Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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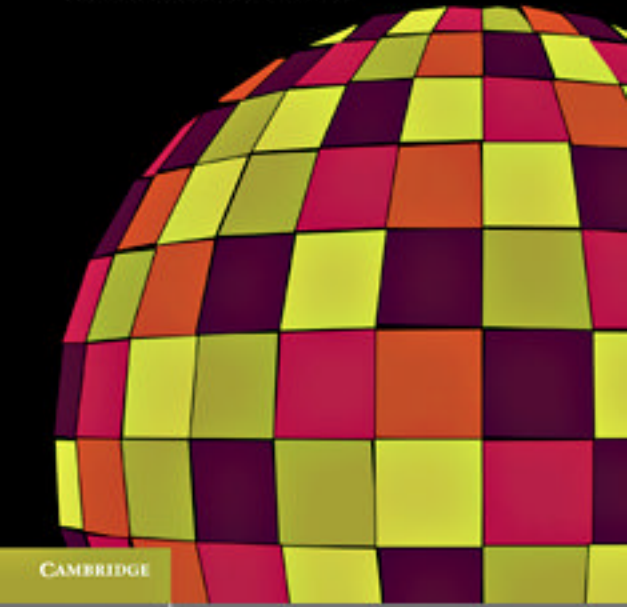

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met by means of interpretation or other rules or principles, the general clause serves the function of last resort, a 'safety valve'.[12]

2 Clauses aimed at fully detaching the contract from the applicable law

2.1 Entire agreement

When interpreting contracts, the courts aim at finding the common intention of the parties at the time the agreement was made, taking into account the reasonable expectations created by the contract, written and oral statements, and the behaviour of the parties, together with more pragmatic factors such as what is needed to fulfil the parties' interests in a fair and reasonable way. Information about the preceding negotiations, marketing material, previous agreements between the parties and other preceding and subsequent circumstances can be included in the basis for the decision. Whereas all kinds of facts relevant to ascertaining the intention of the parties in principle are admissible as evidence, the practical reality is often that it is hard to convince the court that the intention of the parties was in fact different from that expressed in the terms found in the parties' written contract. However, the principle of the court's freedom to assess the evidence implies that it depends on the facts of the individual case and what it would take to convince the court, and the chance that a party will be able to do so cannot be ruled out.

The entire agreement clause is, if taken literally, a far-reaching restriction of the general principles of interpretation. The purpose is to promote legal certainty in the sense that the clause, if taken literally, would exclude either party from claiming that the common intention of the parties was in fact different from what follows from the written contract. Often a claim to this effect will be unsuccessful because the written contract, e.g., due to its elaborate content, creates a strong presumption that the contract supersedes prior agreements. However, the critical point is that the entire agreement clause, if taken literally, would generally exclude a party from any attempt, including potentially successful ones, to try to convince the court that the common intention of the parties was in fact different from what can be read from the written contract. There seems to be no publicised Danish case law concerning this question. Danish courts are not likely to exclude evidence as

[12] See Gomard, 'Aftalelovens §36 og erhvervskontrakter', 14.

irrelevant because of the clause.[13] The general opinion in the legal doctrine is that the entire agreement clause cannot be taken literally.[14] Conversely, the clause may have the effect that it may be harder for the party in question to convince the court that the written contract does not reflect the common intention of the parties.[15]

2.2 *No oral amendments*

Whereas the entire agreement clause purports to rule out the relevance of facts prior to the conclusion of the contract, the no oral amendments clause concerns subsequent facts. It is the general rule of Danish law that oral agreements are as binding as written ones. Even though these oral agreements are generally harder to prove, they are nonetheless binding. In addition to the line of reasoning mentioned above (see Section 2.1) concerning the entire agreement clause, the *lex posterior* principle speaks against taking the no oral amendments clause literally in that, according to its wording, it rules out any attempt to prove the existence of a binding oral agreement that supersedes the written contract. It may, however, influence the assessment of evidence by making it harder to convince the court of the existence of an oral amendment superseding the written contract. In cases within the scope of the CISG, Article 29(2) of the Convention applies. Accordingly, a no oral amendments clause is effective, but the party in question may be precluded by his or her conduct from asserting the clause to the extent that the other party has relied on that conduct.[16] At least at the time when the CISG was adopted in Denmark, the rule in Article 29(2) did not reflect the general state of Danish contract law and was considered necessary because a contract could be amended orally, notwithstanding a no oral amendments clause.[17] There seems to be no sufficient basis for assuming that the CISG rule has in the meantime become the general rule of Danish

[13] E. Lego Andersen, 'Hvorledes indgår erhvervslivet aftaler?', *Erhvervsjuridisk Tidsskrift* (2008), 34–39, 37.

[14] Bryde Andersen, *Grundlæggende aftaleret*, p. 331; and M. Bryde Andersen, *Praktisk aftaleret. Aftaleretten II*, 2nd edn (Gjellerup, 2003), p. 136; Lynge Andersen and Madsen, *Aftaler og mellemmænd*, p. 401; and B. Gomard, H. V. Godsk Pedersen and A. Ørgaard, *Almindelig aftaleret*, 3rd edn (Jurist- og Økonomforbundets Forlag, 2009), p. 76.

[15] See Gomard, Godsk Pedersen and Ørgaard, *Almindelig Kontraktsret*, p. 75.

[16] Article 29(2) is found in Part III (not II) of the CISG and applies in Denmark. See text accompanying note 5.

[17] See B. Gomard and H. Rechnagel, *International Købelov* (Jurist- og Økonomforbundets Forlag, 1990), p. 96.

contract law. This also seems to be the general opinion in the legal doctrine.[18] There is no publicised case law concerning the no oral amendments clause.

