapter 9, under French law by Xavier Lagarde, together with David Méheut and Jean-Michel Reversac; in Chapter 10, under Italian law by Giorgio De Nova; in Chapter 11, under Danish law by Peter Møgelvang-Hansen; in Chapter 12, under Finnish law by Gustaf Möller; in Chapter 13, under Norwegian law by Viggo Hagstrøm; in Chapter 14, under Swedish law by Lars Gorton; in Chapter 15, under Hungarian law by Attila Menyhárd; and in Chapter 16, under Russian law by Ivan S. Zykin.

2 The findings

The expectation that the contract is a self-sufficient unit independent of the applicable law, upon which the drafting of international contracts seems to rely, does not necessarily correspond to the legal effects of the contract. Many recurrent clauses have the function of exhaustively regulating the contract's interpretation and application, thus detaching it from the influence of any external elements, such as the applicable law. This apparent expectation of the drafters may originally have been based on the drafting technique developed under English contract law, which delegates most of the regulation to the parties in the contract and features a low degree of interference by the courts. However, these clauses may not be expected to achieve a full detachment from the applicable law when this belongs to a civil law system, where the general contract law and the courts have a much more active role. Chapter 7 shows that even

under English law, the expectation of total detachment may not always be fulfilled.

In brief, the drafters of international contracts seem to have an excessive trust in the self-sufficiency of the instruments that they write. In reality, the sophisticated contract drafter is aware of this assumption's fallacy. Contracts are nevertheless written in this way because the drafters consider it too burdensome to adjust all clauses of every single contract model to the circumstances of the specific case. Based on a cost-benefit evaluation of the resources needed to adjust the contract to the applicable law, the drafters accept a calculated legal risk.

The less aware drafter will rely on a literal and full implementation of the contract's wording, and this reliance will be enhanced by the use of boilerplate clauses aiming at regulating interpretation and application irrespective of the applicable legal tradition. To the extent that the contract's wording turns out not to be literally and fully enforceable under the applicable law, its presence may nevertheless be useful: not all differences of interpretation end up in court, and in the process leading to the settlement of the dispute, a harsh clause may give a stronger negotiating position even though it may on closer inspection be recognised as unenforceable.

3 Acknowledgments

This book is the result of the research project 'Anglo-American Contract Models and Norwegian or other Civil Law Governing Law' (www.jus.uio.no/ifp/english/research/projects/anglo/index.html) that I ran from 2004 to 2010 at the Department of Private Law of the Law Faculty at the University of Oslo. The project was financed by this Department and the Research Council of Norway. Research assistant positions were also financed by the Norwegian office of the law firm DLA Piper. Some research on specific maritime law topics was financed by the Nordic Institute of Maritime Law.

The aim of the project was to achieve a systematic overview of the frictions that might run counter to the expectations of each of the parties when a common law-inspired contract is governed by a civilian law: this includes the party that had relied on the effects of the (common law-inspired) contractual formulation, as well as the party that had relied on the applicability of the (Norwegian or other civilian) governing law.

Research was done by research assistants at the Department of Private Law of the Law Faculty at the University of Oslo, who each wrote a paper

on selected clauses or contract practices that form the origin of these frictions. The papers assessed the specific function of each clause or contract practice in the contract model under the original common law system and verified the extent to which the clause is capable of exercising the same function once the contract is inserted into the context of a different governing law (primarily Norwegian law). These papers are published in the Publication Series of the Department of Private Law, in a separate series called 'Anglo-American Contract Models'. Eight issues belong to this series: No. 1, Introduction and Method (No. 169/2007, by Giuditta Cordero-Moss); No. 2, No Waiver (No. 176/2009, by Fredrik Skribeland); No. 3, Entire Agreement (No. 177/2009, by Henrik Wærsted Bjørnstad); No. 4, No Oral Amendments (No. 178/2009, by Jens Christian Westly); No. 5, Conditions, Warranties, Representations, Covenants (No. 179/2009, by Tor Sandsbraaten); No. 6, Liquidated Damages (No. 180/2010, by Kyrre Kielland); No. 7, Indemnity (No. 181/2010, by André Bjerketveit); and No. 8, Material Adverse Change (No. 183/2010, by Lars Ole Sikkeland).

