Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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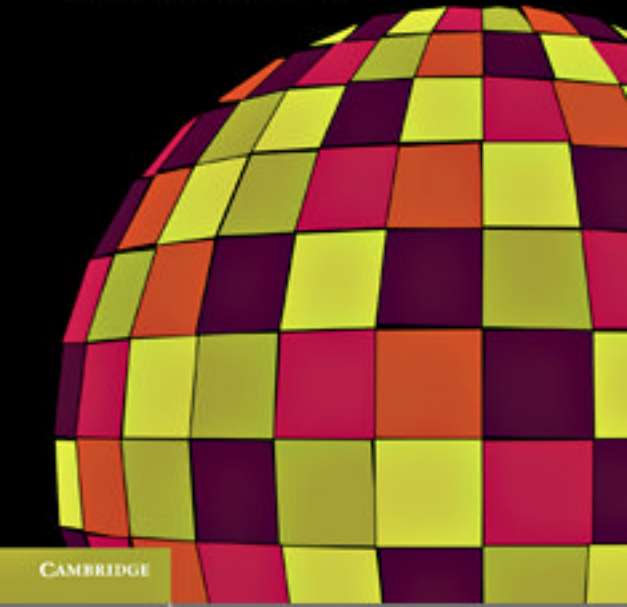

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In commercial settings, the threshold for setting aside or amending contracts under §36 will be similar to that under the doctrine of failed assumptions in Sweden and Norway. In reality, however, where the risk for failed assumptions has been allocated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

the contract to function. If, e.g., the parties have on a previous occasion agreed upon certain specifications for certain products but have not incorporated these specifications into the present contract, the contract probably could not, because of the entire agreement clause, be interpreted in the light of the previously agreed specifications.

It seems obvious that it cannot be deemed unfair or unreasonable according to §36 of the Contracts Act that certain precontractual circumstances are precluded from having legal effect. The courts are, as mentioned above, rather reluctant to apply §36 to commercial relations. However, the potential unreasonableness that may be occasioned by the clause may, in very exceptional circumstances, justify the application of this mandatory rule.

2.2 No waiver

A clause, according to which failure by a party to exercise a right or remedy that he or she has under the contract does not constitute a waiver thereof, would certainly thus not be invalid under Finnish law. Under Finnish law, the right to use a remedy will be lost because of the rules on the duty to give notice of the breach or because of the general rules on the effect of passivity, unless the parties have agreed otherwise. However, the validity of a no waiver clause is limited by the principle of loyalty in contractual relationships. The clause may be disregarded if it would violate the principle of good faith or the duty of loyalty to the extent that it would allow disloyal behaviour by the party invoking it. Thus, for instance, in some cases, it may be unreasonable if the party against whom the clause is invoked could not, in spite of the clause, trust that he or she has waived the right to exercise a right or remedy because of the other party's conduct. However, when a party's conduct is considered disloyal, a no waiver clause may have the effect that the threshold becomes higher.

If the contract gives one party the right to terminate in case of delay in the delivery and the delivery is late, but the party does not terminate until after a considerable time and the real reason for the termination is not the delay but the fact that the market has changed and the contract is no longer profitable, the old delay probably cannot be invoked as a ground for termination; to do so would be regarded as disloyal behaviour.

2.3 No oral amendments

Under Finnish law, a no oral amendments clause cannot prevent the parties from entering into other agreements orally. As long as the

separate agreement does not contradict the original contract with a no oral amendments clause, the clause cannot prevent that separate agreement from being valid and enforceable. A possibility for the parties to restrict their own ability to enter into future agreements does not seem to conform to the principle of freedom of contract. If the parties enter into an oral agreement amending the original agreement, the clause will probably be regarded as being waived implicitly, unless the whole contract is found to be rescinded and is then replaced with a new contract.

The principles of good faith and loyalty in contractual relationships under Finnish law may also prevent a party from invoking a no oral agreement clause. For instance, if the parties to a written construction contract have later orally agreed on extra construction work, the client cannot deny the contractor's claim for compensation for that work.

However, a no oral amendments clause will probably create a presumption that the parties did not definitively intend to vary the contract in a way that would be legally binding. This presumption may often be difficult to rebut.

