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Comparative Analysis of Contractual Frameworks: Insights from England, Germany, Norway, Italy, and the CISG

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Abstract: This essay offers a thorough examination of contract laws across England, Germany, Norway, Italy, and the CISG. It compares the technicalities of contract formation, including the requirements of offer, acceptance, and consideration, as well as principles like good faith. The analysis covers contractual liability, exploring how different legal systems handle non-performance, including the concept of force majeure. Additionally, it discusses various remedies for contract breaches, such as specific performance, termination, and damages, showcasing the diverse legal approaches. The conclusion underscores the importance of understanding these different legal frameworks for effective contract drafting and comparison, highlighting the impact of legal predictability and fairness on fulfilling contractual expectations.

1. Introduction

As far back as 1952, the American Journal of Comparative Law published an article that said, "the greatest confusion persists in uncovering what to compare, the purpose of comparison, and the appropriate technique".[1] Based on the status of the judge in each legal system and the judge's position on the contract party. This has led to differences between the legal systems. We have seen that English law is different from the Civil Law system. Even within the Civil Law system there are differences.[1] In addition, comparing contracts in different legal systems requires special technical knowledge of each legal system. Moreover, understanding the rules of each system is not an insurmountable obstacle.[1] This essay will introduce the key differences in contractual formation, contractual liability and contractual remedies across the five contractual legal cultures, including English, German, Norwegian, Italian, and CISG, then discuss which of the five legal systems would provide the best rule set for high risk entrepreneurial contracts.

2. Contractual formation

Once a contract is "formed", it is legally binding and protected by law. In addition, both parties to the contract have rights and obligations, and corresponding remedial measures will be taken if the obligation is violated. The legal effect of a contract is determined by the laws governing it.[2]

Therefore, there is also the question of whether the contract is established. The following is a discussion and comparison of contractual formation from England, Germany, Norway, Italy and the CISG.

2.1. England

The formation of a contract in English law requires an offer and an acceptance. However, compared with other analytical systems, English law requires consideration for the establishment of contracts.[1] In most exemplary contracts, consideration is identified as the price. When the agreement lacks consideration, English law does not enforce it. Moreover, the important provision of the consideration is the principle of promissory estoppel.[1] The purpose of this rule is to make the courts strictly apply the law. English and Italian law have the same provisions that an offer can be revoked before it is accepted. English law has in common with the laws of other countries is that an acceptance must be consistent with an offer before a contract is established. Moreover, an acceptance is considered to be a counter-offer once a new clause is added. The most prominent feature of English law is that it does not recognize fidelity loyalty and good faith as the result of negotiation between the parties to a contract. Once the contract is formed, both parties are free to perform the contract according to their own will and they don't have to look out for the other party's interests. However, deception and distortion are not allowed.

2.2. Germany

In Germany, BGB stipulates that offer and acceptance are the elements of a contract.[2] If the offer is detailed enough, it is binding. In addition, there are no additional requirements for the form of the contract, which is similar to Norwegian law.[2] If there are conditions that do not meet the agreed terms, they will be eliminated to form a contract. This means that a contract can only be concluded on terms agreed upon by the parties. However, a contract is not considered to have been concluded as long as the parties do not agree on all points of the contract for the purpose of negotiation.[2] Therefore, German law is stricter than Norwegian law on contracts that are deemed valid based on negotiations. German law stipulates that both parties can negotiate contractual obligations. This is the same as the Norwegian law. It is the obligation of both parties to negotiate in good faith. If one party wishes to negotiate the final contract, it shall not terminate the negotiations without any external cause.

2.3. Norway

Under Norwegian law, a contract is formed by an offer from one party and an acceptance from the other. The offer terminates when it is accepted. In addition, the only requirement is that the acceptance must comply with the offer. It is called “mirror image rule”.[1] Furthermore, no writing requirements in Norwegian law. However, the acceptance will be a counter-offer when it is not in accordance with the offer. If an agreement is formed and no other precautions are taken, the contract is considered binding. Norwegian law has a good faith and loyal obligation to both parties even during the contract negotiation phase. There is an obligation to negotiate only if a contract is possible. The signing of a final contract is not considered a condition for the formation of the contract as long as the main terms are conceptually agreed upon.

2.4. Italy

Italian law in the Civil Law Book 1325 provides for the formation of the four elements of

contract.[2] They are agreements between the parties to the contract, the object, the form and the causa. Like German law and Norwegian law, Italian law stipulates that acceptance must be consistent with the offer, and an acceptance that is different from the terms of the offer is regarded as a counter-offer. Moreover, Italian courts have been tougher in applying it. As long as the modified offer by the offeree is not accepted, the contract shall be deemed non-existent and the contract conditions agreed upon by the parties shall be null and void. Furthermore, silence does not translate into acceptance. Under Italian law, there are the same rules as in German and Norwegian law where both parties have obligations of good faith during the contract negotiation stage.