In addition, three PhD theses were written in the framework of the project: on liquidated damages under the US and Norwegian law, by Edward T. Canuel; on hardship clauses, by Herman Bruserud; and on *force majeure* clauses, by Anders Mikelsen.

The project enjoyed the permanent cooperation of English and American academics and practitioners, who participated in the project's workshops, commented on each paper and contributed with their knowledge and insight: Edwin Peel, Fellow and Tutor in Law, Keble College, University of Oxford, Mr Jim Percival, at that time Head of Dispute Resolution, British Nuclear Fuels plc, and Mr Edward T. Canuel, at that time Energy and Economic Officer at the US Embassy in Oslo. Mr Peel contributes to this book with the chapter on the interpretation and application of contract clauses under English law and Mr Canuel with the chapter on the diverging interpretation of certain contract clauses within the common law legal family.

The interaction of contract models and governing law is a topic of interest for the academy and for the legislator (in view of possible reforms to enhance the unification of the contract law), as it has a considerable amount of relevance to the practice of international business. Practising lawyers, both those in private practice and in-house company lawyers, are confronted with this matter on a daily basis, and the project's research is of immediate and direct relevance to their practice. To take advantage of this common interest, a users' group was

established, with representatives from the main Norwegian law firms and legal departments of Norwegian companies who are active in the field of international contracts. A list may be found at www.jus.uio.no/ifp/forskning/prosjekter/anglo/usergroup.html. The users' group has worked as an advisory forum, providing input on the identification and formulation of research themes, as well as contributing practical insight to ensure the relevance of the perspectives chosen for the research.

The practice of adopting common law-inspired contract models is not limited to Norway, and the tension that may arise between the common law system of origin of the contract and the law governing the contract becomes relevant whenever the latter belongs to the civil law family. Numerous academics and practitioners from a number of civilian countries have contributed to the project's seminars and workshops. Their papers are collected in this book.

The copy-editing of the material collected in this book was made by Miriam Hatoum of Boston University.

A special acknowledgement goes to Cambridge University Press and, particularly, to Finola O'Sullivan, Editorial Director, Law, whose understanding of the subject matter and farsightedness have made this book possible and whose friendly support has made it a pleasant enterprise.

All those mentioned above, as well as those who are not specifically mentioned here but contributed to the smooth performance of the project, are deeply thanked.

PART 1

How contracts are written in practice

Introduction to Part 1

Using a certain language to write a contract does not necessarily mean that the legal system that is expressed in that idiom is applied. This is clearly shown by the fact that often the parties to a contract that is written in the English language expressly choose a governing law that is not expressed in English, be it the law of the state to which one of the parties belongs, the law of the state where the contract shall be performed or the law of a third state, which is deemed to be neutral and therefore preferred by both parties. Therefore, it should not be surprising to see commercial contracts written in English, but structured in the same way as a contract would be structured under the law that the parties have chosen to govern their relationship. These contracts would be developed and written according to the legal technique and legal tradition of the governing law, and only from a linguistic point of view would they be expressed in English. The process of drafting would not necessarily have to take place in two tiers, first writing the contract in the original language and then translating it into English. It could very well be possible to think and structure the contract according to the criteria of the governing law and write it directly in English, although the difficulties of expressing legal concepts in a foreign language are well known, that is, of separating the means of expression from the object that is expressed.