2.4 Severability

A severability clause allows that, even when a provision of an agreement is or becomes illegal, invalid or unenforceable, the validity or enforceability of any other provision of the agreement shall not be affected, and therefore other provisions or the entire contract itself would not be disregarded. This is also the general rule under Finnish law. However, a literal interpretation of the clause may lead to an unbalanced contract if the provision that becomes invalid or unenforceable has significance for the interests of only one of the parties. Therefore, in such cases, the court may, pursuant to §36 of the Contracts Act, find that because a provision in the agreement is or becomes illegal, invalid or unenforceable, other parts of the contract may also be amended or the contract terminated.

2.5 Conditions

A clause according to which certain obligations regulated in a contract are fundamental and according to which any breach thereof shall amount to a fundamental breach of the contract is thus valid under Finnish law. This clause may often be interpreted as meaning an

'absolute' right to rescind the contract if there is a breach, not because the term is regarded as a condition but because the parties have expressed the opinion that the obligation is important. Even though the provision as such would be valid under Finnish contract law and the parties need to have such a regulation, the parties cannot, in all cases, be certain that the phrase gives an 'absolute' right to rescind if there is a breach of the obligation. It may well be that a Finnish court would give the clause a restrictive interpretation. Thus, for example, if the contract defines delay in delivery as a fundamental breach and if there is a delay, but the delay has only insignificant (if any) consequences for the other (innocent) party, it may well be that a Finnish court may find that reliance on the clause would be against the principles of good faith and loyalty in contractual relationships. The clause on fundamental breach could certainly not be invoked if it is established that the real reason for the termination is not the delay but the change in the market.

2.6 Sole remedy

A clause that defines that the payment of a certain amount shall be the buyer's sole remedy for any delay in delivery for which the seller is responsible under the agreement is thus certainly not invalid under Finnish law. However, if the damage clause limits the liability and can be regarded as an exemption clause, it may be disregarded pursuant to §36 of the Contracts Act. Thus, if the non-defaulting party is able to prove that the breach has caused a damage considerably larger than the agreed amount, the courts would probably often disregard the clause. Exemption clauses, especially those that cover gross negligence or intentional breaches, are traditionally set aside by the courts, as they may encourage disloyal behaviour. Since the principles of good faith in contract and the principle of loyalty in contractual relationships have a foothold in Finnish contract law, the courts are not likely to promote the possibility of disloyal behaviour.

2.7 Subject to contract

A document which provides that it does not represent a binding agreement between the parties and that neither party shall be under any liability to the other party in case of failure to enter into the final agreement is normally given full effect under Finnish law. However, the principles of good faith and loyalty in contractual relationships may

have the effect that such a clause is disregarded. Thus, for instance, if the parties enter into a letter of intent specifying that failure to reach a final agreement will not expose any of the parties to liability, a party who refuses to enter into a final agreement may be liable to compensate the other party for his or her losses, in particular if it is established that he or she never really intended to enter into a final agreement and used the negotiations only to prevent the other party from entering into a contract with a third party.

2.8 Material adverse change

The intended effect of material adverse change clauses is presumably to protect a contracting party from unknown risks by allowing that party to walk away from the transaction in case of a material adverse change event. If one party invokes this clause to avoid a deal that it has lost interest in and it is established that the real reason is not a change in external circumstances but in the party's own evaluation thereof, he or she could probably not successfully rely on the clause; to do so would be against the principle of good faith and loyalty in contractual relationships.

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

3.1 Liquidated damages

Finnish law permits the parties to agree on contractual penalties. These may be cumulated with reimbursement of damages. Under Finnish law, there is no clear distinction between liquidated damages and penalties. Finnish law does not consider the compensatory nature of damages as mandatory. So-called penalty clauses relating to pre-estimation of damages fill both the purposes of compensating for and deterring from breach. In addition, they usually make any evidence of the amount of the damage superfluous.

Finnish law does not consider the compensatory nature of damages as mandatory. If the parties agree to a penalty, they are, in principle, allowed to do so without concealing it as compensatory liquidated damages. However, Finnish courts have been able to attack the misuse of penalties pursuant to §36 of the Contracts Act ever since the enactment of that Act.

The use of the English term 'liquidated damages' under Finnish law would most probably create a presumption that the amount contractually stipulated is intended to be a reasonable estimation of the actual damages to be recovered by one party if the other party breaches. Thus, 'liquidated damages' may not usually be cumulated with reimbursement of actual damages.

Under Finnish law, a liquidated damage clause is usually presumed to be exclusive. In particular, this is the case in construction contracts regarding 'daily fines' for delay. However, this presumption is probably not likely to be upheld if the breach is intentionally committed by the defaulting party or because of gross negligence. If the actual loss is much bigger than the liquidated damages, the courts have the discretion of adjusting the damages using §36 of the Contracts Act. This will especially be the case if the bigger loss is due to the fact that the defaulting party's conduct was disloyal towards the innocent party, even though there is no intentional breach.