2.3 *No waiver*

According to the general principles of the forfeit of contractual rights, by failure to act, the inactivity cannot, *per se*, have this effect. It is an additional requirement that the conduct of the inactive party has given the other party the impression that the right has been given up or that it will not be asserted, i.e., more than just inactivity is required. In practice, it depends on a rather discretionary overall evaluation whether the requirements are met.[19]

In the case of a breach of contract, a duty to give notice in different situations follows from specific statutory provisions that reflect a general principle of contract law laying down a general duty to give notice within a reasonable period of time after the party knew, or ought to have become aware, of the breach and the remedy sought.[20]

The statutory rules and the general principle of the duty to give notice of breach are not mandatory in commercial transactions. Although contract clauses derogating from the rules are in principle effective, their use in specific cases is likely to be restricted by way of interpretation (or, as a last resort, with reference to the general clause in §36 of the Contracts Act) in order to avoid manifestly unreasonable results such as, e.g., speculation at the expense of the party in breach. Furthermore, a no waiver clause seems to be vulnerable to attack in cases where the conduct of the party in question has given the party in breach the impression that the right or remedy has been given up or that it will not be asserted, i.e., where the general principle of forfeiture of contractual rights by failure to act applies (see above). Although conduct meeting the criteria according to this principle is not tantamount to a binding tacit promise, in most cases, the courts would probably find that the party in breach should be entitled to rely on the conduct.

[18] See Gomard, Godsk Pedersen and Ørgaard, *Almindelig Kontraktsret*, pp. 75f.; and Bryde Andersen, *Grundlæggende aftaleret*, p. 228.

[19] See B. von Eyben, P. Mortensen and I. Sørensen, *Lærebog i Obligationsret II*, 3rd edn (Thomson Reuters, 2008), pp. 169–174; and B. Gomard and T. Iversen, *Obligationsret 3. Del*, 2nd edn (Jurist- og Økonomforbundets Forlag, 2009), pp. 265–268.

[20] See Bryde Andersen and Lookofsky, *Lærebog i obligationsret I*, pp. 279–280.

There seems to be no publicised case law on the clause. It has been addressed by only a few commentators stating that the no waiver clause is not likely to be literally enforced.[21]

2.4 *Severability*

The consequences for the rest of the contract of the invalidity of a certain contract term depend on an evaluation of the individual case. One of the general principles of interpretation speaks in favour of saving the contract by giving the remainder of the contract effect. Alternatively, the contract may not function as intended by the parties without the invalid term, or its absence may disturb the balance between the parties and thus make it unreasonable to do less than setting aside the contract as a whole.

The flexibility of Danish contract law in terms of tailoring the legal effects of voidness has found a marked expression in the general clause in §36 of the Contracts Act (see Section 1 above).The flexibility in this respect is partly based on the realistic view that it is possible, only to a limited degree, to foresee which solutions will meet practical needs in different hypothetical situations. For the same reason, it is hardly possible, without a rather high degree of specification, to derogate totally from this flexibility. A contract clause specifying the effects or lack of effects on the remainder of the contract if a specific term turns out to be invalid (e.g., according to competition law) may have full effect. However, it is not plausible that the courts will respect a clause that generally rules out the possibility that the whole contract is invalid because of the invalidity of one of the terms.[22]

2.5 *Conditions*

It is a general principle of contract law that the remedy of termination normally presupposes fundamental breach, and that the question of whether this condition is met depends on a comprehensive, actual assessment of the extent and the nature of the breach and its significance to the

[21] See B. Saltorp and E. Werlauff, *Kontrakter*, 2nd edn (Jurist- og Økonomforbundets Forlag, 2009), p. 256; and J. Schans Christensen, *Grænseoverskridende virksomhedsoverdragelser. Tilrettelæggelse, Forhandling. Aftaleudarbejdelse og Opfølgning* (GadJura, 1998), p. 265.

[22] See Gomard, Godsk Pedersen and Ørgaard, *Almindelig Kontraktsret*, p. 134; Lynge Andersen and Madsen, *Aftaler og Mellemmænd*, p. 128 (note 30), Bryde Andersen, *Praktisk aftaleret. Aftaleretten II*, p. 360; and Saltorp and Werlauff, *Kontrakter*, p. 256.

party in question, as well as the significance of the termination to the other party. As far as sales of goods between commercial parties are concerned, it follows directly from §21(3) of the Sales of Goods Act that any delay is fundamental. The rule is one of the fairly few examples where the Sales of Goods Act is not in harmony with the general non-statutory principles of contract law. It is the general view in legal theory and practice that the rule is too inflexible and that the threshold for deviating from §21(3) based on an interpretation of the contract is very low.[23]

The same general trend of restrictive interpretation is traceable in the way that courts interpret contracts even though it is, of course, left to the parties to define what they consider to be so fundamental that it can trigger the remedy of termination. If the condition is in fact applied by a contract party as a pretext for not honouring a claim or for activating a legal remedy that is disproportionate compared to the real actual need to protect the party's legitimate interests, the courts are willing to disregard the condition as unreasonable and/or as abuse of legal remedy.[24]

An example to illustrate this point is found in the Supreme Court case reported in *Ugeskrift for Retsvæsen* (herinafter UfR) 1985.766, where an insurance company refused to honour a guarantee covering the debtor's payments under a mortgage deed because the transfer of the mortgage deed to the insured party was not registered. According to information provided by the association of insurance companies, this condition was found in most insurance companies' guarantees and was in fact enforced by the companies. Whereas the High Court gave judgment in favour of the insurance company with a brief reference to the fact that registration of the transfer was made a clearly expressed condition for coverage under the guarantee, the Supreme Court decided the case in favour of the insured party. It held that the failure to register the transfer had had no influence on the risk evaluation and no significant detrimental effects on the insurance company's interests. This being the case, non-coverage under the guarantee would be such a disproportionate effect of the failure to register that it would not be reasonable if the insurance company could be released from the contract with reference to this condition.

