Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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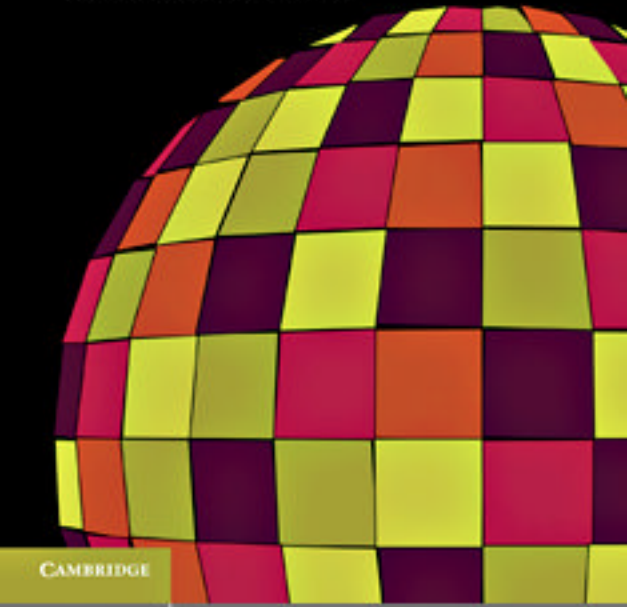

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Under US law, it is likely that in the same situation, no proof of any addition or modification would be allowed.[69] Under English law, the many exceptions to the parol evidence rule make it probable that the oral agreement could be taken into account, for instance, on account of mistake, rectification or the like.

Thus, the German and the US understanding of the entire agreement clause would probably lead to different solutions, whereas in most cases, the German and the English understanding would not influence the final outcome. It therefore matters as to whether the clause is to be given its German or its US meaning, while the difference between the German and the English understanding can almost be neglected.

When faced with a merger clause drafted in common law style in a situation where German law is the *lex contractus*, the guiding principle should be first the explicitly and then the impliedly expressed intentions of the parties. Like the general aims of private international law, it should be the aim of the interpreter to rely on the understanding that the parties in fact intended and that is closest to them in the circumstances of the case.[70]

If in a hypothetical case both parties were German merchants who use an entire agreement clause, there is neither any need nor any reasonable justification to infer the parties' intention to apply the US meaning, unless the parties have unambiguously made clear that the US meaning should prevail or unless the contract has a close connection to a *specific* US state, so that it is reasonable for the parties and the performance of the contract to adhere to the US meaning valid in the specific US state. More or less, this is the outcome of the BGH decision of 1992 mentioned above.[71] There the Court set aside the dogma that foreign law-style contracts should be always interpreted according to the foreign law and should rely on the understanding familiar to both parties.[72]

On the contrary, if, rarely enough, German courts were assigned a case where both parties were US merchants, then it is generally justified to infer the parties' intention to interpret the merger clause in the sense familiar to both parties, despite German law being the *lex contractus*; again, unless the parties clearly agreed otherwise or the contract is closely

[69] It must, however, always be noted that there are differences between the single US states even with respect to the effects of a merger clause. It is therefore an oversimplification to speak of 'the US law' here.

[70] See also above in Section 4 *in fine*.

[71] BGH NJW-RR 1992, 423; see above in Section 4.

[72] BGH NJW-RR 1992, 425.

connected with Germany. However, even if the US meaning prevails, things may become more difficult, namely if both US merchants were located in US jurisdictions which give merger clauses different effects. This is certainly no reason to go back to the *lex contractus* and to interpret the merger clause according to German law. An option could be to apply the meaning that prevails among the US states, while another option would be to take the meaning of the US jurisdiction with which the contract and the parties are most closely connected. The latter option appears to be preferable, because it gives relief from the difficult task of determining the prevailing US meaning.

If, however, both parties were merchants from different non-common law countries, again, their clear agreement on the interpretation method or on the understanding of certain clauses and terms must prevail. Whether they impliedly chose the background law as a separate *lex interpretionis* depends on the circumstances. The mere use of a common law-style contract form alone should not suffice. Further circumstances should indicate a respective intention of the parties.

5.1.2 No oral amendments clauses

In common law jurisdictions, no oral amendments clauses often use the following language:

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

5.1.2.1 German law Under German law, no oral amendments clauses (Schriftformklauseln)[73] are not generally invalid even if contained in standard terms.[74] However, if their language appears to prohibit a party from relying on a different oral agreement that the parties reached afterwards, then such clauses are invalid, because they violate two central provisions on standard contract terms: they neglect the preference of individually negotiated contract terms (§305b of the BGB) and disfavour the other party in an unreasonable and inadequate way (§307 of the BGB).[75] A clause that requires writing for any modification of a contract can always be set aside by an oral agreement (provided that a clear agreement of the parties to disregard the prior form requirement can

[73] In German, 'Änderungen oder Ergänzungen bedürfen der Schriftform'.
[74] BGH NJW 1982, 331; BGH NJW 19985, 320ff.; BGH NJW 1986, 1809; BGH NJW 1991, 1750; BGH NJW 1995, 1488; BGH NJW 2006, 138.
[75] See the decisions cited in the preceding note.

be proved).[76] These rules apply not only to transactions with consumers, but also to those between commercial contract parties.[77]

In sum, under German law, no oral amendments clauses do not exclude the other party from relying on an oral modification or addition to the contract upon which the parties clearly agreed after they concluded the contract.