However, international commercial contract practice does not seem to follow this path. Not only does the drafter of the contract use the English language, it also applies contract models that are developed in England, the USA or other common law jurisdictions. Separating the use of the English language from the adoption of the underlying legal structures would assume: (i) a thorough knowledge of the English or other common law system under which the model has been developed; (ii) an understanding of the function of the various contract clauses in that legal system; (iii) a systematic comparison with the governing legal system; and (iv) an exclusion or correction of the contract clauses that turn out to be tailored to the legal system under which the model was developed

and not to the governing legal system. Such an extensive process cannot always be expected in the framework of a commercial case and, as a result, contract models are often simply adopted as they are. Hence, contracts often reflect the requirements and structure of a contract law that will not govern them.

It may apparently seem unreasonable to disregard the legal tradition under which the contract will be interpreted and applied. Experienced practitioners who are active in the drafting of international commercial contracts have been asked to explain the rationale behind this commercial practice. In Part 1, David Echenberg and Maria Celeste Vettese show how the dynamics of negotiations, considerations of efficiency and organisational matters affect the process of drafting contracts and lead to contracts that are not tailored to any specific state law.

1

Negotiating international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements?

DAVID ECHENBERG*

The range of legal entities contracting internationally, as well as the range of types of agreements entered into by companies, is very broad indeed. This introductory chapter will focus generally on companies transacting internationally for one-off contracts for the sale and purchase of goods and services.[1]

Business is about assuming and managing risks, including legal risk. This reality is mirrored in the negotiation process. Contracts can be viewed as the final result of a dynamic process seeking to take into consideration all the imponderabilities of transnational business. Of course, the negotiation process contemplates the enforceability of contractual provisions under the relevant applicable law. That said, the reality is that not all contractual provisions are created equal and there are factors that will impede a complete review, including time restraints and budgetary concerns. There are also the 'unknown' factors, stemming from cultural gaps or linguistic limitations in some cases, or simply from the state of the law in others, to mention only a few. Finally, there are contracts that can be considered as the 'unseen unknowns'.

Section 1 of this chapter outlines the starting point and some of the elements of the negotiation process, seeking to explain why, in practice,

* The views and opinions in this chapter are solely those of the author and should in no way be construed to represent in whole or in part those of General Electric or any other person or legal entity. The author would like to thank Kai-Uwe Karl, whose suggestions and edits were invaluable.

[1] While there are different 'processes' for different types of contracts, this chapter will focus on one-off transactions and will only touch upon others, be they public tenders, frame agreements or other forms of contractual arrangements.

there may be gaps between 'standard contracts' and 'national legal requirements'. Section 2 briefly reviews the findings.

1 How it all got started

While there is no 'prescribed' procedure for negotiating high-value or strategic international contracts, companies normally initiate the process by exchanging their respective standard terms of purchase and sale. Following generally accepted commercial practice, the starting point for the negotiations are the buyer's terms of purchase. After the initial exchange, the buyer will generally be in the position to insist on the usage of its contractual template subject to the rules of supply and demand and some general exceptions. For example, in some markets a seller may possess a particularly strong bargaining position, such as that of a sole supplier. In addition, there are some sectors that do not follow this general rule, including software, IT and telephony providers when contracting outside their internal markets, who are commonly able to insist on the use of their respective terms of sale. However, in general, the seller normally accepts the buyer's terms as the starting point of the negotiation process and will thereafter reply with a number of counterproposals modifying the buyer's original contractual language.

A distinction should be drawn between large-scale companies and their smaller counterparts. The former will normally have legal counsel 'in house' and the quantity and type of counterproposals will reflect this fact, whereas smaller companies normally do not have easy access to such additional resources (at least without incurring additional costs) and generally provide fewer counterproposals. Furthermore, in the latter case, as the reviewer is likely to possess a commercial rather than a legal background, the comments will reflect this fact and normally emphasise the commercial rather than the legal contractual provisions.

1.1 Not all contractual terms are created equal

Setting the commercial and technical aspects of the contract aside, the negotiation process typically focuses on a few select legal issues, such as warranty, limitation of liability, termination, dispute resolution and the governing law provisions of the contract. The extent to which individual contractual provisions are reviewed from the point of view of national legal requirements will depend on the importance of the individual provision to one or the other party.