[23] See Bryde Andersen and Lookofsky, *Lærebog i Obligationsret*, pp. 214–215; and Gomard, *Obligationsret 2. Del*, p. 91.

[24] See Bryde Andersen and Lookofsky, *Lærebog i Obligationsret*, pp. 215–225; and Ewald, *Retsmisbrug I formueretten*, p. 201.

2.6 Sole remedy

The freedom of commercial contract parties to decide the remedies applicable in case of breach of the contract is respected by the courts, although not without modifications. One modification is based on the general notion that each party to a contract should have an adequate remedy at his or her disposal in all cases of the other party's breach of the contract. If the sole remedy of the contract turns out not to protect the interests of a party in a way that is adequate and reasonable in the given situation, then that party has the right to activate the remedies authorised in the general rules of contract law. This is a well-established principle in case law. As far as warranties stipulating repair as the sole remedy in case of non-conformity of a product are concerned, the innocent party, after having given the other party sufficient opportunity to attempt (unsuccessfully it turns out) to eliminate the defects by repair, is entitled to terminate the contract if the non-conformity is fundamental,[25] or to claim damages[26] or a proportional price reduction according to the general rules of contract law.[27]

Other modifications follow from the general principles developed in the case law concerning the interpretation and voidability of contract clauses excluding or limiting liability to pay damages. According to the case law, in order to have effect on liability founded in negligence, such exclusion/limitation clauses must clearly state so. Furthermore, exclusion/limitation clauses are unenforceable in cases where the liable party caused the damage deliberately or, as a main rule, by gross negligence. As indicated, this is not without exceptions – see the Supreme Court judgment reported in UfR 2006.632 concerning a clause limiting the amount of damages to be paid for goods stolen while they were in the possession of a cargo freight company which had acted with gross negligence. The liability clause was part of the General Conditions of Nordic Freight Forwarders (NSAB 2000) and the only exception, according to the wording of the terms, was deliberately caused damage. The Supreme Court stated that the terms were based on negotiations between trade organisations representing freight forwarders and their customers, and that the limitation clause, together with various other terms, was part of the set of standard terms which were presumed to be the result of an

[25] See Supreme Court judgment reported in UfR 1969.152.
[26] See Supreme Court judgment reported in UfR 1986.654.
[27] See Gomard, *Obligationsret 2. Del*, pp. 55–56; and Bryde Andersen and Lookofsky, *Lærebog i Obligationsret*, pp. 406 and 420.

overall trade-off, considering, inter alia, the insurance options. Therefore, the court found no basis for setting aside the clause according to the general clause in §36 of the Contracts Act.

The groups of modifications mentioned above also apply to contracts defining the payment of a certain amount ('konventionalbod')[28] as the sole remedy. Generally, a contract term authorising this remedy is likely to be interpreted as substituting the remedy of damages so that the entitled party cannot claim damages according to general rules[29] unless the modifications mentioned above apply or the amount defined in the contract is unreasonable according to §36 of the Contracts Act.

2.7 Subject to contract

If a term negotiated, seen in isolation, contains a binding promise, its binding effect is not automatically excluded by the fact that other elements of the document point in the opposite direction. In that case, as in other cases of mutually conflicting contract elements, the result depends on interpretation, taking into account all facts of the individual case. See, e.g., the Supreme Court decision reported in UfR 1994.470 about a document with the title 'letter of intent', which stated: 'In view of the fact that [the Bank] has placed credit facilities at the disposal of the [subsidiary company], the undersigned [parent company] hereby declares . . . that we shall if required transfer [to the subsidiary company] sufficient liquid funds to make sure that the subsidiary company will at all times be able to fulfil its obligations towards the bank.' The majority of the Supreme Court decided that the parent company had made a clear and unconditional promise. On the basis of the above quotation, there was, irrespective of the title of the declaration, a presumption that the parent company was bound in accordance with the contents. The fact that during prior negotiations with the bank, the parent company had refused to act as guarantor for the subsidiary company was not sufficient reason to establish that the bank had accepted that the declaration was not to be considered legally binding. The reason for this was that refusal to act as guarantor is (for accounting reasons) the typical reason for the

[28] Equivalent to liquidated damages – see Section 3.1 below for details.

[29] See Bryde Andersen and Lookofsky, *Lærebog i Obligationsret*, p. 422; and Bryde Andersen, *Praktisk aftaleret. Aftaleretten* II, pp. 395–396, but in the opposite direction J. Nørager-Nielsen, S. Theilgaard, M. Bjerg Hansen and M. Hørmann Pallesen, *Købeloven*, 3rd edn (Thomson, 2008), p. 493.

use of a 'comfort letter', as in this case. In the Supreme Court case reported in UfR 1998.1289, the result was the opposite. Here the parent company in a 'letter of comfort' had declared 'to support [the subsidiary company] financially with a view to enable the company to fulfil its obligations towards [the bank]'. A majority of judges stated that the declaration, in contrast to that in the 1994 case mentioned above, did not expressly state an obligation for the parent company to transfer liquid funds to the subsidiary company, and that the declaration could be complied with without such a transfer. The minority could find no sufficient basis for making such a distinction between the declaration in question and that of the 1994 case, and therefore voted for the same result as in the 1994 decision.