5.1.2.2 English law Under English law, a no oral amendments clause is likely to be interpreted rather strictly so that the parties are generally bound by that clause. In conformity with the parol evidence rule, proof of an oral modification would generally be inadmissible.[78]

5.1.2.3 US law Most US states provide that under a no oral amendments clause, a contract can generally be modified only in writing.[79] This is the solution of the Uniform Commercial Code, which has been adopted by all US jurisdictions.[80] An oral modification has, in principle, no effect except where, under certain circumstances, it is inequitable that a party invokes the clause against the other, who reasonably relied on the oral modification.

5.1.2.4 Discussion No oral amendments clauses may lead to different solutions under German and common law, in particular US law. However, this will not always be the case. While under German law it is necessary to prove a clear agreement modifying the original writing requirement, under US law it must be shown that reliance on the form requirement would be inadequate. The final solutions will thus not always vary; however, it can be decisive whether the German or US understanding applies.

In concrete cases where the solutions vary, it must be determined which understanding should be preferred. This question must be answered in the same way as discussed before. The interpretation follows

[76] BGH NJW 1985, 320 (322: 'Eine Schriftlichkeitsklausel kann dadurch außer Kraft gesetzt werden, dass die Vertragschließenden deutlich den Willen zum Ausdruck bringen, die mündlich getroffene Abrede solle ungeachtet dieser Klausel gelten'); BGH NJW 1995, 1488.

[77] See BGH NJW 2006, 138 (concerning a lease between commercial parties).

[78] In *Henderson* v . *Arthur* [1907] 1 KB 10, even without a no oral amendments clause, the proof of an oral modification was rejected.

[79] See Farnsworth, *Farnsworth on Contracts*, §§7(6) and 7(6)(a).

[80] See Section 2-209(2) of the UCC.

the *lex contractus* unless there is a clear indication that the parties intended a different *lex interpretionis*. The mere use of a contract drafted in common law style, *per se,* should not be the indication. As mentioned, the German courts still apply the meaning of the foreign law unless there are sufficient indications that the parties had another intention.

5.2 Clauses that use a terminology with legal effects not known to the applicable law

The contract may use terms with legal effects that are either unknown in the applicable law or, in their technical meaning, unknown to the law that governs the contract. The *lex contractus* is then of little or no help in interpreting such terms.[81] A most obvious example of this kind could be found in the marriage contracts of Islamic couples where the parties regularly agree on a *mahr*[82] or dower, a legal institute unknown today other than in Islam-oriented countries. If German law governs the contract,[83] it is more or less necessary to go back to the law with which the parties are connected and where such legal institution is known.[84] Furthermore, it will regularly be the parties' explicit or tacit intention to understand the term in that sense.

In commercial contracts, rather than the use of completely strange terms, it is more often the case that a term or phrase also known to the *lex contractus* has acquired a different specific technical meaning in the law of the contract's language. As mentioned, 'consideration' is an example of this.[85] Another is the word 'indemnity'. In German, it is generally translated as 'Entschädigung', a neutral term equivalent to compensation. In legal English, it is generally a term of art meaning an assurance to indemnify someone against his or her liability towards the indemnifier or a third person.[86]

[81] See already above in Section 3.5.

[82] A sum of money the bridegroom has to pay, at least to promise to pay to the bride because of the marriage; see thereon W. Wurmnest, 'Die Mär von der *mahr* – Zur Qualifikation von Ansprüchen aus Brautgabevereinbarungen', *Rabels Zeitschrift für Ausländisches und Internationales Privatrechts*, 71 (2007), 527–558; N. Yassari, 'Die Brautgabe im iranischen Recht', *Das Standesamt* (2003), 198–201.

[83] This would be the case where, e.g., a Syrian bride and an Iraqi bridegroom who both live in Germany marry.

[84] See OLG Hamburg FamRZ 2004, 459.

[85] See above in Section 3.5.

[86] See *Jowitt's Dictionary of English Law*, vol. I, 2nd edn by J. Burke (Sweet & Maxwell, 1977), 959.

5.2.1 Indemnity clauses

Indemnity clauses as drafted in common law jurisdictions can have rather different fields of application. Their wording may therefore vary widely. Examples include the following clauses:

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 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 the Company Group.
2) Indemnity for non-performance of this Charter-party, proved damages, not exceeding amount of freight. (GENCON Charter 1976 No. 12)[87]
3) Termination indemnity: 12 months or legal benefit if higher.[88]

5.2.1.1 German law In German law, indemnity clauses do not, *per se*, have a specific technical meaning. Their meaning and interpretation depends on their precise language and context. They can mean a penalty (Vertragsstrafe) as well as a liquidated damages clause (Schadenspauschalierung) or the obligation to indemnify the other party against the claims of others (Haftungsfreistellung). In commercial contracts between merchants, all these kinds of contract terms are, in principle, valid even if contained in standard contract terms.[89] However, penalty clauses are only enforceable if the penalty sum is not excessively high.[90] In addition, the clause must regularly require fault.[91] Liquidated damages clauses, in particular in standard terms, are valid if the agreed damages do not exceed the amount that could be expected in the ordinary course of events. Moreover, liquidated damages clauses must not exclude the possibility of proving that