If the liquidated damages clause limits the liability and can be regarded as an exemption clause, it can be set aside pursuant to §36 of the Contracts Act. As mentioned above, exemption clauses, particularly those that cover gross negligence or intentional breaches, are traditionally set aside by the courts, as they may encourage disloyal behaviour. The principles of good faith in contractual relationships have a foothold in Finnish contract law and the courts are not likely to promote the possibility of disloyal behaviour.

It is not entirely clear under Finnish law whether the principle of good faith has the consequence that the duty to mitigate damages also applies to 'liquidated damages'.

3.2 Indemnity

If an indemnity clause was triggered by a breach of contract and the law applicable to the contract is Finnish law, the indemnity clause would probably just be understood to mean that damages have to be paid in case of a breach of contract. If the contract uses the term 'indemnity' to designate a guaranteed payment, it is a question of interpretation as to whether it prevents the guaranteed payment when no actual damage has occurred. Thus, if it is clear that the term 'indemnity' has been used only to designate a guaranteed payment, the use of the term does not, as such, prevent the guaranteed payment when no actual damage has occurred.

4 Clauses that regulate matters already regulated in the applicable law

4.1 Representations and warranties

Under Finnish law, there is no general requirement to disclose information. However, the parties shall disclose such information that it would be dishonest to withhold. In addition, the principles of good faith and loyalty may require information to be disclosed. The parties have a general duty to bargain in good faith, which means that the parties have a precontractual duty to disclose such information that is relevant for the opposite party. The duty to disclose information varies somewhat depending on the type of contract, but generally it is strict in situations where it is difficult or impossible for a party to the contract to conduct an inspection of the trade object and thus is without information that would be within the knowledge of the opposite party. Therefore, it is clear that the parties cannot completely renounce their duty to disclose information. Liability for fraudulent or grossly negligent behaviour and situations that fall within §33 of the Contracts Act cannot be contracted out of. This is also the case with certain remedies for breach of contract. Beyond this, the answer is more uncertain and depends on the principles of loyalty and good faith and the criteria of unfairness in §36 of the Contracts Act.

Whether or not liability can be contracted out of depends on which of the parties, after a concrete assessment according to the aforementioned rules and principles, is to have responsibility for disclosing information.

One more general point can probably be stated, which is that even though it is not possible to contract out of all liability for the duty to disclose information, the fact that the parties have included such an extensive and detailed list of representations and warranties in the contract will probably affect the extent of the duty to disclose other information that is not written into the contract. Beyond this, the answer must be found by assessing each case concretely and individually.

As a primary conclusion here, it must be said that the parties should specify more explicitly in their contract that they wish to limit the responsibility for withheld or disclosed information. A list of representations and warranties does not give grounds for a presumption that the parties have meant to exclude liability.

With regard to the information that is typically included in the list of representations and warranties, it is not possible to give a general answer

as to when the parties will be objectively liable. However, it is probable that this will be the case for much of the information contained in the list. When the information which is 'warranted' concerns specified attributes, is detailed and amounts to substantial information, and in some cases also concerns 'core' attributes, it is probable that the disclosing party will be objectively liable for damages. With respect to contracts concerning the sale and purchase of businesses, it is often held that the main function of representations and warranties is to impose objective liability on the party disclosing the information.

4.2 Hardship

There is no general provision in Finnish law that specifically regulates the consequences of supervening, external events that make the performance excessively onerous for one party. The only general provision concerning contractual relations and supervening events is the aforementioned provision in §36 of the Contracts Act providing that, in considering whether a term is unreasonable, the court shall take into account not only the whole contract and the situation of the parties when the contract was entered into, but also the situation of the parties thereafter. If the parties regulated the matter in their contract, this does not mean that the contract regulation will be the only applicable regulation, but it will be integrated in the applicable law.

Thus, §36 of the Contracts Act may be applied despite the hardship clause in the contract.