If a party to a non-binding preparatory agreement, e.g., a letter of intent to continue negotiations in order to reach a final agreement, does not participate in a loyal way in the continued process, that party may incur a liability to pay damages covering the other party's costs (i.e., the negative interest) caused by negligence (*culpa in contrahendo*) founded in the manifest violation of the general principle of loyalty.[30] In its decision of the case reported in UfR 2007.3027, the Supreme Court held that a trading agreement was a framework agreement only for a future partnership based on a common expectation that one of the parties would develop measuring equipment and that that party was under no obligation to develop such equipment. The Court stated that, within the scope of the agreement, it was a consequence of the agreement that both parties were obliged to honour loyal conduct and to inform each other of facts pertinent to the planned partnership (*in casu*, the failure to develop the measurement equipment), and that violation of this duty of loyalty could lead to liability for payment of damages, which was, in fact, the outcome.

If the (rather strict) conditions for liability to pay damages for failure to reach a final agreement due to disloyal conduct are met, a subject to contract clause, not explicitly stating that it excludes liability in case of negligence, is not likely to have that effect.[31]

[30] See Bryde Andersen and Lookofsky, *Lærebog i Obligationsret*, pp. 242–244; Bryde Andersen, *Grundlæggende aftaleret*, pp. 94ff.; Lynge Andersen and Madsen, *Aftale og mellemmænd*, p. 109; and Gomard, Godsk Pedersen and Ørgaard, *Almindelig Kontraktsret*, p. 89.

[31] See the general principles developed in case law concerning the interpretation and voidability of contract clauses excluding or limiting liability to pay damages. See Section 2.6 above.

2.8 *Material adverse change*

According to the general principles of contract law, the significance of altered circumstances to the binding effect of contractual obligations is usually dealt with primarily under the doctrine of failure of assumptions.[32] The basic conditions for the release of the promisor from the promise required by the doctrine are that the assumption in question was fundamental to the promise and that this was perceptible to the promisee. Furthermore, it is a condition that it is just and reasonable to put the risk of the failure of the assumption upon the promisee, taking into account which of the parties had, in the given situation, the better reason and the better possibility to investigate the circumstances, and thus clarify the validity of the assumption in question, their insurance possibilities, etc. Such factors in general indicate that the risk should lie with the promisor, but there are also specific cases where the risk should typically lie with the promisee. The release of the promisor in commercial situations normally requires subsequent events of a quite extraordinary nature and beyond normal commercial calculation.

To the extent that material adverse change clauses specify what constitutes material changes making the contract not binding, they make the doctrine of failure of assumptions redundant, whereas imprecise clauses are likely to be interpreted in line with that doctrine. Furthermore, courts, generally speaking, tend to put a rather restrictive interpretation on such clauses to the extent that they leave the question of the binding effect of the contract to the discretion of one of the parties. This then counteracts the clause being used as a pretext for withdrawing from the contract in cases where the party in question has no real need to do so[33] or ought to have anticipated the development, or where the change is clearly not affecting that party's interests on a permanent basis. The more precise the clauses are, e.g., in terms of quantifying what constitutes a material change, the less likely the restrictive interpretation will be.[34]

[32] In Danish: *forudsætningslæren*. The introduction of §36 of the Contracts Act in 1975 was expected by some commentators to be the beginning of the end for the doctrine of failure of assumptions, because §36 would make it superfluous in practice. The doctrine is, however, still alive and well alongside §36. See Gomard, Godsk Pedersen and Ørgaard, *Almindelig Kontraktsret*, pp. 199–200; and Lynge Andersen and Madsen, *Aftale og mellemmænd*, pp. 199 and 126.

[33] Compare this with Section 2.5 above concerning 'conditions'.

[34] L. Stolze and C. Svernlöv, 'Virksomhedsoverdragelsesskolen', in *Revision & Regnskabsvæsen* (2005), No. 1, 6–13, No. 4, 50–60 and No. 5, 50–56, 54–56; and A. Tamasauskas, *Erhvervslivets lånoptagelse* (Gjellerup, 2006), pp. 555–556.

There seem to be no publicised decisions on the material adverse change clauses.

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

The common intention of the parties when the contract was made is decisive. This also applies to the interpretation of contract clauses containing special terminology, be it technical, legal, in another language, etc. In order to establish the common intention of the parties, the courts will take into account all available pertinent facts and such pragmatic factors as mentioned above in Section 2.1. It does not matter that the common intention of the parties deviates from the authorised or natural understanding of the term in question; *falsa demonstratio non nocet*.[35]

To the extent that it is not possible to ascertain the common intention of the parties, courts tend to interpret/fill out the contract in a way that complies with the general rules and principles of the applicable law, i.e., in the present context, Danish contract law (see above, Section 1). The Western High Court decision reported in UfR 1977.1031 concerned a special delivery clause, 'Jan Fix15/4', that the parties had apparently copied from a department store's contract practice where the clause seemed to have been used to indicate that delivery could take place from a certain point in time (*in casu*, January) and that the goods had to be at the buyer's disposal at the very latest on a certain date (*in casu*, 15 April). The controversy concerned the question of delay. The goods were handed over to the carrier on 14 April and arrived at the buyer's shop on the 17 April. The parties had not discussed the precise meaning of the clause when the contract was made, the clause was not generally used within the trade, and its content was not considered well-established trade usage. The court therefore interpreted the clause in compliance with the concept of delivery of the Sales of Goods Act and accordingly held that delivery had taken place on 14 April. Consequently, there was no delay.

The delivery clause interpreted in the Supreme Court decision reported in UfR 2001.1039 was less exotic and the decision nicely illustrates the basic point.[36] Both the Danish buyer's order and the Italian

[35] Gomard, Godsk Pedersen and Ørgaard, *Almindelig Kontraktsret*, p. 178; and Lynge Andersen and Madsen, *Aftaler og Mellemmænd*, p. 388.