[87] The GENCON Charter 1994 does not contain a similar provision.
[88] See OLG Frankfurt NJW-RR 1995, 36 (employment contract with a company director).
[89] BGH BB 1995, 1437; BGH NJW 2003, 2158; D. Coester-Waltjen, in *Staudingers Kommentar zum Bürgerlichen Gesetzbuch,* §309 No. 6, para. 28.
[90] BGH WM 1990, 1198; BGH NJW-RR 1998, 1508.
[91] See thereto Coester-Waltjen, in *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, §309, No. 6, para. 28.

the real loss was less than the agreed amount.[92] In contrast to penalty clauses, liquidated damages clauses require that, in principle, damage has occurred. On the contrary, German law does not allow the cumulation of a penalty and a damages claim for the same breach of contract. However, further losses not covered by the penalty can still be claimed.[93]

For the validity of indemnity clauses in the sense of English law, German law provides no specific requirements. If contained in standard contract terms, they must comply with the general adequacy test for such terms as laid down in §307 of the BGB.

The German court decisions that dealt with the term 'indemnity' in common law-style drafted contracts rejected a specific English meaning of the term. The Federal Court relied on the German meaning of the word because the parties were both German.[94] The OLG Frankfurt came to the same conclusion mainly because the addressee of the clause was a German employee.[95]

5.2.1.2 English law Under English law, indemnity clauses mean that the indemnifier has agreed to indemnify the other party against a liability that this party may incur either towards the indemnifier itself or towards a third party.[96] Such clauses are valid. In principle, they are to be interpreted in the same way as exemption clauses.[97] That means that they are being interpreted narrowly and, in case of any doubt or ambiguity, against the party promising the indemnity.[98]

5.2.1.3 US law In US law, indemnity clauses appear to have the same technical meaning as in English law.[99] Unless the indemnity is for an illegal act, an indemnity clause is generally valid.[100] It has to be interpreted in the same strict sense as exclusion clauses.[101]

[92] See §309, No. 5 of the BGB; thereon BGH NJW-RR 2003, 1056; Grüneberg, in *Palandt, BGB*, §309, para. 32; Coester-Waltjen, in *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, §309 No. 5, paras. 25ff.

[93] §340(2) of the BGB.

[94] BGH NJW-RR 1992, 423.

[95] OLG Frankfurt NJW-RR 1995, 36.

[96] Lewison, *The Interpretation of Contracts*, p. 479.

[97] See thereto *ibid*., pp. 479ff.

[98] See, for instance, *White* v. *Warwick (John) & Co. Ltd* [1953] 1 WLR 1285; *Murfin* v . *United Steel Co. Ltd* [1957] 1 WLR 104; *Dairy Containers Ltd* v. *Tasman Orient Line CV* [2005] 1 WLR 215; Lewison, *The Interpretation of Contracts*, pp. 450ff.

[99] See cases such as *Jewett Publishing Co.* v. *Butler*, 34 N.E. 1087 (MA 1893); *Williams* v. *White Mountain Constr. Co.*, 749 P.2d 423 (CO 1988).

[100] See, for instance, *Atkins* v . *Johnson*, 43 Vt. 78 (1870).

[101] Farnsworth, *Farnsworth on Contracts*, §5.2 No. 17.

5.2.1.4 Discussion Clauses containing the term 'indemnity' are particularly suited to be interpreted differently since the term translated into German (Entschädigung) is easily understood but lacks the legal connotations it carries in legal English.[102] Whether the German or the English/US meaning should prevail should again depend on the parties' express or tacit understanding. It is therefore correct that German courts have interpreted clauses using the term 'indemnity' in the sense that the parties or the addressee of the clause have most likely understood them.[103]

5.2.2 Liquidated damages clauses

A liquidated damages clause may read as follows:

> If, due to the fault of the Seller, the goods have not been delivered at dates according to the delivery schedule as provided in this Agreement, the Seller shall be obliged to pay to the buyer liquidated damages for such delayed delivery at the following rates:
> i) For each complete week, the liquidated damages shall be 0.5% of the value of the goods delayed.
> ii) The total amount of the above mentioned liquidated damages will not exceed 25% of the price for the delayed goods.
> iii) The payment of liquidated damages shall not release the Seller from its obligation to continuously deliver the goods.

5.2.2.1 German law As already indicated, in German law, liquidated damages clauses can be validly agreed upon between merchants even in standard form.[104] In contrast to indemnity clauses, they have a specific technical meaning. A clause is a liquidated damages clause and not a penalty clause if the agreed amount is adjusted at, and corresponds to, the damages amount which could be expected in the ordinary course of events.[105] Moreover, liquidated damages clauses even between merchants must not exclude the possibility of proving that the real loss was less than the agreed amount.[106] If the clause complies with these requirements, it would be enforceable.

[102] For this phenomenon see also Triebel and Balthasar, 'Auslegung englischsprachiger Vertragstexte', 2190.
[103] See BGH NJW-RR 1992, 423; OLG Frankfurt NJW-RR 1995, 36.
[104] BGHZ 67, 312; BGH NJW-RR 2000, 719.
[105] See the text of §309, No. 5 of the BGB.
[106] See §309, No. 5 of the BGB; thereon BGH NJW-RR 2003, 1056; Grüneberg, in *Palandt, BGB*, §309, para. 32; Coester-Waltjen, in *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, §309 No. 5, paras. 25ff.

