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Entire Agreement Clause

The main general purpose of an entire agreement clause is to *isolate* the signed contract from interference from any other applicable sources. Only the words inside the four corners of the contract shall be subject to determine both parties' rights and obligations[1]. The first problem is that the clause *itself* is subject to interpretation by the parties to determine the content and scope. The second problem is that there is no transnational standard of interpretation. The result of these two problems is that the *intention of isolating* the contract from all other sources will depend on the governing law regulating the contract.

Question 1

What state law that will govern an international contract is subject to the conflict rules; and the conflict rules are different depending on which state the questions arises in. To be able to determine what state law that governs the contract between Industrimaskin and Components, one must first be able to determine the conflict rules. The conflict rules can be derived from the *lex fori (the law of the forum).* So, the first question is what forum that would be applicable to a dispute between Industrimaskin and Components.[2]

The contract does not contain a choice of forum clause, so the choice of forum must be determined with other applicable sources. Neither Norway or England is part of the EU or any other commonly shared transnational regulation on jurisdiction – so, the main rule is that the question of jurisdiction is determined by each state civil law.[3] Because the contract does not contain a choice of forum clause, the choice of forum will be determined by the private international law of the company sued/defendant[4].

As the main rule, according to the Brussels 1 Regulation and Lugano Convention Article 2 the court will have jurisdiction in the place of the permanent home (domicile) of the sued/defendant. But also, alternative rules on forum can be applicable, see Lugano Convention Article 5.1 and 22 (1). The main rule applied to this case, the court will have jurisdiction in the state where the defendant is domiciled. If one assumes that in this case, it is Industrimaskin that sues Components, according to the main rule on the choice of forum, the English courts will have jurisdiction to determine what conflict rules to apply.

Generally speaking, when the forum has been settled it is the conflict rules of the private international law of that particular forum that will be applicable to answer the question of what

[1] (Cordero-Moss, 2014, p. 18)

[2] (Cordero-Moss, 2014, p. 153)

[3] Moss, 2014, p. 154)

[4] Moss, 2014, p. 157)
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state law that governs the contract. In the case of the parties failing to choose what state law that

governs the contract, the main conflict rule is that the contract shall be governed by the state law with the "closest connection"[5].

Conclusion: What is the "closest connection" must be subjected to interpretation, and this can result in loose or strict interpretations. The principle of "closest connection" Article 4.2 of the Rome 1 regulation says that where the parties have failed to choose the governing law, the contract is governed by the state law where the party making the "characteristic performance" has the "habitual residence". In our case, Components is making the "characteristic performance" and therefor English law will be the governing law.

Question 2

The problem in this case is that the renewed contract between Industrimaskin and Components contains a clause stating the deliveries are to be made *once* per month, but the signed MOM is stating deliveries *two times* per month. The questions are: is the MOM a part of the renewed contract? Will the EAC *exclude* the content of the MOM?

When the contract is subject to English law – a common law system – the main rule of establishing the intention between the parties must be taken from inside the four corners of the document[6]. The main rule for interpretation of the text in the contract is the *literal meaning*. As a general rule, a judge will not have access to documents from the period prior to signing the document that can/could shine a light on the provisions in the contract. Because of the literal interpretation applied by a judge under English law, implied provisions between the parties are likely not to be taken into consideration when establishing the rights and obligations. In addition, the judge under a common law system will have no possibility to create an equitable balance between the parties[7].

With this is mind, the first question is what the content and extent of the EAC is. The EAC reads:

> "This Contract contains the entire agreement between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract."

[5] (Cordero-Moss, 2014, p. 171)

[6] Moss, 2014, p. 81)

[7] Moss, 2014, p. 84)

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First of all, one can read that the scope of the document (the Contract) is "the entire agreement", and that the Contract that the EAC is encapsulated in "supersedes all prior negotiations, representations, undertakings and agreements" on "any subject matter".

When a literal interpretation is applied to this text the first finding is that the agreement between Industrimaskin and Components consists of the written document alone. And in the case of a

conflict between the Contract and other prior "negotiations, representations, undertakings [or] agreement[s]", the written Contract will prevail.

There is no information that the signed renewal has made any references to the signed MOM, so the conclusion is therefor that the MOM is not part of the Contract. This literal interpretation will exclude the MOM from the Contract, and the effect is that only the written content of the Contract will be subject to determine rights and obligations between Industrimaskin and Components.

The renewed contract contains no change in frequency of the deliveries.

Conclusion: Deliveries will have to be made once per month when English law is applied.

Question 3

The main rule for a judge under Norwegian law – a civil law system – is to start the process of determining rights and obligations in the words of the contract. The common feature between a Norwegian and an English judge is that the interpretation of the contract is based on the wording in the contract. But the difference is noticeable when it comes to the power to evaluate fairness between the provisions of the parties. A judge under a civil law system will have a larger access to reinstate the contractual balance between the parties[8]. Also, a judge under civil law can search for the mutual understanding between the parties and attach weight to this. In addition to this, the contract drafters themselves can insert legal standards or general clauses such as good faith or fair dealing; signaling to the judge that the concrete application is left to the judge herself. Comparatively the common law system does not have a general principle of good faith[9].

With this is mind, it is important to remember that the overall goal of a judge under a civil law system is to determine the common understanding of the provisions with the wording as the starting point. A civil law judge will not have free access to determine the rights and obligations unless she is faced with legal standards or general principles *allowing* her to do so.

[8] Moss, 2014, p. 87)

[9] Moss, 2014, p. 87)
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With this is mind, the questions are: is the MOM a part of the contract? Can it be established that the parties' intentions were to include the MOM?