[36] In that particular case, Italian law applied to the contract. Therefore, the value of the decision as precedent for Danish courts is doubtful as regards interpretation of contracts under Danish law.

seller's confirmation of the order contained the clause 'franco (the Danish city of) Skanderborg'. The buyer later brought a lawsuit concerning the non-conformity of the goods delivered against the seller in a Danish court, based on the fact that the 'franco' clause, according to Danish default rules,[37] defines the place of delivery and thus meant that Danish courts had jurisdiction under Article 5(1) of the Brussels Convention. The Italian seller argued that the 'franco' clause should be interpreted in accordance with Italian law where the clause concerns costs only and has no relevance to the place of delivery. The Supreme Court stated that it was not established that the parties had based their business relations on the buyer's interpretation of the 'franco' clause and, referring to the fact that Italian law was the applicable law to the contract, held that the contract did not show that the parties had agreed that the city of Skanderborg was the place of delivery. Therefore, according to Article 31(a) of the CISG, the place of delivery was in Italy and the Danish courts did not have jurisdiction.

3.1 Liquidated damages

In Danish contract law, there is no sharp distinction between penalty clauses and clauses defining a standardised amount of damages. Both categories are within the scope of '*konventionalbod*'. Before the General Clause of §36 was introduced into the Contracts Act in 1975, §36 contained a rule to the effect that such payment obligations could be set aside to the extent that the payment of the full amount would be manifestly unreasonable. The mixed character (penalty/damage) of this clause found expression in the way the former provision described some of the factors to be taken into account when deciding on the question of reasonableness. Thus, not only the loss suffered but also the interest of the entitled party in the breach in question (together with the other facts of the case) should be taken into account. This provision was repealed and substituted by the General Clause in 1975, but it is the general view that the criteria are, by and large, still the same when the General Clause is applied to such clauses.[38] An illustration is found in the Supreme Court decision reported in UfR 2004.2400 concerning delay of the delivery of

[37] See §65 of the Danish Sales of Goods Act.

[38] See Gomard, Godsk Pedersen and Ørgaard, *Almindelig Kontraktsret*, p. 200; and T. Iversen, 'Nogle bemærkninger om dagbøder', in T. Iversen (ed.), *Festskrift til Det Danske Selskab for Byggeret* (Thomson Reuters, 2009), pp. 105–124, 121–124.

elements for air-conditioning systems. The Supreme Court held that the daily amount (50,000 SEK) stipulated in the contract to be paid by the seller in case of delay as well as the total amount claimed (1.4 million SEK) were markedly out of proportion with the contract value (260,000 SEK) and that it was not shown that the buyer would suffer or actually had suffered losses of such a size that the daily amount stipulated and the total amount claimed were proportionate to the losses incurred. Therefore, according to §36, the amount to be paid under the contract clause was reduced considerably (to less than 100,000 SEK).

Generally, the clauses do not apply unless there is a basis for liability to pay damages according to the general rules of contract law.[39] Furthermore, it is the general view that there is a presumption that such clauses should be interpreted as excluding the payment of damages in excess of the stipulated amount.[40] See Section 2.6 above for further details.

4 Clauses that regulate matters already regulated in the applicable law

4.1 Representations and warranties

One important aspect of the general contract law principle of loyalty in contractual relations is the general duty to disclose material facts. This rule is developed in case law and has been embodied in the statutory rules on consumer sales that, in this respect, also reflect the principles that apply to commercial contracts. It follows from §§76 (1) and (3) of the Sales of Goods Act that the goods are not in conformity with the contract if the seller has failed to inform the buyer of circumstances that influenced the buyer's assessment of the goods and which were known, or ought to have been known, by the seller. Breach of the duty to disclose such facts implies negligence and thus, *per se,* a basis of liability to pay damages for breach of contract.[41]

Whereas extensive lists of representations and warranties may reduce the practical need for applying the general principle of the duty to disclose material facts, it is not plausible that such lists will be considered exhaustive in the sense that there will be no duty to disclose other

[39] See Bryde Andersen and Lookofsky, *Lærebog i Obligationsret*, p. 422.
[40] See *ibid*., p. 422, but in the opposite direction, Nørager-Nielsen *et al*., *Købeloven*, p. 493.
[41] A statutory rule to this effect concerning consumer sales is found in §§80(1) and (3) of the Sales of Goods Act.

material facts known, or which ought to have been known, by the contract party in question.[42] In the case reported in UfR 2004.1784, the Supreme Court held that the buyer was entitled to terminate a contract of transfer of the ownership of a company inter alia, because the seller did not loyally inform the buyer of a significant decline in orders, for at least a six-month period, from one of the company's largest customers.

4.2 *Hardship and* force majeure

Danish contract law only to a rather limited extent contains precise rules dealing with the legal consequences of supervening external events making performance more onerous to a party, and thus leaves it to the parties to regulate the matter in their contract. In addition to the rather general and vague principles expressed in the doctrine of failure of assumptions[43] and in the General Clause in §36 of the Contracts Act, §24 of the Sales of Goods Act contains a rather precise rule regulating the basis of liability to pay damages for breach of generic obligations, i.e., obligations to supply a given quantity of generically defined, unascertained goods.[44] §24 applies to the seller's delayed delivery of goods only, but embodies a general principle concerning the breach of generic obligations.[45] According to §24, the breach triggers liability unless it is deemed impossible to perform in time due to extraordinary circumstances such as war, import prohibition, etc. Such circumstances are usually (but not in the wording of §24) defined as *force majeure*. In order to exempt the party from liability, the circumstances causing the impossibility must belong to the same category (*ejusdem generis*) as the examples mentioned (war, etc.) and not have been foreseeable to the party when the contract was made.[46] The *force majeure* principle based on §24 concerns the basis of liability to pay damages, but also applies to the party's obligation to perform, in that the obligation is suspended temporarily or brought to an end by the same circumstances.[47]