4.3 Force majeure

Until the Sales of Goods Act was adopted in 1987, there were no provisions in Finnish law on *force majeure*. §§27 and 40 of the Sales of Goods Act provide that a party is not liable for a failure to perform any of his or her obligations if he or she proves that the failure was due to an impediment beyond his or her control and that he or she could not reasonably have been expected to take the impediment into account at the time of conclusion of the contract, or to have avoided or overcome it or its consequences. These two provisions are identical to Article 79(1) of the CISG. The same rule has later been included in some other new legislation relating to the delivery of goods. A clause that describes as *force majeure* such events that are beyond the control of the parties and that may not be reasonably foreseen or overcome would, at least normally, be

valid under Finnish law. If the law applicable to the contract is Finnish law, however, it would not be applied independently of Finnish law. Thus, an impediment or event within a party's own organisation is not regarded to be beyond the control of that party. Nor is an impediment or event beyond the control of a party if the impediment or event is, e.g., due to the fact that the party's subcontractor or his or her supplier has not fulfilled its obligation, unless this is due to an impediment or event beyond the sub-contractor's or supplier's control that he or she could not reasonably have been expected to take into account at the conclusion of the contract, or if the event could not have been avoided or its consequences overcome. For an impediment or event to be beyond the control of a party, it is thus not sufficient that a party has been diligent and has acted in good faith.

The parties may, of course, validly agree that a *force majeure* clause shall apply even when the impediment could reasonably have been taken into account at the time of conclusion of the contract, or even if the consequences of the impediment could have been avoided. In addition, the use of the word 'event' instead of the word 'impediment' would probably mean that the *force majeure* clause would apply in cases in which the provisions on *force majeure* in the Sales of Goods Act and the CISG would not apply.

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The Nordic tradition: application of boilerplate clauses under Norwegian law

VIGGO HAGSTRØM

1 The Scandinavian law of obligations – and of contracts – is a part of the law with old traditions[1]

From a Norwegian perspective, a modern law of obligations and of contracts was launched in the early 1850s, with the publication of a textbook incorporating the existing statutes and court decisions. By the 1870s, the law of obligations was a well-established discipline, both academically and in legal practice. The law of obligations was strengthened at the same time by the establishment on a governmental level of Scandinavian cooperation on legislation in the field of the law of obligations. One of the best known fruits of this is the joint Scandinavian Sales of Goods Act (1905–1907). It was not, however, a wholly Scandinavian invention, but was to a large extent a pragmatic simplification of concepts from English, French and German law. It can be noted that this pragmatic legislation was one of the cornerstones for CISG; it was very familiar to Ernst Rabel, who had initiated the publication of a German version of Tore Almén´s extensive commentary on the Sales of Goods Act.[2]

Thus, Scandinavian law has long been regarded as a separate entity from English, French and German law, a law family of its own.[3] The law of contracts is the main core of Scandinavian private law, and textbooks and court decisions from one of the countries is regarded more or less as on the same level as internal sources of law. Even though Norway has a

[1] V. Hagstrøm, 'The Scandinavian Law of Obligations', *Scandinavian Studies in Law*, 50 (2007), 113–124, 117ff.
[2] V. Hagstrøm, *Kjøpsrett* (Universitetsforlaget, 2005), pp. 23f.
[3] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford University Press, 1998) pp. 276ff.

small population and thus not a large number of court decisions on contract law, sources from Denmark, Sweden and later on also from Finland have supplemented the Norwegian sources to a large extent. From this perspective, Norwegian law is not something provincial, but a part of the Scandinavian legal family, having taken concepts from various legal families and transplanted them in Scandinavian soil.

There has been no political proposal to reform the Norwegian law of contract. When the United Nations (Vienna) Convention on Contracts for the International Sale of Goods ('CISG') was ratified, the Nordic countries enacted new laws for internal sales that differed only slightly from the CISG. This was not a large step, because the Nordic Sales of Goods Act (1905–1907) was very similar to the CISG. It follows from this that the UNIDROIT Principles of International Commercial Contracts ('UPICC') and Principles of European Contract Law ('PECL') are a familiar landscape to a Norwegian lawyer, and they are also widely used in internal transactions. Likewise, Books II and III of the Draft Common Frame of Reference ('DCFR') are close to the Nordic tradition, although the abstraction following from the incorporation of not only contracts but other obligations as well makes the DCFR a bit unfamiliar.

In summary, the law of contracts has a long tradition in Scandinavia, and over the years it has been enriched by English, French and German law, but has nonetheless maintained its individuality. It has functioned fairly well. It is also in line with recent international developments. One might therefore wonder how the present anglification of the law of contracts came about. I think it is due in part to worldwide economic development, with the USA as the dominating economic power and the City of London as the international economic centre, and, to a certain extent, to sociology, rather than to the superiority of the common law itself.