While most contractual provisions are negotiable, specifically meaning in this context that a party would be willing to assume additional risks including the risk of enforceability if it receives benefits elsewhere in the contract or by price adjustment, others will be considered as 'deal breakers'. In the latter case, a party would rather walk away from the negotiations than accept certain contractual terms and the associated risk.

> *The author was involved in a transaction where the parties were negotiating a long-term international maintenance contract with an expected duration of fifteen years. When the buyer insisted on having the right to terminate the contract for convenience on very short notice and at no cost, the seller elected to break off the negotiations. Granting the buyer such a right would have undermined the long-term nature of the transaction and in effect would have allocated a significant degree of risk to the seller. This situation was exacerbated by the fact that the seller's business model caused it to assume greater costs in the initial stages of the contract that it planned to have offset by the long-term nature of the agreement.*

Whether a contractual provision shall constitute a 'deal breaker' or an acceptable risk that can be mitigated will depend on the risk tolerance of the individual company. For example, under French law, it is inherently difficult to enforce a limitation of liability clause in case of latent defects. To avoid this issue, an international seller may attempt to nominate New York or English law as the governing law where a limitation of liability for latent defects generally stands. However, there will often be strong commercial pressure on the seller to accept French law when contracting with a French buyer insisting on the application of the laws of its home country. In such a scenario, the seller will be compelled to determine whether it is willing to accept this particular allocation of risk that is difficult to mitigate. There are circumstances where the buyer, in turn, will consider the application of its governing law as a deal breaker, as is often the case when it is a state-controlled or state-owned legal entity. Using the same example of latent defects, it may be the case that both parties would consider French law as a deal breaker, the buyer insisting on its usage and the seller rejecting it.

In any event, irrespective of whether or not a contractual provision constitutes a deal breaker, one party will typically have a considerable interest in ensuring that the provision in question is enforceable in case of a dispute. If this cannot be determined in-house, a corporation will often seek advice from outside counsel.

The author was involved in a transaction with a French state-owned company buying equipment from a non-French company. The French party insisted on the application of French law and rejected English law, and, as a compromise proposal, accepted the application of Swiss law. Before signing the contract, the non-French party made a considerable investment in analysing the risks relating to the enforceability of the relevant limitation of liability and how such risks could be mitigated.

On the other hand, there are a number of boilerplate provisions that take second place in the negotiations process, such as inspection, access and audit rights. The parties may not even have an active interest in negotiating some of these provisions and will be less concerned as to whether any such provisions are in line with the national legal requirements under whatever governing law may be applicable.

The author was involved in a number of transactions where the governing law was changed in the course of the negotiations without a full review being conducted as to the repercussions of the change of the governing law on certain standard clauses.

In addition, second rank provisions are often used as bargaining chips during the negotiations process.

For example, in an international contract for the purchase of industrial pumps for integration into the buyer's equipment, the buyer required the seller to provide access to its facilities to inspect equipment from a safety perspective, to ensure the seller was making progress under a production schedule and to perform testing. The seller counterproposed a certain amount of advance notice to be provided prior to allowing access and attempted to define the limits of testing to ensure any additional testing would be at the buyer's expense. While safety, access and testing form part of the standard contractual obligations and both parties had an interest in avoiding disruptions and ensuring timely performance, the seller made 'concessions' regarding access rights with the view of receiving other concessions for provisions it valued more highly.

In fact, granting concessions on issues of minor importance with the view of receiving them on what a party considers as the important contractual clauses should properly be viewed as a negotiation strategy. Even under the circumstances where a party is in a very strong bargaining position, it will generally give a little ground on issues of lesser importance in order to not appear to misuse its strong position. In addition, there are a number of cultural factors to be considered in the interplay of the give-and-take process that varies considerably according to custom and region.