It is the general view that there is a presumption that clauses referring to *force majeure* should be interpreted in accordance with the principle in §24. This implies that, for want of evidence pointing in another direction, *force majeure* clauses stipulating examples of exemptions other than

[42] See Schans Christensen, *Grænseoverskridende virksomhedsoverdragelser*, p. 194.
[43] See Section 2.8 above. [44] Another example is Article 79 of the CISG.
[45] Gomard, *Obligationsret 2. Del*, p. 161. [46] See *ibid.*, pp. 163ff.
[47] See *ibid.*, p. 35.

those mentioned in §24 (labour disputes, bad weather, etc.) in all other respects are interpreted in compliance with the principle in §24. In addition, as far as the legal effects of an exemption are concerned, there is a general presumption that such clauses should be interpreted as dealing only with remedies of liability to pay damages and the obligation to perform.[48]

4.3 Clauses on contractual liability and/or product liability

One special feature of Danish law is the status of the rules on product liability, i.e., the liability for personal injury and damage caused to property (other than the dangerous/defective product itself). The product liability rules are constructed in a way that can cause problems concerning the interpretation and validity of contract clauses dealing with limitations of a seller's or a service provider's liability. Under Danish law, personal injury and damage caused to property (other than the defective product itself) are outside the scope of the seller's liability for breach of contract. No explicit rule to this effect is found in the Sales of Goods Act, but the Act has been, and still is, understood in this way by the courts.[49] An exception to this is found *e contrario* in Article 5 of the CISG, concerning damage to the buyer's property in international non-consumer sales contracts.

The liability of producers and suppliers of dangerous/defective products and services is based on fault (*culpa*) following the non-statutory principles of tort law with the extra refinement that professional suppliers have a vicarious liability for product liability incurred by previous links in the chain of production or distribution. The principle of vicarious liability is developed by the courts and it is usually justified by the consideration that the professional supplier is regularly in a better position than the injured party to influence and to seek recourse against the producer and other previous links in the chain of distribution. In addition to the court-developed principles, rules on product liability are

[48] See *ibid*, p. 168; and Nørager-Nielsen *et al*., *Købeloven*, p. 434.

[49] This interpretation has been based mainly on the preparatory works of the Sales of Goods Act (from 1906). Although it may be doubtful that the preparatory works of the Act were actually meant to be understood in this way (see T. Iversen, 'Produktansvar og ansvarsbegrænsningen', *Juristen*, 6 (2008), 188–193, 190), it has for a long time been an established fact that the Act does not apply to product liability, See Justitsministeriet, København, *Betænkning 1502/2008 om visse køberetlige regler om sikkerhedsmangler om visse køberetlige regler om sikkerhedsmangler*, p. 74.

found in the Product Liability Act[50] implementing the Product Liability Directive.[51] These impose a strict (no-fault) defect liability on the 'producer' (with a development risk defence) and codify the pre-existing principle of professional suppliers' vicarious liability for product liability incurred by fault by a previous link in the chain of production and distribution.[52] As is the case with the Directive, the scope of the Product Liability Act is personal injury and damage to consumers' property. Thus, both the court-developed rules and the rules of the Product Liability Act apply to personal injury and damage to consumers' property, whereas only the court-developed rules apply to damage to non-consumer property.

The Product Liability Act is mandatory not only to the benefit of the injured party[53] but also to the benefit of a supplier who has paid damages to the injured party according to §10a of the Product Liability Act, i.e., on the basis of the supplier's vicarious liability for fault-based liability of a previous link – see §12 of the Act.[54] This means that contract terms excluding or limiting liability claims between commercial parties are not binding on suppliers seeking recourse against a previous link in the chain of distribution. The mandatory rule applies within the scope of the Product Liability Act, i.e., only in cases of personal injury and damage

[50] Act No. 371/1989.

[51] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 No. L210/29.

[52] Originally, the Product Liability Act stipulated that suppliers were also vicariously liable for the producers' strict liability. In its preliminary ruling in Case C-402/03, *Skov Æg* v. *Bilka Lavprisvarehus* [2006] ECR I-199, the European Court of Justice found that the supplier's vicarious liability for the producer's no-fault liability was in conflict with the Product Liability Directive. The vicarious liability rule of the Danish Act was amended accordingly to the effect that suppliers are now vicariously liable for the producers' (and other previous links') fault-based liability only – see §10a of the Act. The net result of *Skov Æg* was that the protection of consumers was lowered, and the Danish Minister of Justice therefore appointed a committee to consider a possible amendment of the Sales of Goods Act in order to improve the protection of consumers without laying disproportionate burdens on the sellers. In its report, the committee recommended an amendment of the Sales of Goods Act to the effect that the seller's liability for damage caused by non-conforming goods includes personal injury and damage to property: see *Betænkning 1502/2008 om visse køberetlige regler om sikkerhedsmangler*.

[53] I.e., the victim of personal injury or the owner of the consumer property damaged.