2 The way commercial contracts are drafted in Norway has changed considerably during the past twenty to thirty years

Since the beginning of the nineteenth century, Norway has had an industrial sector dominated by engineers. Most of them were educated at the Technical University in Trondheim, still an elite institution today. These men were familiar with all stages of production in their companies. They preferred to draft their company´s contracts themselves as they had a thorough understanding of the production process, the products and the markets. In many instances, lawyers were not consulted at all. Even

when they were, the contracts still tended to be rather brief and straightforwardly written in the Scandinavian style. One might wonder, of course, how this could have worked. To a large extent, the contracts relied on supplements found in the default rules of the law of obligations, and this actually worked well.

A new area in the industrial sector began in the early 1970s, with the advent of oil production in the North Sea. As Norwegian companies had little, if any, competence and experience in oil production, the operators of the oil fields were international oil companies. Their contractual agreements came mostly from a common law tradition and all contracts were therefore drafted in this tradition, even though the governing law, as stipulated in the concessions, should be Norwegian. This practice was also followed in relation to suppliers, so that common law contract models permeated an important part of the Norwegian industrial sector. There was a subsequent development: the leaders of the companies were no longer primarily recruited from the ranks of engineers, but rather, to a large extent, from pools of economists. Through their education, the economists had close ties to the USA and England. They were strongly influenced by the ideas of commerce in the Anglo-American world. As a result, globalisation brought the common law to the forefront. During the last decades of the twentieth century, the drafting of contracts changed in Norway and influences for these changes clearly came from common law.

This development was linked to fundamental changes in the law firms. At the beginning of the 1980s, law firms in Norway tended to be rather small, reflecting the demand for legal services from the business sector. But then there was a demand for more sophisticated services, especially in drafting contracts, often written in English and in the common law tradition, even though both parties to the agreement were Norwegian. This development largely contributed to a huge growth in law firms, whose staff tended to look to common law models when drafting contracts. These contracts regularly incorporated standard contract clauses. Moreover, whole procedures were transplanted from common law, for example, the due diligence process, without the question ever being raised as to whether such costly procedures were necessary, not to mention the added security that Norwegian law could provide. In a nutshell, this is the development that has taken place in Norway.

In my opinion, this development has not been satisfactory in every respect. One aspect is quite apparent: from an economic point of view, transaction costs have risen considerably. The rise in costs cannot be said

to have added significant foreseeability and security for the clients; in many instances, the opposite is true. By introducing common law contract models, an uncertainty is often created. As already mentioned, the Norwegian contract law has its roots in civil law traditions, especially German law. It is widely accepted that the common law tradition is not compatible with the civil law tradition – and therefore with the Scandinavian tradition – on major issues. As will be discussed later, many of the contract clauses that are now widely used in contracts with Norwegian law as the governing law stem from common law. In many instances, these clauses are not in accordance with the governing law. The aim of introducing common law contract clauses is obviously to secure foreseeability, a phenomenon widely recognised as a characteristic of English law. But when common law concepts are taken out of their context and transplanted into a system such as that in Norway, uncertainty may very well be the result.

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

3.1 Entire agreement

One evident example is the concept of entire agreement clauses. These clauses are connected to the procedural rule of parol evidence in English law, which has no counterpart in Norwegian law. A contract in writing does not bar evidence prior to contract; there is no such procedural rule in Norway. Understood on the basis of their common law background, the clauses would have no meaning and therefore would be devoid of any force. However, when the parties have inserted such a clause in their contract without having any mutual understanding, one might expect that Norwegian law would tend to solve the problem in line with the regulation in Article 2(1)(17) of the UNIDROIT Principles 2004, which states: 'A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.' By so doing, the clause would be given an effect that, it must be presumed, is in line with the intentions of the parties.[4]

[4] V. Hagstrøm, *Obligasjonsrett* (Universitetsforlaget, 2003), pp. 63f. See also H. W. Bjørnstad, *Entire Agreement Clauses*, Publications Series of the Institute of Private Law No. 177 (University of Oslo, 2009), pp. 201f.

In this instance, we see that the clause only creates a slight degree of uncertainty. It must be added, though, that it is not clear that Norwegian law would accept such a strict solution as is laid down in the UNIDROIT Principles. The need to append special supplements to the contract could be the next recourse.