A party may also insist on including certain legal provisions in the contract without being overly concerned as to whether such rules would be enforceable before a court of law. The sole purpose of such contractual provisions may be to influence the behaviour of the other party, and the simple insertion of the clause may be sufficient to achieve compliance in the majority of cases, without that party ever having to enforce such a rule in front of a court or arbitral tribunal.

> *For example, contractual terms often reference or include business and ethical codes of conduct. While such codes form part of the contractual obligations assumed by the parties, their main purpose is to put the other party on notice of ethical rather than legal responsibilities.*

Finally, the negotiation process is an active and dynamic process, and there are many moving parts when the parties negotiate the terms and conditions for a particular transaction. While parties normally attempt to narrow down the open points as they go through the process and thereafter try to not go back on matters that have been agreed as 'closed', there are no hard and fast rules. Often the personnel negotiating the contract must seek approval at the end of the process from senior management, who may have a different opinion on the acceptable allocation of contractual risk.

> *For example, the author was involved in a multimillion-dollar transaction between a European buyer and a South American seller for construction services to be performed in South America. The parties agreed to use a modified version of the buyer's contract with its client as the starting point for the negotiations. Such supply contracts are commonly known as 'flow down contracts' as they seek to align the contractual responsibilities of the supply base with those of the buyer under the client-facing contract. The flow down contract contained a choice of the governing law of the State of New York. In a final business meeting where no lawyers were present, the question of the law governing the transaction was revisited and became part of a wider negotiation. It was agreed to change the governing law, and there was no time to fully review the impact of the new governing law on each contractual provision so that the review was limited to determining whether assuming any additional contractual risk was acceptable in light of the commercial benefits that were achieved.*

1.2 Imperfect information

In practice, parties negotiate contracts based on imperfect information, whether it is because of linguistic barriers, the actual state of the law or simply due to a lack of time and resources.

One significant factor is that of language. While the English language is generally considered as the *lingua franca* of international contracts, the corresponding performance may occur anywhere on the globe. Where performance occurs in locations where neither the buyer nor the seller have the requisite ability to efficiently conduct business in the local language, not all of the relevant national legal requirements may form part of the negotiations.

> *For example, for an EPC project to be performed in Angola on behalf of a US oil major with an associated contract governed by US law, the supply contract was divided into two parts, as commonly is the case. One part was the offshore or international contract for the work to be performed outside of Angola and the other part was a local contract for the work to be performed in country. All three of the contracts were written in the English language. However, as both the buyer and the seller in the supply contract only had a very limited local presence in Angola, neither had the necessary language capabilities to review the local Angolan legal requirements written in Portuguese.*

A related issue is the actual state of law in the relevant national legal system. Legislation, decrees and special laws may in some cases create a myriad of rules that can cause the actual state of the law to be ambiguous or contradictory and, as a result, unknown to the parties. This difficulty is heightened by the fact that many complex issues will never have been brought before the courts and, as a result, there may be no indication on how a law or a series of different laws would be applied in practice. Furthermore, even where companies are willing to pay local counsel for opinions on certain aspects of the law, the answers provided may not be conclusive. Another issue is that in the author's experience, it has proved extremely difficult to access legal texts in some countries, for example, in certain countries in the Middle East.

> *In a contract between a state-controlled Tunisian entity and a foreign seller, the buyer insisted that the warranty provisions should include the relevant Tunisian warranty law in addition to the warranties specifically agreed to under the contract. This apparently innocuous request caused the foreign seller a great deal of difficulty, as it was unclear as to how the request impacted the contractual obligations. In particular, the question arose as to which Tunisian laws were being referred to. Was the reference limited to the warranties set out in the Tunisian code of obligations or did it also include all warranty provisions under all Tunisian laws? What would occur if there were discrepancies between the contract and the Code Civile or other relevant Tunisian law? In the end, this issue was resolved not by a complete analysis of Tunisian law that would have been*