5.2.2.2 English law Under English law, penalty clauses are generally invalid while liquidated damages clauses are admitted.[107] The distinction between them depends on whether the clause primarily intends to deter the other party from breaking the contract by an *in terrorem* effect (penalty) or to compensate for the loss caused by a breach (liquidated damages).[108]

5.2.2.3 US law In the US, as in England, penalty clauses are not permitted, whereas liquidated damages clauses are allowed as long as they do not clearly disregard the principle of compensation and excessively exceed the presumed loss.[109]

5.2.2.4 Discussion In both German law and the common law, the distinction between penalty clauses and liquidated damages is difficult.[110] However, while German law allows penalties to a certain extent and the common law prohibits them, the distinction and the question of whether the German or the English/US solution applies can become decisive. The answer should again depend on the parties' express or implied understanding.

5.2.3 Conclusion

Where a contract uses terms unknown to the *lex contractus*, the latter can give no guidance in their interpretation. This is at least true where it is clear from the parties' express or tacit agreement that they meant the term to be understood in its technical meaning. In this case, this technical meaning has to be accepted. However, if the parties agreed on a different meaning, that other meaning must prevail.

The same solution should apply where a term has acquired a technical meaning in the background law of the contract, even though this meaning might be unfamiliar to the *lex contractus*.

5.3 Contract clauses that regulate matters already regulated in the applicable law

Rather often, contract clauses regulate matters that the applicable law also regulates. As far as the applicable law is mandatory, it enjoys priority

[107] Lewison, *The Interpretation of Contracts*, p. 591 with references.
[108] See, e.g., *Lordsvale Finance Plc* v. *Bank of Zambia* [1996] QB 752.
[109] See extensively thereon Farnsworth, *Farnsworth on Contracts*, §12.18.
[110] For a comparison of the European solutions for penalty clauses, see H. Schelhaas, 'The Judicial Power to Reduce a Penalty', *Zeitschrift für Europäisches Privatrecht* (2004), 386–398.

over the contract regulations. Problems can, however, arise with respect to interpretation when the rules of the applicable law are non-mandatory. The question is always whether the contractual regulation is final and exclusive or whether it can and should be supplemented by the non-mandatory rules of the *lex contractus*. Again, this is first a matter of the applicable *lex interpretionis* and then of interpretation. Two kinds of such clauses – *force majeure* clauses and hardship clauses – will be discussed.

5.3.1 *Force majeure* clauses

A *force majeure* clause in common law style can be drafted in the following way:

> The Supplier shall not be liable for delay in performing or for failure to perform its obligations if the delay or failure results from 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.

5.3.1.1 German law The German law of obligations is still essentially based on the fault principle, though fault in any deficit of performance of the contractual obligations is presumed.[111] The debtor is thus generally not liable in a case of *force majeure*. Exemption clauses for *force majeure* are therefore less necessary than in legal systems that base their contract law, in principle, on strict liability. Nonetheless, such clauses (like the cited one) are used and they are valid. The term *force majeure* ('höhere Gewalt') is a term of art in German statutory law.[112] The courts define it as an extraordinary external event that is unavoidable.[113] The term includes not only natural events such as flooding, storm, etc., but also unavoidable acts of third persons like criminals.

[111] See, in particular, §§276 and 280(1)(2) of the BGB.

[112] See, for instance, §7(2) Straßenverkehrsgesetz (StVG – Road Traffic Act); §1(2) Haftpflichtgesetz (HaftPflG – Liability Act), where 'höhere Gewalt' is an excuse against strict liability.

[113] See BGH NJW 1953, 184; BGH VersR 1976, 963; BGH NJW 1988, 2733; W. Filthaut, *Haftpflichtgesetz*, 6th edn (C. H. Beck, 2010), §1, paras. 158ff.

It is rather likely that German courts, when called upon to interpret the mere formulation 'acts of God', would be confronted with the translation 'höhere Gewalt' (foreign language texts have generally to be translated).[114] And it is equally likely that the court would take the German meaning cited above unless the meaning of 'acts of God' could be inferred from the whole clause (as in the model clause cited above).[115] But without such explanation and help for interpretation, it is quite probable that the court would not even be aware that there is an interpretation problem because of the difference between 'acts of God' and 'höhere Gewalt'.

5.3.1.2 English law Under English law, parties are, in principle, relieved from their agreed contractual duties if an unavoidable event or act occurs that renders performance of these duties impossible (discharge by frustration).[116] A *force majeure* clause of the kind quoted above would more or less merely specify this state of the law. Such a clause would therefore be valid.[117] Although the distinction is difficult to draw, *force majeure* clauses are said not to be exemption clauses[118] that must be strictly interpreted.[119] However, the so-called *ejusdem generis* principle could lead to a restriction where the listed exempting events were of the same genus (for instance, only natural events).[120] In that case, the clause would cover only comparable events. The formulation 'any cause beyond a party's control' does, however, prevent such restriction.[121] Under English law, 'acts of God' do not include anything other than natural events without any human intervention.[122] Whether the law on frustration can supplement *force majeure* clauses depends greatly on

[114] See §184 of the Gerichtsverfassungsgesetz (GVG – Act on the Constitution of Courts): 'The language before the court is German.'