3.2 No waiver

The no waiver clause, expressing that failure by a party to exercise a right or remedy that it has under the contract does not constitute a waiver thereof, is much more problematic.[5] A central concept under Norwegian contract law is the duty of loyalty and good faith. If a no waiver clause is invoked, although it would be against good faith to do so, then it is not likely that the courts would apply the clause. For example, if a delivery is late but the party does not terminate until after a considerable length of time and changes in the market, and the latter is the real reason for termination, Norwegian courts would not give the no waiver clause effect. But the duty of loyalty goes beyond preventing mere speculation at the other party´s risk. It would be deemed that a party is under a duty to give notice about a breach within a reasonable time, even though no loss is incurred.[6] A no waiver clause must therefore be presumed to be without effect if a party demonstrates passivity in a situation where this is contrary to good faith.

3.3 No oral amendments

The no oral amendments clause has another position. Business contracts in Norway are most frequently made in writing, apart from such specialised areas as, for example, the sale of stocks. Even without an express contract clause, the courts would be very reluctant to accept mere oral changes to a written contract, as they tend to give the written contract considerable weight.[7] It must follow from these decisions that the need for clarity and foreseeability leads to the need for the interpretation to be based on the written contract and not on oral statements and

[5] F. Skribeland, *No waiver-klausulen*, Publications Series of the Institute of Private Law No. 176 (University of Oslo, 2009), pp. 117ff.
[6] Hagstrøm, *Obligasjonsrett*, pp. 339ff.
[7] See Rt. 1994, p. 581; Rt. 2000, p. 806; Rt. 2002, p. 1155; Rt. 2003, p. 1132 (Rt.= supreme Court Reporter).

assumptions. Therefore, in principle, the no oral amendments clause does not add very much. However, if a party has reasonably relied on an oral statement, then the other party may be precluded by its own conduct from invoking the clause. This solution is in line with Article 2(1)(18) of the UNIDROIT Principles.[8]

3.4 *Severability*

Severability clauses express that if a provision in the agreement is or becomes illegal, invalid or unenforceable, this will not affect the validity or enforceability of any other provision of the agreement. Partial invalidity is a well-known feature in Norwegian contract law.[9] As a point of departure, these clauses do not add much to the applicable law. The difference is that while the severability clause declares that illegality, invalidity or unenforceability shall have no effect on any other provision of the agreement, it is nevertheless at the court´s discretion to make decisions pursuant to Norwegian contract law. Therefore, minor discrepancies may arise where the clause adds something.

3.5 *Conditions*

The conditions clause, meaning that any breach of a described duty is a fundamental breach, has its counterpart in Norwegian contract law ('betingelser').[10] Thus, as a starting point, this clause does not add anything new. However, whereas the clause is rarely used in practice in contracts made in the Norwegian tradition, apart from the clause 'time is of the essence', it seems to be more widely used in contracts drafted in the common law tradition.[11] In a Norwegian contract, only terms of utmost importance would be made conditions, if ever, whereas other terms might be made conditions in a contract based on the common law tradition. Thus, it might be said that if Norwegian law is the governing law, the clause itself may not be a problem, but rather its use would be. If terms other than those of utmost importance are made conditions, one can envisage that a minor breach would give the other party a right to

[8] J. C. Westly, *No Oral Amendments klausler*, Publications Series of the Institute of Private Law No. 178 (University of Oslo, 2009), pp. 171ff.
[9] J. Hov and A. P. Høgberg, *Alminnelig avtalerett* (Papinian, 2009), p. 316.
[10] Hagstrøm, *Obligasjonsrett*, pp. 412f.
[11] T. Sandsbraaten, *The Concepts of Conditions, Warranties and Covenants*, Publications Series of the Institute of Private Law No. 179 (University of Oslo, 2009), pp. 21ff.

terminate the contract. This could lead to highly unfair results. The Norwegian courts have never been willing to accept this. The leading case in point is Rt. 1922, p. 308, where the seller in a commercial transaction was delayed in supplying the goods. The buyer terminated the contract pursuant to the Sales of Goods Act 1907, which deemed that any delay should be regarded as a fundamental breach in a commercial sale. Even though the buyer had the right to terminate pursuant to the wording of the Sales of Goods Act, the Supreme Court would not accept a result leaving the seller with costly equipment tailored specially for the buyer, while the buyer was hardly affected by the delay, and held that such a result could not have been the parties' intention. As there was no evidence of the parties' intention in this regard, it is recognised that the decision was based on public policy considerations. As Rt. 1922, p. 308 concerns the application of a law, the considerations would apply even more so to a contract clause.