Based on the wording alone in the EAC, the main rule is that the MOM is not a part of the contract. But, one the one hand, Industrimaskin sent over the renewed contract after the signed MOM, under the assumption that the signed MOM was a part of the contract. On the other hand, Components assumed Industrimaskin understood that Components had no interest in changing the frequency. So, the question is what the mutual understanding between the parties were. Under a civil law system, an agreement can be reached if the judge can establish a mutual

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understanding between the parties. The signed MOM indicates strongly such a mutual understanding. But on the other hand, Components assumed that Industrimaskin understood "all the good arguments" for not changing the frequency; but can a mutual understanding be established?

Components did not notice Industrimaskin about the assumption of understanding all the good arguments for not changing the frequency, but Industrimaskin on the other hand did not change the frequency in the renewed contract after the MOM was signed.

In summary, the mutual understanding was established after the signed MOM and therefor the signed MOM is a part of the renewed agreement.

Conclusion: Deliveries will have to be made two times per month under Norwegian law.

Question 4

Transnational law is the non-national law system that cross borders and can be applied to international commercial contracts. Transnational law can be applied if applicable to determined rights and obligations between contractual parties. But the questions that arise in connection with transnational law is for example: will it replace the state law? Does it integrate and complement the state law? And to what extent does it complement the state law?[10]

The general sources of transnational law is lex mercatoria, general principles and soft law, general principles of public international law, treaties and convention under the assumption that they include provisions for business activity[11].

I will examine the question of number of deliveries in light of the soft law sources UPICC and PECL. Why? Because, because they represent an expression of the main rules when dealing

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[10] (Cordero-Moss, 2014, p. 32)

[11] (Cordero-Moss, 2014, p. 31)

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with international commercial contracts. To some extent, they represent the "best solutions".[12] As such, these soft law sources can be considered to be placed *between* the common law and the civil law system to bridge them together. But, keeping in mind that these soft law sources are not binding unless the contract is referencing them.

EAC is recognized in article 2.1.17 of the UPICC and in article 2:105 of the PECL. Interesting for the case between Industrimaskin and Components is that EAC according to UPICC and PECL take into consideration prior statements or agreements to shed a light over the rights and obligations. [13] But to be able to determine the impact of prior statements and agreements, one must take into consideration the principle of good faith. And the principle of good faith must be specified and interpreted. The definition of good faith as a legal standard is not straight

forward for the person interpreting the provision. On the one hand, applying a good faith principle can involve that one of the parties have obtained reasonable expectations of prior statements and agreements being a part of the contract. For example, one can argue based on good faith that Industrimaskin have obtained reasonable expectations based on no objection from Components. But on the other hand, the same principle of good faith can pull in direction of not including prior statements and agreements because the final contract indicates no agreement between Industrimaskin and Components.

I put decisive weight on the application of good faith according to UPICC AND PECL and the circumstances that Industrimaskin have obtained reasonable expectations that deliveries will be made two times per month after the signed MOM.

Conclusion: Deliveries will have to be made two times per month under transnational law.

Question 5

The question of wrong application of English law must be split into two more questions. Why? Because, "wrong" application can mean two things. 1) is the wrong application based on error of law? 2) or is the wrong application based on procedural irregularities?

UNCITRAL Model Law Article 28 (1) states that the arbitral tribunal shall "decide the dispute in accordance with such rules of law as are chosen by the parties". And if the parties have made no choice, Article 28 (2) states that "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".

But the UNCITRAL Model Law contains – as far as I can see – no provisions that can solve the question of what will be the outcome if the tribunal applies the governing law *wrong (error in*

[12] Moss, 2014, p. 35)

[13] Moss, 2014, p. 47)
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law)[14]. In conclusion, the Model Law determines what law *should* be applied, but does not contain provisions in the case of wrong application of the law. Wrong application of the law is not a ground for invalidity according to the Model Law. In addition to this, the consideration of predictability can weigh heavier than the consideration of materially correct results. Also, the parties have assumed some risk when subjecting the contract to arbitration.

Conclusion: In the case of error in law, the losing party does not have remedies against the award.

On the other hand, if the "wrong" application can be tracked back to "the arbitral procedure was not in accordance with the agreement of the parties", see The Model Law Article 36 (1) (a) (iv), the award may be refused. This is referenced to as "irregularity of procedure" in legal theory[15], and can probably be considered in conjunction with the parties' autonomy; if the

[14] Moss, 2014, p. 287)

[15] Moss, 2014, p. 242)
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parties have instructed the tribunal, it seems reasonable that the losing party can refuse the award if the tribunal does not act according to the instructions from the parties.

Conclusion: In the case of irregularity of procedure, the losing party can refuse the award.

Question 6

The main rule is that the tribunal shall follow the instructions from the parties, and the consequence of the tribunal not following the instructions is invalidity.[16] This can also be seen in conjunction with the fact that it is the will of the parties that constitutes the tribunal. It is not clear to me what "inconsistent results" are, but the main rule of the instructions to the tribunal is to settle the dispute based on the applicable law, not equity. The tribunal can only decide in equity when: "the parties have expressly authorized" the tribunal, see The Model Law Article 28 (3).

The Model Law states in Article 34 (2) (iii) that recourse to a court against the award can be made if the tribunal exceeds its power in the mandate from the parties. The Model Law Article 36 (1) (a) (iii) states that if the tribunal exceeds its powers the party can use that as a ground for refusing recognition or enforcement.

[16] Moss, 2014, p. 281)
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Conclusion: If the tribunal disregards the instructions entirely and applies a in equity instead of the relevant national laws, the tribunal have failed its mandate after my reasoning in accordance with the Model Law Article 34 (2) (iii) and 36 (1) (a) (iii).

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