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## **Entire Agreement Clauses**

*Convergence between US and Danish Contract Law?*

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Entire Agreement Clauses:  
Convergence between US and Danish  
Contract Law?

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## ABSTRACT

The majority of worldwide concluded commercial contracts are nowadays written in English and based on Anglo-American contract models. This happens regardless of the governing law of the specific contract. When relying on those models, contractual parties often embrace not only the actual wording, but also the contract drafting style typical for common law countries. In this way, common law concepts and rules can be transferred to civil law jurisdictions, however, without certainty about the legal effects. This is especially pertinent to boilerplate provisions.

On this background, the article aims to elucidate the influence of American contract law and contract drafting style on Danish contract law and practice, taking the entire agreement (EA) clause as an example. While applying comparative law method, and more specifically taking the departure in various theories on diffusion of law, it aims to investigate the treatment of EA clauses in contracts governed by Danish law and opens up a discussion whether on the example of EA clauses we can observe Americanization of Danish contract law or whether we should rather speak of legal transplants or convergence between American and Danish contract law.

The findings suggest that the use of EA clauses in contracts governed by Danish law can indeed be deemed legal transplants, but that it is impossible to identify whether this transplanting process has been successful. For now, the available court decisions from the two jurisdictions dealing with the topic of EA clauses do not show mutual appreciation between the two legal systems, although the results are not as divergent as expected. Therefore, what we are experiencing seems to be convergence or transnationalization of contractual practice rather than contract law. We might thus conclude that the contract drafting process overtakes the judiciary, which is more attached to national rules and values. This does not seem to be the case for Denmark only, but appears to be a common observation in other civil law jurisdictions as well. In line with the irritant perspective on the legal transplants theory, it can then be expected that the contract drafting practice will in turn influence national legal rules and the courts' approach. This effect can already be seen in Danish legal scholarship and its presumption that the judges will not entirely disregard EA clauses, but take a middle road in interpreting them.

## 1. INTRODUCTION

English is a lingua franca of international business.<sup>1</sup> Moreover, the majority of nowadays concluded commercial contracts are not only

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<sup>1</sup> C Nickerson, 'English as a Lingua Franca in International Business Context' (2005) 24 *English for Special Purposes* 367; D Echenberg, 'Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?' in G Cordero-Moss (ed), *Boilerplate Clauses, International Commercial*

written in English but also based on Anglo-American contract models.<sup>2</sup> While both England and the USA can be defined as sources of the commonly used contract models, due to the size of national economies, it is mostly American law and contracting that finds its way to other countries. This development has been described in legal scholarship as the ‘reception of American law’<sup>3</sup> or even the ‘Americanization’<sup>4</sup> of law.

The present article is one of the outcomes of a research project aiming to elucidate the influence of common law on civil law in the area of contract law and contract drafting practice. It takes the influence of American contract law and contract drafting style on Danish contract law and practice as an example.<sup>5</sup> The purpose of the clauses is described in detail in sections III and IV. However, briefly it can be said that EA clauses aim to confine the full agreement between the contractual parties into the contractual text; they intend to exclude any extrinsic communication, agreements and evidence from determining the contract’s content and, depending on jurisdiction, contract interpretation.

The EA clauses are typical examples of boilerplate provisions characteristic of common law contract models.<sup>6</sup> The use of common law-inspired boilerplate provisions has proliferated globally through commercial contracting, in both common and civil law countries. In order to ascertain the use of EA clauses in Danish contracts, the authors have conducted interviews with representatives of Danish companies and legal practice. The investigation confirmed that indeed EA clauses are present in an absolute majority of international contracts regardless of the

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*Contracts and the Applicable Law* (Cambridge University Press 2011), 16 (hereinafter Cordero-Moss ed., Boilerplate Clauses).

<sup>2</sup> G Cordero-Moss, ‘International Contracts Between Common Law and Civil Law: Is Non-State Law to Be Preferred? the Difficulty of Interpreting Legal Standards Such as Good Faith’ (2007) 7(1) *Global Jurist* 1, 1.

<sup>3</sup> W Wiegand, ‘The Reception of American Law in Europe’ (1991) 39 *AJCL* 229.

<sup>4</sup> M Shapiro, ‘The Globalization of Law’ (1993) 1 *Ind.J.Global Legal Studies* 37, 39; FW Grosheide, ‘Legal Borrowing and Drafting International Commercial Contracts’ in K Boele-Woelki et al. (eds), *Comparability and Evaluation: Essays on Comparative Law, Private International Law, and International Commercial Arbitration, in Honour of Dimitra Kokkini-Iatridou* (M. Nijhoff Publishers 1994), 74-75.