3.6 Sole remedy

What has been said about conditions could also apply to clauses on sole remedy. The concept is well known and widely used in many commercial contracts, for example, in cases where a party is entitled only to a certain amount of liquidated damages in the event of a breach of contract.[12] Normally, such clauses will be respected. They are much more common and germane to Norwegian law than clauses containing conditions. Only in more exceptional instances would one expect a sole remedy clause to be set aside pursuant to the general clause against unfair contract terms in §36 of the Contracts Act 1918.

3.7 Subject to contract

The subject to contract clause is quite well known in Norwegian contract law. Basically, and in general, such clauses will be respected and upheld by the courts. The parties are free to negotiate. Since it is often arguable whether the parties entered into a contract through negotiations, the clause is designed to make the position clear. In the introduction to Part 3 of this book, an unusual situation is described: the parties have entered into a letter of intent, while the one party never intended to enter into a final agreement and used the negotiations only to prevent the other party

[12] Hagstrøm, *Obligasjonsrett*, pp. 651ff.

from entering into a contract with a third party. If such intentions could be proven, it is not likely that the party could find a formal shield against liability in the subject to contract clause. Such behaviour would surely constitute an abuse of the freedom of contract and is not worth protecting, even though the contractual arrangement was clear.

3.8 Material adverse change

The material adverse change clause is not unknown in Norwegian law, although change in circumstances is usually treated within the framework of the theory of failed assumptions mostly developed through case law in Scandinavia. As this protects the party at loss to a certain extent, it is not usual to insert a material adverse change clause in the contract. However, assuming the clause is included, the introduction to Part 3 then describes the situation where a party invokes the clause in order to avoid the deal, in which it has lost interest. A point of departure in Norwegian law would be that if the clause is effective, it is not up to the courts to evaluate the party´s behaviour. This would be a moral judgment, not a judgment based on law.[13] But if it must be deemed that the party abused his or her contractual right, the party cannot rely on the material adverse change clause.

4 Clauses with legal effects not known to the applicable law

4.1 Liquidated damages

A clause pertaining to this category is the liquidated damages clause. In Norwegian law, this clause will not create confusion or problems. However, the well-known distinction between liquidated damages and penalty clauses in English law has no parallel in Norwegian law. According to Norwegian law, the parties are free to agree on contractual penalties, even though the liquidated damages do not correspond to an actual loss – or no loss at all.[14] If Norwegian law is the applicable law, one would not apply the common law rules on penalty clauses unless it is deemed that it was the parties' intention to invoke this particular doctrine. A further question is whether or not liquidated damages may be cumulated with the reimbursement of damages. In principle, there are no obstacles to such cumulation in Norwegian contract law.[15] However, the

[13] *Ibid*., pp. 303ff. [14] *Ibid*, p. 652. [15] *Ibid*, p. 653.

question is a matter of interpretation. A liquidated damages clause is normally inserted into the contract to avoid responsibility exceeding the liquidated damages. If this is the case, no cumulation is relevant. One will assume that the parties intended to maximise the limit of responsibility to the sum held as liquidated damages.

4.2 Indemnity

Another clause within this category is the indemnity clause. In common law, this assumes that damage has in fact occurred. If Norwegian law is the applicable law and the contract is drafted in English using the expression 'indemnity', one must assume that an actual loss must be suffered and that it does not cover mere guaranteed payment. The very term 'indemnity' suggests an actual loss and that the promisor should have the privilege of subsidiarity. But this is only a matter of interpretation.

5 Clauses that regulate matters already regulated in the applicable law and how these interact with each other

5.1 Representations and warranties

The first issue is a contract containing representations and warranties. In Norwegian contracts inspired by common law clauses, such clauses regularly appear in acquisitions.[16] They rarely add anything to Norwegian law, under which one party has a duty to inform the other party of important matters about which the other party has a reasonable expectation to be informed.[17] This is a general duty and is not restricted to instances of misrepresentation. The duty to inform is a cornerstone of Norwegian contract law and is a part of the more extensive duty of good faith. It is also accepted that the parties may regulate this duty in their contract. In regular sales, an 'as is' clause can be mentioned as an example; it follows from this clause that the duty to inform is then restricted to what the seller knew about, not what he or she ought to have known; see §19 of the Sales of Goods Act 1988. When a contract contains an extensive list of representations and warranties, the question arises as to whether this list shall be regarded as exhaustive, whereby the

[16] M. B. Christoffersen, *Kjøp og salg av virksomhet* (Gyldendal Akademisk, 2008), pp. 215–216.
[17] Hagstrøm, *Obligasjonsrett*, pp. 135ff.

other party waives the protection pursuant to the principles of the right to be informed. In Norway, a list of representations and warranties would normally be regarded as giving the other party a protection not necessarily granted by the ordinary rules. Generally, such representations and warranties should therefore be integrated by the duty to give information stemming from the general rules. It is difficult to envisage that a party may limit its duty to inform according to Norwegian law by using representations and warranties.

