



Language and different legal concepts as obstacles - common law principles in civil law contracts

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Basic problem when using English in civil law contracts:

- Applicable law is often not available in English (at least not in the form of an official English translation).
- Common law drafting style may not correspond with the requirements of the applicable law.
- Relevance of the language in a contract.
- Typical English legal terms will potentially be construed in the meaning of the original common law understanding.

The different approaches of common law and civil law:

Common law:

Principle: case law

- Jurisprudence forms precedents.
- Cases are reported to other common law jurisdictions.

Exception: statutory law

- Limited amount of written codifications.
- Rarely extensive written laws.

Civil law:

Principle: extensive codifications

- Extensive framework of written laws (e.g. German Civil Code or Swiss Code of Obligations).
- Jurisprudence not reported to other jurisdictions.

Exception: case law

- Courts construe the statutory law.
- Rarely filling of gaps of the written codifications.

Characteristics of a contract under common law and under civil law:

Common law:

- Contract tries to cover every scenario in order to avoid the impact of case law.
- Literal construction of the terms used in the contract.
- Extensive drafting given the lack of a legal framework.
- Higher standardisation.
- A lot of examples and details are used.

Civil law:

- Contract must be read together with legal framework. Reference to the legal framework not strictly required (even if it might be advisable in certain cases).
- Less paperwork / shorter contracts.
- Wording is a factor **but the intention of the parties is decisive.**
- Therefore, contracts often summarize the purpose of the respective agreement.
- Contract does not necessarily need to specify the consequences of a breach.

Examples:

Usage of the word “*shall*”:

- Common law: The term “*shall*” required to create an obligation of the respective party.
- Civil law: The term “*shall*” not necessarily required to create an obligation of the respective party.

“Within 10 days of the signing of this Agreement the Seller will provide the Buyer with the Documentation”.

Better: *“Within 10 days of the signing of this Agreement the Seller shall provide the Buyer with the Documentation”*



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Examples:

Usage of the word “*agent*”:

“To the extent permissible by law, the Seller’s liability for acts of his agents is excluded”.

Better: *“To the extent permissible by law, the Seller’s liability for acts of his associates according to Article 101 of the Swiss Code of Obligations is excluded”.*

Examples:

Usage of the word “*acceptance*” in a contract for works and services:

- Common law: Contract explains in detail if and when acceptance can/must be assumed and what the consequences of acceptance are.
- Civil law: Definition of acceptance in the contract not (necessarily) very detailed (at least in some civil law jurisdictions). Consequences of acceptance defined in the respective codifications (e. g. transfer of risk, burden of proof, beginning of the notification period, beginning of the warranty period).

➡ definition of acceptance only might be sufficient and no drafting error.

Examples:

Usage of the word “*guarantee*” in a purchase contract regarding defects of the sold goods:

- Common law: Contract explains in detail which characteristics of the sold goods are guaranteed and sets forth the consequences of a breach of guarantee.
- Most civil law jurisdictions: These jurisdictions provide comprehensive framework how to deal with defects and what the consequences of a defect are. Contract important to describe the characteristics of the sold goods (even though not necessarily required with regard to any defect). In Switzerland, usage of the word “*guarantee*” unclear with regard to defects of the sold goods.

“The Seller guarantees the following characteristics of the Sold Goods: ...”

Better: *“The Seller warrants the following characteristics of the Sold Goods:...”*

Examples:

Usage of the term “*liquidated damages*” and contractual penalties:

- Common law: Provisions on contractual penalties are (or might be?) void. However, agreements on liquidated damages are possible.
 - Switzerland: Contractual penalties and liquidated damages are both permissible. However, consequences are different. E.g.: liquidated damages might require the evidence that there is a damage; reduction of excessive contractual penalties (disputed as regards liquidated damages) etc.
- ➡ Clear stipulation in a civil law contract required if parties agree on contractual penalties or liquidated damages.

Examples:

A purchase contract under Swiss law drafted in English contains detailed provisions on defects, when they give rise to rights of the purchaser and consequences of defects. The following section “*Indemnification*” reads as follows:

“Supplier shall save, indemnify, defend and hold Buyer harmless from and against any and all actions, obligations, claims, demands, losses, damages, liabilities, awards, costs and/or expenses, including but not limited to those resulting from death, disease or injury to any person or damage to any property or the environment, arising out of, in conjunction with or related in any way to any act or omission by Supplier in connection with the Items, Works or Services acquired or purchased by, provided to, or performed for Buyer, Customer of Buyer, End User or incorporated into goods sold buy Buyer.”

Supplier shall indemnify Buyer from any damages costs and/or expenses related in any way to any act or omission by Supplier in connection with the Items, Works or Services purchased by Buyer

Examples:

A purchase contract under Swiss law drafted in English contains detailed stipulations on the liability of the seller. Furthermore, the liability of the seller is capped at an amount of twice the purchase price. The following section “*Indemnification*” reads as follows:

“Seller shall indemnify, defend and hold Buyer harmless from and against any claims and liabilities arising out of or related in any way to the delivery of the Defective Goods”.

Examples:

A very extensive purchase contract is drafted in English language using various terms known in common law countries. However, the contract is governed by Swiss law.

Detailed construction clause strongly recommended:

“This Agreement is drafted in English for convenience only. The use of the English language shall not change the applicable law and the Agreement shall be interpreted as if it was drafted in one of the Swiss official languages. A construction of the Agreement according to common law principles is excluded”.

Lessons learned

Drafting civil law contracts in English:

- Intention of the parties is decisive.
- Four corner rule does not apply.
- “*Leaner*” contracts in civil law jurisdictions possible and not necessarily a drafting error.
- Reference to the relevant legal provision reduces risk of wrong interpretation (e.g.: “... *in the sense of article ... of the Swiss Code of Obligations*”).
- Special regard to clauses on liquidated damages/contractual penalties, (limitation of) liability and indemnification when adapting a common law contract template for a civil law jurisdiction.
- Detailed construction clause compulsory.



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