<sup>5</sup> See also Katerina Mitkidis, *The use of entire agreement clauses in contracts governed by Danish law*, 2017/3 *Erhvervsjuridisk tidskrift* 198 (reporting empirical observations gained through an interviews-based study on the use of EA clauses in contracts governed by Danish law).

<sup>6</sup> A Müller, *Protecting the Integrity of a Written Agreement: A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL)* (Eleven International Publishing 2013), 177-178; R Strugała, ‘Merger Clauses in Contracts Governed by Polish Law’ (2013) 3 *Wroclaw Review of Law, Administration and Economics* 14, 15.

governing law, and sometimes also in domestic contracts.<sup>7</sup> This widespread use of common law-originated boilerplate provisions, and namely EA clauses, calls for more investigation into this phenomenon, especially due to their hesitant and somewhat unclear acceptance by civil law judiciary.<sup>8</sup>

Thus, while applying comparative law method and taking the departure in theories of diffusion of law<sup>9</sup> (including the legal transplant theory),<sup>10</sup> this article aims to investigate the treatment of EA clauses in contracts governed by Danish law and open up the discussion whether on the example of EA clauses we can indeed observe Americanization of Danish contract law or whether we should rather speak of legal transplants or convergence between American and Danish contract law. Possibly, the answer is neither of the above, but a development of transnational contract law and practice that is increasingly disconnected from national legal systems. The article has both theoretical and practical relevance; it contributes to the legal scholarship on transnationalization tendencies in private law as well as provides Danish companies with a better understanding of the background and original purpose of EA clauses and the treatment of these clauses under Danish jurisdiction, therefore allowing them to better manage the connected business and legal risks.

The question at hand will be approached through the following steps: (i) reviewing currently predominant contract drafting style and the reasons behind it, (ii) identifying the original function of EA clauses under American law and assessing whether this function is fulfilled under American law, (iii) assessing whether the original function is achieved when EA clauses are included in contracts governed by Danish law, and (iv) discussing whether on the example of the use of EA clauses in Danish contracts we can observe Americanization of Danish law, convergence between the two legal systems or development of a transnational contracting practice disconnected from national laws.

The article presents a micro-comparison of EA clauses in two jurisdictions, namely the USA and Denmark. The selection of the USA for the comparison is straightforward as explained in the introduction part above. Denmark is then chosen for several reasons. Firstly, Denmark, although home to a number of large multinational companies, is a smaller

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<sup>7</sup> The collected data (anonymized) are on file with the corresponding author and reported in Mitkidis (n 5); for data from another civil law jurisdiction, see e.g. D Beenders and J-W Meijer, 'Uitleg van commerciële contracten in de praktijk' (2013) 9 *AA* 646 (reporting that over a half of Dutch contracts, including those between domestic parties, include an EA clause).

<sup>8</sup> For Danish case law, see below section V. For a prominent civil law case on this issue, see the decision of the Dutch Supreme Court HR 5 April 2013, NJ 2013, 214 (establishing the exact opposite effect of an EA clause than its original one).

<sup>9</sup> W Twining, 'Diffusion of Law: a Global Perspective' (2004) 49 *J Legal Plur* 1, 5.

<sup>10</sup> A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

country with strong economic ties to the USA,<sup>11</sup> and thus presumably exposed to the influence of the US contracting practice. Secondly, Denmark is part of Scandinavia, which is a legal region known for its pragmatic court approach. The effects of EA clauses that American owners and business partners of Danish corporations expect may not materialize here. Finally, the article aims to contribute new knowledge to legal scholarship, as there is currently no comprehensive literature on this issue in regard to Denmark.<sup>12</sup>

The starting point of this article is an investigation into a legal institution originating in one jurisdiction and comparing its effects while being repeatedly used in another jurisdiction. The point of departure is thus the idea of borrowings, or in other words, diffusion of laws and legal institutions among jurisdictions.<sup>13</sup> Traditionally, legal transplants scholarship has been concerned with moving of an entire legal system or a portion of it (meaning a legal rule in the form of a statute) to a new location, through copying or imposing laws in order to establish a legal system where there was not such one, in order to fill in existing gaps in the recipient's legal system or to replace it entirely.<sup>14</sup> This narrow understanding of legal transplants has been broadened and many variants have been identified, this leading to speaking rather of diffusion of law as a broader term than legal transplants.<sup>15</sup> Diffusion of law through commercial contracts are one of the variants.<sup>1617</sup>

<sup>11</sup> The USA is Denmark's main non-European trading partner, see <http://www.worldstopexports.com/denmarks-top-import-partners/>.