5.2 Hardship

The second issue is contracts containing a hardship clause, raising the question of whether such a clause in a contract would exclude other regulations. Hardship, that is, a duty to renegotiate contracts which, because of supervening events, makes performance onerous for the other party, is not a general part of contract law in Norway. The situations usually covered by hardship clauses are normally dealt with by §36 of the Contracts Act 1918 and the general principles of failed assumptions. Pursuant to these rules, a party may claim that the contract must be altered or that he or she should be relieved from all his or her duties. Thus, a hardship clause brings in a new element, namely that the other party has a duty to cooperate and to renegotiate the contract in a given situation. This can be regarded as a procedural rule, the aim of which is to ensure that the parties find a balanced solution in the changed circumstances. A hardship clause would not, as a general rule, be interpreted as excluding the said §36 and the principles of failed assumptions. One would normally regard such a provision as adding something to the general rules. If a party fails to fulfil his or her duty to renegotiate, this would be an argument for applying §36, even if the threshold is not met.[18]

5.3 Force majeure

Force majeure clauses give rise to several questions. Unknown in English law, *force majeure* is a well-established concept in Norwegian law. Stemming from civil law, the concept has been developed considerably through court decisions. Of course, classical events like war, civil war, acts of sabotage, natural disasters, explosions, fires, boycotts, strikes,

[18] *Ibid.*, pp. 292ff.

lock-outs and acts of authority are recognised as *force majeure*. However, the courts have gone further. Rt. 1970, p. 1059 established that failure to deliver on the part of the seller's supplier constituted *force majeure* for the seller. Therefore, events outside the control of a party must normally be considered as *force majeure*. However, it is not enough that a party has been diligent and has acted in good faith. 'Beyond the control' presupposes that some external event has occurred constituting an impediment to the fulfilment of the contract. Furthermore, *force majeure* presupposes that the party could not be reasonably expected to have taken the impediment into account at the time of the conclusion of the contract – see Rt. 1962, p. 165. However, the fact that the impediment could not have been foreseen is not relevant.[19] It is also expected that the party could not have avoided or overcome the impediment or its consequences.

On this background, *force majeure* clauses written in a common law tradition could create uncertainty, as they are usually much narrower in their description of *force majeure* than in Norwegian contract law. The question then arises as to whether the clause should be regarded as exhaustive or whether it should be interpreted in line with Norwegian case law. Thus, a *force majeure* clause based on a common law model could clearly create the opposite of what was intended – namely confusion.

[19] *Ibid.*, p. 271.

14

The Nordic tradition: application of boilerplate clauses under Swedish law

LARS GORTON

1 General background

Scandinavian law is often regarded by comparative lawyers as one particular group under the civil law family. There is no common Scandinavian law, except for particular parts of contract law and the law of obligations. There is a common Scandinavian approach in several respects and there is thus some common legislation. This is particularly true within parts of private law, the particular area of law covered in this book.

Following Nordic legislative cooperation at the end of the nineteenth and the first half of the twentieth centuries, a substantial amount of private law legislation from this period is common or similar in the different Scandinavian countries. Thus, for example, the Maritime Codes from the 1890s, the Sales of Goods Acts from the early-twentieth century, the Contracts Acts from around 1915–1920 and the Acts on Promissory Notes from the end of the 1930s were more or less common.[1] Apart from the Maritime Codes of the 1990s, which are largely common for all the Nordic countries, the situation has partly changed. Thus, for example, in spite of all Nordic countries having adhered to the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (CISG), there are currently differences between the Nordic Sales of Goods Acts.[2] Some amendments have been made to the Contracts Acts, the most important amendment being that regarding §36, the

[1] The reason for not giving any exact dates is that the various pieces of legislation were introduced at different times in each of the Nordic countries.

[2] Particularly with respect to the National Sales of Goods Acts, there are differences between the solutions chosen. Denmark decided to maintain the old Sales of Goods Act from 1905. See, inter alia, J. Herre and J. Ramberg, *Allmän köprätt*, 5th edn (Norstedts Juridik, 2009), pp. 25ff.