2.5. CISG

The form of the contract is stipulated in part II of CISG.[2] CISG has no connection to traditional common law and civil law. It has its own unique provisions. For contract formation, however, CISG applies the classic forms of offer and acceptance and has no additional requirements. CISG avoids the need of consideration in contract. An offer may be revoked by the offeror before it is accepted. This is as same as the common law rule. As far as the mirror image rule is concerned, there is an obstacle for the offeror to accept the modified acceptance.[1] Under the CISG, the offeree cannot change the material terms of the contract, such as payment, quantity, price, quality, time and place. If the material terms are modified, the acceptance is considered counter-offer. Moreover, CISG does not provide for pre-contractual obligations. Therefore, in the period of contract negotiation, the legal effect of the acts of both parties to the contract shall be stipulated by the domestic law.

2.6. The key differences

In terms of the consistency of offer and acceptance, English law is constrained by the realities of the business environment. Italian law is a rule of positivism, which hinders adaptation to new social conditions. German judges are creative enough to allow the creation of new rules. Norwegian judges play an important central role in law. Therefore, Norwegian law has more provisions on contract formation. The approach in CISG may be due to the need to find a compromise that would satisfy all states when they participated in the drafting. For former contractual obligations, the principle of good faith is not recognized in English law or the CISG. However, other systems require both parties to consider the interests of others. Moreover, English law focuses on making rules of enforceability so that fair and predictable law can applies to the contracting parties.

3. Contractual liability

Liability for non-performance is divided into strict liability and liability resulting from intentional or negligence.[1] Strict liability shall be borne by the party who fails to perform the obligation, regardless of the cause of the breach. Intentional or negligent liability means that only one party is liable for intentional or negligent breach of contract. However, if the liability for breach cannot be attributed to the breaching party, the breaching party shall not be liable for non-performance. The case that the party in breach can be exempted from its liability is force majeure. [1] Such obstacle is unforeseen event and beyond the control of the parties. Moreover, the responsible party has done its duty of care. The following is a discussion and comparison of contractual liability from England, Germany, Norway, Italy and the CISG.

3.1. England

Under English law, both parties to a contract have a strict obligation to perform the contract accurately.[1] The only circumstance that can be exempted from liability is supervening event. It is not breach of contract due to illegal performance of the contract by the contracting party. This is called frustration of the contract and it applies strictly.[1] English law has strict rules about what is impossible and the nature of the supervening events. Moreover, in other legal systems of verification, obstacles must be beyond the control of the parties, unforeseeable and continuous. The consequence of a setback is to “kill the contract”.[1] A temporary event cannot cause a suspension of the contract effect. However, it is possible in other systems.

3.2. Germany

The scope of liability provisions of German law are not applicable and the risks are not pre-allocated. Its legal form is different from Norwegian law, but it has similar legal results.[1] German law sets the standard of liability for failure to perform the negligence of a party to a contract. Under the provisions of BGB, there is only evidence of negligence. Furthermore, the non-performing party shall not be liable for its non-performing act, even if the impediment occurs within the control of the contracting party. BGB states that if the obligation to perform the contract under the original contract terms becomes intolerable to one party, the contract should be renegotiated. The contract may be terminated if the renegotiation is unsuccessful. Moreover, in German law, the master contractor is responsible for the actions of a third party and chooses to execute all or part of the contract. In addition, temporary obstacles are indirectly specified in BGB.

3.3. Norway

Norway enacted a new Sale of Goods Act in 1988.[1] This act provides for out-of-control events and is an exemption from non-performance. Therefore, the traditional strict liability is replaced by immunity from force majeure. More specifically, it was replaced by a sphere of control.[1] Moreover, the actual scope of control determines the liability of the defaulting party, which is not an abstract concept of control. The judgment of the scope of control is obviously different from the standard stipulated in the CISG. Norwegian law is used to determine whether the affected party is able to control the obstacle, not as a means of assigning risks between the parties to a contract. Therefore, the interpretation of this criterion of judgment is similar to that of the political systems of Italy and Germany, where the sphere of responsibility is influenced by political parties and the sphere of exemption is not controlled.

3.4. Italy

Italian law explicitly requires the affected party to prove that an external event has made performance impossible, a standard that is stricter than that provided by German law for lack of negligence.[1] However, the Italian court ruled that the debtor must have the duty of diligence as a reasonable person in performing the obligation. Moreover, if the affected party has evidence that it has exercised due diligence, the exemption provision can be applied. In fulfilling the obligations inherent in a professional activity, diligence must be assessed in the light of the nature of the activity being undertaken.[1] For subcontractors, the "double barrier" requirement is valid.

3.5. CISG

Under clause 79 CISG, if a party proves that the failure to perform is due to obstruction beyond control.[1] It is unpredictable and cannot be reasonably overcome. The CISG does not provide for the diligence of the affected parties as an exemption from the contractual obligation. Each party may exercise remedies against the other for non-performance of contractual obligations. There is no need to prove any negligence, fault, lack of integrity or diligence. Moreover, there is no stipulation that the contract be executed in good faith. The CISG requires an autonomous interpretation that takes no account of the domestic legal system and applies the literal interpretation. It objectively divides article 79 into two categories, seller and buyer. There is no possibility of actual and specific applicable controls.