[54] See J. Langemark and H. Jørgensen, 'Regresaftaler vedrørende produktansvar', *Ugeskrift for Retsvæsen*, B (1997), 65–69; and M. Samuelsson, 'Ansvarsfraskrivelse og produktansvar', in *Forsikrings- og Erstatningsretlige Skrifter* I:2000 (Forsikringshøjskolens Forlag, 2000), p. 248. According to Article 8(1), the Directive does not prejudice national law concerning the right of contribution and recourse.

to consumers' property. Damage to non-consumer property is outside the scope of the Act and accordingly, beyond the reach of the mandatory rule. Furthermore, as a result of *Skov Æg,* the supplier's vicarious liability is no longer extended to the producer's non-fault based liability. Conversely, the mandatory rule also applies in cases where a vicariously liable supplier seeks recourse against another supplier who is also vicariously liable for fault-based liability incurred by the producer.

Another point to be made goes beyond the Product Liability Act, in that it concerns the distinction between contract law rules on non-conformity and rules on product liability in general. As mentioned above, personal injury and damage to property (other than the non-conforming/defective good itself) are traditionally considered to be outside the scope of the liability rules of the Sales of Goods Act. Accordingly, there seems to be a basis for a general assumption that clauses in sales contracts that do not unambiguously refer to product liability rules but to sales law concepts are to be understood as dealing with matters within the scope of the Sales of Goods Act only. Thus, clauses limiting the liability for, e.g., 'non-conformity' of the object of sale or 'breach' of the contract do not have any effect on the liability for physical damage caused by the object of sale.[55]

The Supreme Court judgment reported in Uf R 1999.255 provides a basis for an assumption to this effect. A Danish supplier who had delivered pipes to a municipal heating scheme had incurred vicarious liability for damage caused to other parts of the pipeline by a leak in welded steel pipes produced by a German company who had sold the pipes to the Danish supplier. The German producer had incurred fault liability vis-à-vis the municipality under the court-developed rules on product liability. The sales contract between the German seller and the Danish supplier referred to the seller's general conditions of delivery and payment, which contained a choice-of-law clause according to which 'the law of seller's domicile applies to all legal relations between the buyer and us'[56] and a clause concerning notification of defects using contract law terminology ('conformity', 'non-conformity', 'replacement'), and stating, inter alia, that 'all other claims, including claims for damages, no matter their legal foundation, are excluded'.[57] The Supreme

[55] See V. Ulfbeck, *Erstaningsretlige grænseområder. Professionsansvar, produktansvar og offentlige myndigheders erstatningsansvar,* 2nd edn (Jurist- og Økonomforbundets Forlag, 2010), pp. 216–223; and Nørager-Nielsen *et al*., *Købeloven*, p. 831.

[56] This is my own translation of the Danish translation (found in the decision). The original text in German is not cited in the reported case.

[57] See note 56.

Court held that the question of whether the Danish supplier was entitled to have recourse against the German seller for the liability of the latter to compensate the municipality was not, with a sufficient degree of clarity, within the scope of the choice-of-law clause of the seller's general conditions. Therefore, the clause did not apply to the case. Similarly, the Supreme Court held that the supplier's claim of recourse was not within the scope of the seller's 'general conditions' clause on notification of defects.

The Supreme Court judgment reported in UfR 2006.2052 shows how a liability limitation can be drafted in order to make sure that both contractual liability and product liability are within its scope. In this case, the clause stipulated that the seller, in case of non-conformity and damage caused by the product, was liable only if the non-conformity or the damage was caused by failure or negligence by the seller.

It should be noted that neither the 1999 case nor the 2006 case concerned liability under the Product Liability Act but damage to non-consumer property falling outside the scope of the Act, and that the cases were consequently dealt with under the court-developed rules on product liability. Although the same principles of interpretation are likely to apply in cases that are within the scope of the Product Liability Act, the main emphasis in such cases is typically on the fact that the victim's and supplier's right of recourse are protected by mandatory rules.[58]

As mentioned above, the sharp distinction between contract law liability and product liability was originally founded in the preparatory works of the Sales of Goods Act. Nevertheless, a similar interpretation to the one applied by the Supreme Court in UfR 1999.255 seems to apply to the interpretation of contract law clauses outside the scope of sales law, i.e., normally in areas of the law where there are no statutory rules.[59] See the Supreme Court judgment in UfR 2008.982. This case arose from a fire in a power plant caused by a negligently installed safety membrane. The claim in question concerned consequential loss caused by the fire. A clause found in a widely used agreed document, the General Conditions for Turnkey Contracts (ABT 93), was part of the contract. The clause stipulates that:

> §35. The contractor shall be liable for compensation of losses suffered due to non-conformity[60] of the work where such non-conformity is caused by

[58] See §12 of the Act and the text above.
[59] The general principles of Danish contract law are not codified. See Section 1 above.
[60] The Danish term used is 'mangler', which is contract law terminology. In the English translation available at http://servicebutik.danskbyggeri.dk, the term used is 'defect'.

> errors or negligence on the part of the contractor, or where they relate to properties the presence of which has been guaranteed in the contract.
>
> Subsection 2. The contractor shall not be liable for operational losses, loss of profit or other indirect losses.

The Supreme Court stated that the case did not concern the contractor's contractual liability for the non-conforming installation but rather the product liability (outside the scope of the Product Liability Act), and that the clause in §35 applies to contractual liability only. Therefore, the liability for operational losses was not excluded by sub-section 2 of the clause.

In summary, the interpretation and validity of contract terms excluding or limiting liability sometimes depend on whether the basis of the liability in question is found in contract and/or in tort law rules. A last example mentioned here to illustrate the rather delicate difference between contractual liability and product liability (outside the scope of the Product Liability Act) is found in a Supreme Court judgment reported in UfR 2010.1360. In this case, the producer of a gas engine used by a power plant was not liable to compensate the power plant's operational losses caused by the breakdown of the gas engine. The breakdown was due to a defective thread in a connecting rod made and installed in the engine by the same producer. The damage to the gas engine caused by the faulty connecting rod was not within the scope of the product liability rules, i.e., damage to other property, but damage to the product itself, and was thus a consequence of non-conformity of the gas engine.