[115] See thereto in the same sense Triebel and Balthasar, 'Auslegung englischsprachiger Vertragstexte', 2191, relying on an unpublished decision of LG Bochum (27 April 1976 – 12 O 18/76) which interpreted the German translation of 'act of God' as 'höhere Gewalt' in the sense used in Germany.

[116] See H. Beale, *Chitty on Contracts*, vol. I, 30th edn (Sweet & Maxwell, 2008), paras. 23–001ff. with extensive references.

[117] For *force majeure* clauses, see Beale, *Chitty on Contracts*, paras. 14–126ff. In *Dorset County Council* v . *Southern Felt Roofing* (1989) 48 BLR 96 (CA), the agreed risk that a party had accepted of damage caused by fire, lightning, explosion, aircraft and other aerial devices was held not to exclude liability for fire caused by negligence.

[118] See thereto Beale, *Chitty on Contracts*, para. 14–126 with references.

[119] See note 98.

[120] See on this doctrine extensively with many references Lewison, *The Interpretation of Contracts*, pp. 279ff.

[121] Beale, *Chitty on Contracts*, para. 14–127.

[122] *Ibid*., para. 14–137.

the language of the respective clause. It is likely that in the interpretation of the above-quoted model clause, English courts would rely on the meaning given to certain terms (in particular, 'acts of God') by English case law.

5.3.1.3 US law The state of US law concerning events rendering performance impossible corresponds in principle to English law.[123] Equally, *force majeure* clauses generally confirm the existing law and are therefore valid.[124]

5.3.1.4 Discussion The question of whether *force majeure* clauses can be supplemented by national law depends on their formulation. The more detailed the clause, the less it leaves room for any supplement.

In interpreting English *force majeure* clauses, there is the danger that German courts may not be aware of differences of meaning, for instance, of terms such as 'acts of God'.

5.3.2 Hardship clauses

Hardship clauses can be encountered in the following form:

> 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.
>
> 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.

5.3.2.1 German law Since the reform of the law of obligations in 2002, German statutory law acknowledges expressly that parties can request an

[123] See Farnsworth, *Farnsworth on Contracts*, §§9(5)ff.
[124] As to their drafting, see *ibid*., §9(9)(a).

adjustment of the contract if circumstances that constituted the basis of the contract have fundamentally changed (Störung der Geschäftsgrundlage).[125] This regulation covers the case of hardship in the sense that performance has become more onerous.[126]

If the parties have agreed on a hardship clause, statute itself gives their agreement preference over the statutory regulation.[127]

5.3.2.2 English law Depending on their precise formulation, English law would generally regard hardship clauses as valid.[128] They prevail over the doctrine of frustration under which a party may be relieved of its obligation.

5.3.2.3 US law Similarly, in US law, hardship clauses are fully accepted.[129] They confirm and specify for the respective contract the otherwise rather vague doctrine of economic impracticability.

6 Final conclusions

In common with the general aims of private international law, it should be the aim of the interpretation of international contracts to uncover the understanding that the parties in fact intended or that is closest to them and their interests in the circumstances of the case.

Between common law and civil law jurisdictions, there are still differences in the method of interpretation of contracts and their terms. It therefore matters which law governs the interpretation issue. In principle, this is the law that governs the contract as a whole, whether this law is chosen by the parties or objectively designated. This *lex contractus* is generally also the *lex interpretionis*. However, generally, terms which are known to have acquired a precise technical meaning in a specific legal system will be understood in that sense.

In principle, national interpretation methods govern the construction of international contracts. Wherever possible, the national method should, however, be 'internationalised' where international contracts are involved. This means that where an international meaning of terms

[125] §313 of the BGB. [126] Grüneberg, in *Palandt, BGB*, §275, para. 21.
[127] See §313(1) of the BGB; see also BGHZ 81, 143; BGHZ 90, 69 (74); BGH NJW 2005, 205 (206); Grüneberg, in *Palandt, BGB*, §313, para. 10.
[128] See Beale, *Chitty on Contracts*, para. 23–056.
[129] See thereto and to their drafting Farnsworth, *Farnsworth on Contracts*, §9(9)(a).

and phrases can be identified, this meaning should be preferred to a purely national meaning, unless there are clear indications that the parties agreed on a different meaning. International sets of principles, in particular the UNIDROIT Principles of International Commercial Contracts, are helpful in revealing an almost uniform international understanding of certain contract clauses or terms.

The rule that the *lex contractus* is generally the *lex interpretionis* of a contract becomes problematic when a contract is drafted in the style and on the basis of a specific law, while the *lex contractus* is another law. The law governing the contract may then differ from the law on whose background the contract was drafted. First, the parties are always free to choose explicitly a *lex interpretionis* that differs from the *lex contractus*, for instance, by using a construction clause. Secondly, the parties may also tacitly choose a separate *lex interpretionis*. Such a choice will depend on the parties' express or implied intentions. Although it is contrary to the general principle enunciated, and as a result is often modified by German courts, the mere drafting of a contract in English using common law terminology should in itself not be regarded as a tacit choice of English or US law as the *lex interpretionis*. Today, both the language and the common law terminology are too insignificant to indicate the choice of the law of a specific common law jurisdiction. Further indicative circumstances should be necessary for a tacit choice of such a law, for instance, the citizenship of and/or habitual residence of the parties in the same common law jurisdiction, and the negotiation, conclusion and performance of the contract in the same common law jurisdiction. Where such circumstances are lacking, the *lex contractus* remains the *lex interpretionis*.