3.6. The key differences

English law stipulated that the risk sharing of contract dominated the Common Law liability for breach of contract. 'Consideration' is a central concept of English law. Traditional Germanic responsibilities can easily be replaced by fair goods available on the market. In CISG, as long as an item is promised to be available in the market, the seller can obtain it from another source.[1] Even if goods are destroyed or cannot be delivered. Norwegian law combines the provisions of CISG on risk allocation with the sense of obligation in German law. Therefore, the legal cultures are divided.

4. Contractual remedies

There are various remedies for non-performance. Moreover, although the degree of application varies, most can be applied to all analytical systems. However, some remedies cannot be applied to all comparative systems.[1] The main difference between remedies in various legal systems is the distinction between special performance and damages. It can be seen that the calculation of damages is also different. The following is a discussion and comparison of contractual remedies from England, Germany, Norway, Italy and the CISG.

4.1. England

The remedy under English law for a contract is reimbursement of damage and termination of fundamental breach.[1] Special performance is permitted only if the English judge considers that the damages are insufficient. Moreover, special performance is performed as secondary relief. It was restricted to special conditions because discretion was particularly strict in English law. Furthermore, the contractual liability under English law is absolute.[1] It means that the non-performing party is liable for breach of contract regardless of whether the liability for breach is attributed to the non-performing party. At the same time, the other party to the contract is entitled to compensation for the damage.

4.2. Germany

According to German law, the non-breaching party may choose to require special performance after notifying the breaching party to perform the contract.[1] This is subject to the possibility of further performance of the contract. Moreover, the non-fault party can choose to terminate the contract. The only requirement is that the non-breaching party give notice to the wrongful party before terminating the contract. The purpose is to enable the defaulting party to fulfill the obligation appropriately. Furthermore, in BGB, the non-breaching party is entitled to claim compensation for

the losses arising from the liability of the breaching party due to the intentional or negligent acts.[1]

4.3. Norway

According to the provisions of Norwegian law, the non-defaulting party has the right to demand the defaulting party to perform the contract and fulfill the obligation.[1] However, it is on the basis that the contract may continue to be executed. In addition to this particular performance, Norwegian law attempts to fix what is already defective. Therefore, the price cut is needed to repair thing that is defective. Moreover, the non-defaulting party has the right to terminate the contract.[1] Damages are an additional remedy under Norwegian law. It must hold the breaching party liable for breach of contract.

4.4. Italy

Under Italian law, remedies for breach of contract include special performance and termination of contract.[1] However, the contract can only be terminated if the breach of contract is fundamental. Moreover, through the clause 1218 Codice Civile, the non-fault party can claim damages.[1] This does not require negligence on the part of the wrongdoer. Obviously, this is a strict standard of liability for damages. In addition, in article 1176, a party is required to perform its obligations diligently in the expectation of a reasonable person. In Italian judicial practice, diligence will be considered to mitigate strict liability. Therefore, if the breaching party can prove that it has complied with the duty of diligence, it will not have to compensate for the loss.

4.5. CISG

CISG provides for a range of applicable remedies for non-breaching parties. These can compensate for the loss.[1] In addition, special performance is provided as a remedy in CISG. However, the scope of special performance is only applicable to national law by judges.[1] Other remedies included in CISG include: (i) replacement of defective thing, (ii) repair of defective items, (iii) termination of contract, and (iv) reduction of price.[1] In addition, under CISG, compensation for damages means that the non-breaching party receives the same economic benefits as the normal performance of the contract. Therefore, it does not consider compensation for negative contractual interests.[1]

4.6. The key differences

The different purposes for special performance are the main differences between the Civil Law system and the Common Law system.[1] In Civil Law system, special performance is the main remedy. However, it is only an auxiliary measure applicable at the discretion of the judge when the primary remedy is insufficient under the English law.[1] In terms of compensation for damages, Norwegian law does not take into account indirect losses such as loss of profits.[1] Unless the breaching party is negligent. However, other systems take indirect losses into account. Moreover, different legal systems have different definition of what harm is foreseen. There is the distinction between subjective and objective predictability. The CISG and English law hold that damages are subjectively foreseeable or that the parties are based on their knowledge of the situation.[3] In contrast, the judgement of other systems of predictability are objective. It does not contemplate the perception of the contracting party.

5. Conclusion

Different legal systems have different rules. The essay above summarizes and compares the major legal spects. Therefore, it is necessary to have a technique for comparing contracts in various legal systems. Moreover, the respective legal provisions can be understood. However, whether a system can be predicted preferentially or judged fairly will more strongly influence the application of regulations and meet the expectations of the contracting parties. [4] This is more important than the application of various technologies. Because this not only affects the structure of the legal document, but also can achieve the desired results. [5]

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