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The Nordic tradition: application of boilerplate clauses under Finnish Law

GUSTAF MÖLLER

1 Introduction

The general starting point in Finnish contract law, as it usually is in countries with market economies, is *pacta sunt servanda* and that each party must carry his or her own risk as to how the contracted obligations will develop. The Finnish Contracts Act of 1929 is almost completely identical to the Danish, Norwegian and Swedish Contracts Acts, which have served as models for the Finnish Contracts Act. Moreover, the Sales of Goods Acts in Finland, Norway and Sweden are, with the exception of some minor differences, identical. However, Finland has no comprehensive civil code like, e.g., the German BGB or the French Civil Code. Instead, the general principles of contract law are not codified, which makes case law and doctrine important as legal sources in the field of contract law in Finland. In substance, the principles of Finnish law on contracts are the same as in the other Scandinavian countries.

The basic principles of Finnish contract law that seem relevant in this context are good faith and loyalty in contractual relationships and fairness. The underlying idea is to conceive a contractual relationship as a cooperative project for the parties instead of an arrangement which entitles a party to a contract to pursue only his or her own interests. In general, these principles impose a duty to also take into consideration the interests of the other party. These principles may prevent the full implementation of clauses aiming at detaching the contract from Finnish law, which is presumed to be the governing law. First, the parties cannot, at least not fully, exclude liability for fraud or gross negligence. Nor is a party under Finnish law allowed to exploit a contract to his or her own advantage. Secondly, pursuant to §36 of the Contracts Act, an agreed-upon term may be amended or disregarded if it is deemed unfair or

unreasonable, or if its application in a given case would be unfair or unreasonable. In considering whether a term is unreasonable, the court shall take into account the whole contract, the situation of the parties when the contract was entered into and the situation of the parties thereafter, as well as other circumstances. If the term is such that because the amendment of the term makes it no longer reasonable for the contract to remain in force, then other parts of the contract can also be amended or the contract terminated. §36 is very rarely applied by the courts to commercial relations. Under Finnish law, it is clear that the parties cannot completely renounce their duty to disclose information. Liability for fraudulent and grossly negligent information that falls within §§30 (fraud) or 33 of the Contracts Act cannot be contracted out:

§30 provides:

> Where a person in relation to whom a legal act is performed has fraudulently represented or withheld facts which may be presumed to be material in relation to the act, such person shall be deemed to have thereby induced the legal act, unless it is shown that such legal act was not influenced by fraud.

§33 provides as follows:

> A legal act which would otherwise be deemed valid may not be relied upon where the circumstances in which it arose were such that, having knowledge of such circumstances, it would be inequitable to enforce the legal act, and where the party in respect of whom such legal act was performed must be presumed to have had such knowledge.

Whether or not there is a duty to disclose depends on both objective and subjective circumstances, and the evaluation of whether it would be inequitable to enforce a legal act shall be done taking into account the principle of loyalty and §33 of the Contracts Act. There are two sets of principles that may apply in situations of supervening circumstances affecting the balance in the parties' agreement. First, there is the doctrine of failed assumptions. Secondly, there is the aforementioned mandatory rule in §36 of the Contracts Act (the 'general clause'). However, the influence of the doctrine of failed assumptions has been rather limited in Finland, at least in comparison to what has been the case in Denmark, Norway and Sweden. It has been submitted that the doctrine of the right to be discharged from obligations under the contract because of factual (physical) or economic impossibility can sometimes also be used in these situations. Moreover, since 1983, there is even less need for the doctrine of failed assumptions, because §36 of the Contracts Act is no longer limited to penalty clauses, as was originally the case.

In commercial settings, the threshold for setting aside or amending contracts under §36 will be similar to that under the doctrine of failed assumptions in Sweden and Norway. In reality, however, where the risk for failed assumptions has been allocated in the agreement, there is little room left for the application of §36 of the Contracts Act.

As to interpretation, a court is likely to choose the alternative that is seen as the most 'fair and reasonable' option. This is supported by the general duty of loyalty in contracts under Finnish law and the standard for fairness in §36 of the Contracts Act. It is likely that the considerations of fairness and reasonableness will depend on the specific circumstances of the case. Sometimes non-mandatory legislation, e.g., the Sales of Goods Act, is used in practice as a yardstick for fairness or reasonableness. Exemption clauses and other clauses excluding liability are construed narrowly. In addition, the *in dubio contra stipulatorem sive proferentem* rule is a well-established rule in Finnish contract law. Surprising and onerous clauses are usually narrowly construed.

2 Clauses aiming at fully detaching the contract from the applicable law

2.1 Entire agreement

An entire agreement clause does not, under Finnish law, mean that all sources of law other than the contract would be excluded. Thus, it does not have the consequence that a contract in writing is regarded as an exhaustive regulation of the contractual relationship. It does not prevent a party from invoking practices or usages that they may have established between themselves, unless this has been explicitly mentioned in the clause. However, there can be no doubt that the clause has the effect that the parties' precontractual conduct and agreements are of minor relevance for the interpretation of the contract. The clause would most probably, except perhaps in very rare and exceptional cases, prevent corrective interpretation based on precontractual circumstances. Most probably, the parties' precontractual assumptions will be of little relevance when it could reasonably be expected that the question was regulated in the contract. Circumstances arising subsequently to entering into a contract are probably not affected by the clause.

An entire agreement clause probably has only minor effects when it is necessary to fill a gap in a contract. However, it may prevent supplementation of the agreement when supplementation is not required for