There are contract situations where the interpretation of contract clauses and terms must necessarily be 'international'. This is the case with contracts to which uniform law conventions apply and, further, where the contract uses internationally unified terms (such as INCOTERMS) or where the contract is concluded according to an internationally standardised contract form. The international method of interpretation means here that courts and tribunals must strive for uniform principles of interpretation, must try to find and maintain a uniform meaning of specific contract terms and expressions, and must take into account the relevant case law of other countries.

When German courts are faced with concrete contract clauses drafted in common law style in a situation where German law is the *lex contractus,* the guiding principle should be first the explicitly and then the

impliedly expressed intentions of the parties. If both parties were German merchants who use a contract drafted in common law style, there is no justification to infer their intention to apply the meaning familiar in a specific common law jurisdiction unless the parties have unambiguously made clear that this meaning should prevail, or unless the contract has a close connection to that specific common law state so that it is reasonable for the parties and the performance of the contract to adhere to the meaning valid in this state. Where, on the other hand, both parties were merchants from a common law jurisdiction, it is generally justified to infer their intention to interpret the respective clause in the sense familiar to both parties, despite German law acting as the *lex contractus*, except where the parties clearly agreed otherwise or the contract is closely connected with Germany. On the other hand, if both parties were merchants from different non-common law countries, again their clear agreement on the interpretation method or on the understanding of certain clauses and terms must prevail. Whether they impliedly chose the background law as a separate *lex interpretionis* depends on the circumstances. The mere use of a common law-style contract form alone should not suffice. Additional circumstances should be necessary to indicate that intention.

9

The Romanistic tradition: application of boilerplate clauses under French law

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1 Preliminary observations

Even in international matters, there is no such thing as 'lawless contracts' under French law,[1] although it is perfectly admissible in international arbitrations to provide that the arbitral tribunal shall rule in 'amiable composition', which does not require the tribunal to apply a law except for fundamental rules of due process and international public policy. However, by virtue of the principle of contractual freedom, a contract governed by French law may also refer to other norms and customs, e.g., the trade practices of the shipping industry. The general observations contained in this chapter must therefore be adapted to the specific business norms and customs that may apply to a given contract according to the field of activity involved.

These general observations should also be qualified to take into account the general approach of French judges towards contracts. The Civil Code does contain a few rules of construction in Articles 1156–1164. One should, however, point out certain qualifications regarding their exact scope and effect:

- First of all, the French Supreme Court decided that these rules of interpretation are not mandatory.[2]

This lack of mandatory character applies to all rules of interpretation, including the rule provided by Article 1162 of the Civil Code, according

[1] Messageries Maritimes, Cass. Civ, 21 June 1950, RCDIP 1956.609, note Batiffol; Siret 1952.1.1 note Niboyet: 'Tout contrat international est nécessairement attaché à la loi d'un Etat.'

[2] Cass. Civ. 1, 6 March 1979, Bull I, no. 81; Cass. Com., 10 July 2001, No. 97–21.648, JCP G 2002, II, No. 10072; Cass. Civ. 1, 1 March 2005, No. 02–16.802.

to which: 'when in doubt a contract is interpreted against he who stipulated and in favour of he who contracted the obligation.'[3] This is the equivalent of the English law principle of *contra proferentem*. The rule may, however, be mandatory for certain categories of contract if there is a specific provision to that effect, as is, for instance, the case for contracts between a consumer and a professional (Article 133(2) of the Code de la consommation).

- Moreover, construction of a contract is an issue of fact and not an issue of law. This means that no appeal to the French Supreme Court for civil matters (Cour de cassation) is permissible,[4] save in case of blatant distortion of the clear stipulations of the contract ('dénaturation de stipulations claires et précises').[5]
- Article 1134 of the Civil Code provides that 'legally formed agreements have the force of law between the parties that made them' but immediately adds that agreements 'must be performed in good faith' (Article 1134, §3 of the Civil Code). The requirement of good faith under the Civil Code is always a source of amazement for common law lawyers and it is important to define the scope of that principle inasmuch as it can be defined.

As regards the duty to perform the contract in good faith, one can summarise it as a duty to go beyond the letter of the contract. This can essentially occur in two types of circumstances:

- the strict application of the contract would be particularly harmful to one of the parties;
- the strict application of the contract would not conform to the actual intention of the parties.

The effect of the principle of good faith is best illustrated by giving a few examples taken in an abundant case law:

- a party was found in bad faith when he suddenly invoked a de jure termination clause after he had let the breach continue without reacting;[6]
- a bank which failed to exercise its right to immediate full payment ('déchéance du terme') for six years was found to be in breach of its obligation of good faith when it then sought the payment of interest and penalties for late payment;[7]
- a company was found to be in bad faith for preventing its distributor from applying competitive prices;[8]

[3] Cass. Soc. 1975, Bull. V, No. 93.
[4] Cass. sect. réunies, 2 Febuaury 1808, GAJC, 12th edn No. 159.
[5] Cass. Civ., 15 April 1872, GAJC No. 160.
[6] Cass. Civ. 1, 16 February 1999, Bull. Civ. I, No. 52.
[7] Cass. Civ. 1, 31 January 1995: Bull. Civ. I, No. 57; Defrénois 1995. 749, obs. Delebecque.
[8] Cas. Com. 24 November 1998: Bull. Civ. IV, No. 277; D. 1999. IR 9; JCP 1999. II. 10210, note Picod; *ibid.* I. 143, No. 6 s., obs. Jamin; Defrénois 1999. 371, obs. D. Mazeaud; RTD civ. 1999. 98, obs. Mestre, and 646, obs. Gautier.

- a seller who had told the buyer that he would not perform the sale was found to be in bad faith when he sought to hold the contract unenforceable as the buyer subsequently failed to comply with a suspensive condition.[9]

This could seem quite far-reaching and to be contrary to legal certainty. However, the French Supreme Court has recently ruled that if the rule of good faith allows a court to sanction the disloyal use of a contractual prerogative, it does not allow the court to affect the very substance of the rights and obligations legally agreed upon by the parties.[10]

In other words, the duty to perform in good faith is complementary to the doctrine of *pacta sunt servanda* and is by no means in contradiction to it.

Article 1135 of the same Code also provides that they 'bind not only to what is expressed, but also to all the consequences that equity, usage or law confer to an obligation in accordance with its nature'.[11]

This provision goes further than the mere compliance with the requirement of good faith in the performance of the contract. Indeed, it is not just a matter of matching the spirit of the contract against its letter. The purpose is, in an objective way, to add obligations to a contract. The two main obligations of that kind are as follows:

- A general obligation of safety ('obligation de sécurité') that is imposed on most professionals. This can be defined as an obligation to ensure that no harm is caused to the other party or his or her belongings as a result of the contract. This is often applied to contracts of transport but there is no restriction as to the scope of application of this obligation of safety.
- The duty of information and advice ('obligation d'information et de conseil'), the scope of which is also general. A professional is supposed to inform and advise the other party against the normal risks and specificities of a contract, even if that other party is a professional. However, the intensity of this duty depends on the respective knowledge and skills of the parties.

[9] Cass. Civ. 3, 23 June 2004: Bull. Civ. III, No. 132; D. 2005. 1532, note Kenfack; Contrats Concurrence Consommation 2004, No. 154, note Leveneur.

[10] Cass. Com. 10 July 2007, Bull. Civ. IV, No. 188; D. 2007. 2839, note Stoffel-Munck and note Gautier; *ibid.* AJ 1955, obs. Delpech; ibid Chron. C. Cass. 2769, obs. Salomon; *ibid.* Pan. 2972, obs. Fauvarque-Cosson; JCP 2007. II. 10154, note Houtcieff; JCP E 2007. 2394, note Mainguy; Defrénois 2007. 1454, obs. Savaux; Contrats Concurrence Consommation 2007, No. 294, note Leveneur; RLDC 2008/46, No. 2840, note Delebecque; Dr. et patr., September 2007, p. 94, obs. Stoffel-Munck; RDC 2007. 1107, obs. Aynès, and 1110, obs. D. Mazeaud; RTD Civ. 2007. 773, obs. Fages; RTD Com. 2007. 786, obs. Le Cannu and Dondero.

[11] The word 'equity' is not used in the English sense, i.e., it does not refer to any specific body of law but rather to general notions of fairness.

> The actual content of the obligation to advise or inform depends greatly on the type of contract involved and the specific circumstances of each case. For instance, in engineering contracts, the contractor will generally be expected to warn the other party of the risks associated with a particular engineering technique. The consequences of such obligations can be particularly harsh on bankers who fail to advise inexperienced borrowers or people giving a personal guarantee on the risks of the contemplated operation.[12]

For the sake of completeness, it should be noted that for certain categories of contracts, French law automatically attaches a number of obligations derived from the 'nature' of the contract. In the Civil Code, such rules are generally not mandatory. There are also mandatory rules that are generally found in specific provisions outside the general provisions of the Civil Code. Most frequently they are attached to the exercise of a specific activity, e.g., franchise, insurance, etc.

Lastly, beyond the individual clauses identified below, certain formulations often found in English wordings (e.g., fulfilment of an obligation 'to the satisfaction of X', 'best endeavours', use of the word 'reasonable') are not given the same effect under French law as they would be under English law, for instance:

- Even if there is no case law on this issue, the expression '*to the satisfaction of X*' could be interpreted by a French judge as a *condition potestative*, i.e., left to the power of the beneficiary of the obligation, in that it would leave to the latter the possibility of unilaterally deciding on the good performance of the contract. In practice, it is likely that a French judge would simply ignore this clause and would consider himself or herself competent to appreciate objectively the effect of such a clause.
- The expression 'best endeavours' under English law implies very onerous obligations and is generally opposed to 'reasonable endeavours'. Under French law, there is no uniform interpretation of the expression 'best endeavours' and it is quite likely that it would be less onerous and more uncertain than under English law. Similarly, 'reasonable endeavour' would not be used in French and would be a source of confusion.

It is therefore not advisable to simply change the choice-of-law clause of an English law-wording without having checked those points.

[12] E.g., Cass. Ch. Mixte, 29 June 2007, Bull No. 8, JCP 2007 II 10146, note Gouriot.

Having made these preliminary observations, one can now turn to the individual clauses envisaged in this book.

2 Entire agreement ('clause d'intégralité')

There appear to be two purposes to this clause:

- The first purpose would be replace and supersede prior agreements which may have been reached by the agreement contained in the document to which that clause refers.
- The second effect is to suggest that the agreement referred to is the exclusive source of rights and obligation between the parties.

As regards the first effect (replacement of all past agreements), such a clause is frequently used in French law and practice for this purpose and does not present any particular difficulty.

Indeed, it would be analysed as a novation of all prior agreements into a new agreement. French case law only requires that the intention to proceed to a novation be unequivocal and that it clearly results from the stipulations concluded between the parties.[13] There is little doubt that the entire agreement clause under consideration fulfils this condition.

However, it should be noted that prior agreements and documents may obviously be taken into consideration when interpreting the intention of the parties. The clause under consideration would not change that.

As regards the second purpose (the agreement becoming the exclusive source of rights and obligation between the parties), this is more problematic and, to a certain extent, this purpose of the clause is both ineffective and redundant.

It is ineffective in the sense that French case law may impose additional ancillary obligations on the parties. Thus, as explained in the preliminary observations above, French courts often impose obligations of safety as well as obligations of information and advice on professionals, whatever the clauses of the contract may be. In any event, expressly excluding such 'implied obligations' would not necessarily make a difference, since they are often considered to be public policy and, as such, cannot be contracted out.

The second purpose is also redundant as regards the main rights and obligations that have been specifically negotiated between the parties,

[13] Cass. Com. 31 January 1983, Bull. Civ. IV, No. 44.

since French courts are loath to add to such rights and obligations in order not to disturb the balance of the contract.[14] As a matter of fact, French courts may even ignore this purpose of the clause in case there is a gap in the conditions of implementation of any obligation (e.g., place of payment). In such a case, the judge would supply the missing stipulation by looking for the intention of the parties or by relying on established practice.

Lastly, this clause does not address the issue of amendments to the contract. This will be dealt with in Section 4 below, but it should be noted that parties could prevent an interpretation that would be based on a supposed modification of the contract by providing that any amendment should be signed and in writing.

3 No waiver

This clause is effective and (to a certain extent) redundant. Indeed, it is a general principle under French law that waiver of a right has to be specifically proven and mere inaction is not normally sufficient to establish the intent to waive a right. The clause under consideration merely incorporates this general principle of French law on waiver of a right. This means that the clause will presumably be interpreted with all the exceptions and qualifications that are applied to the principle under French law.

Thus, French courts sometimes sanction parties whose behaviour is inconsistent with their rights, essentially based on the principle of good faith imposed on all contracts by Article 1134, §3 of the Civil Code. This was, for instance, the case for a party who repeatedly tolerated the non-performance of a debtor and then, suddenly, claimed full payment.[15] The Supreme Court regularly applies this solution against banks.[16] Similarly, one can reasonably think that in the event of a clause providing for the renegotiation of the contract in case of change in circumstances, and in the event that the creditor is late in requesting its implementation (one, two years), one may invoke the behaviour of the latter to prevent him or her from relying on the clause.

[14] Cass. Civ. 3, 1 March 1989, RTD Civ. 1991, p. 113, obs. J. Mestre; Cass. Com., 14 October 1997, Defrénois 1998, p. 538, note Y. Dagorne-Labbe; Cass. Civ. 3, 30 May 1996, Contrats Concurrence Consommation 1996, Com. 185 obs. Leveneur.

[15] Cass. Civ. 3, 8 April 1987, P. No. 85–17596, Bull. III, No. 88; Cass. Civ. 1, 16 February 1999, P. No. 96–21997, Bull. I, No. 52.

[16] E.g., Cass. Com., 8 March 2005, P. No. 02–15783, Bull. IV No. 44.

4 No oral amendments

Such a clause is valid insofar as it contains an agreement on the form that an amendment should take. Indeed, parties can reach agreements on the issue of proof as recognised by the French Supreme Court.[17]

It is also useful insofar as, in commercial matters, there is no restriction on means of proof (Article L.110–3 of the Code of Commerce) so that a party could pretend that a written contract was amended orally.

However, it should be mentioned that it is very hard to establish that a contract was concluded orally before a French state court, as testimonies are generally not given significant weight and there is hardly any hearing of witnesses.[18] The best way to prove things in French court proceedings is still to bring written evidence, whether it be the contract itself or written documents evidencing an oral agreement. In that respect, Article 1341 of the Civil Code requires written evidence in civil matters and forbids testimonies against written documents. Even if this article is not binding in commercial matters, it is a model which is recognised by commercial judges.

The clause is also useful in that it not only forbids oral proof of a contract but also requires a signed document. In that respect, one may wonder whether a French judge would recognise the validity of a modification of contract by, say, a mere exchange of emails.

French law recognises electronic signature (Article 1316(4) of the Civil Code) and an electronic document can be considered as a written document (Article 1316(1) of the Civil Code). However, a mere email does not fulfil the requirements of reliability of Articles 1316(1) and 1316(4) and cannot be deemed to be an electronic document bearing an electronic signature that would be recognised as a 'signed written document' for the purpose of the Civil Code.

5 Severability

This clause, which purports to preserve the contract in case one of its clauses is deemed invalid, has to be considered in light of French law on the issue of severability.

[17] See Cass. Civ. 1, 8 November 1989, D. 1990, 369.

[18] Things are different in arbitrations where hearing of witnesses and cross-examination can usually take place.