<sup>12</sup> Within Danish jurisdiction, one master thesis studying EA clauses from the law and economics perspective has been found, see AL Carstensen and JK Christensen, *Fuldstændighedsklausuler i B2B kontrakter (Merger clauses in B2B contracts)* (supervised by P Møgelvang-Hansen and O Lando, 2009). For studies on EA clauses from other jurisdictions, see Strugala (n 6); Müller (n 6); HW Bjørnstad, *Entire Agreement-klausuler* (Skriftserie 177, Institutt for privatrett, University of Oslo 2009); M Fontaine and F De Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (2nd edn, Martinus Nijhoff 2009), 129-150; L Gorton, 'Merger Clauses in Business Contracts' (2008) *Erbvervsjuridisk Tidsskrift* 344; D van Dorst, *The Entire Agreement Clause*, (Msc thesis supervised by MW Hesselink, 2015); O Kirman, *(re)Defining the Entire Agreement Clause*, (Msc thesis supervised by V Mak and G van Dijk, 2015/16).

<sup>13</sup> 'History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.' See Watson (n 10), 22 (citing Roscoe Pound). Twining (n 9); M Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

<sup>14</sup> Watson (n 10).

<sup>15</sup> Twining (n 9), 17; A Watson, 'Legal Transplants and European Private Law' (2000) 4.4 *EJCL*, <http://www.ejcl.org/ejcl/44/44-2.html>.

<sup>16</sup> See e.g. L-W Lin, 'Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57(3) *AJCL* 711.

<sup>17</sup> NB, we use the term diffusion of law in line with Twining (n 9). For the purpose of this article, this term encompasses among others also the term of legal transplant.

Contractual freedom allows parties to include in their contract provisions originating from another legal system than the governing law of the contract, or the domestic law of the parties for that matter. Such foreign provisions and legal constructs can then be seen as a type of a legal transplant,<sup>18</sup> and EA clauses are a frequently seen example of the same in Danish contract practice.

## 2. COMMERCIAL CONTRACT DRAFTING

Major legal transplants (most often) happen as a conscious process; the exporter wants to impose her legal rules and institutions upon the importer or the importer wants to copy the rules of the exporter. However, the diffusion of EA clauses from American to Danish law happen mostly unintentionally as a result of day-to-day contract drafting and negotiation practice rather than fulfilling specific legal needs.<sup>19</sup>

Today, when a lawyer starts drafting a new contract, (s)he will rarely start from scratch. In order to save time and money,<sup>20</sup> lawyers will usually reach for a similar, previously written contract, the company's standard terms and conditions or a pre-printed contract form (contract models).<sup>21</sup> The existence of such models is moreover of great importance when a contract is negotiated by a businessperson without the involvement of a lawyer.<sup>22</sup> Rarely the contract model is used in full, but the final contract is a mix of provisions coming from different sources and different jurisdictions that do not necessarily respect the legal system and culture of the governing law of the contract.<sup>23</sup> In fact, it is not uncommon that the governing law is chosen only after the contract is negotiated.<sup>24</sup> Thus, in an

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<sup>18</sup> Due to its closer ties to economic interests rather than national legal culture and sentiments, contract law and commercial law are considered easier transferable than for example public or constitutional law. See O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) MLR 1, 12-13; Twining (n 9), 29; and R Cotterrell, 'Is There a Logic of Legal Transplants?' in D Nelken and J Feest, *Adapting Legal Cultures* (Hart Publishing 2001), 82.

<sup>19</sup> Not all uses of EA clauses are however unintended. Companies may want to include the clauses into their contracts to fulfil the functions originally assigned to them by common law or other strategic functions, such as ascertaining a strong negotiation position if a dispute arises (see Cordero-Moss ed., *Boilerplate Clauses* (n 1), 4) or simply influencing the behaviour of the parties (see Echenberg (n 1), 5).

<sup>20</sup> MC Vettese, 'Multinational Companies and National Contracts' in Cordero-Moss ed., *Boilerplate Clauses* (n 1), 20-21.

<sup>21</sup> LA DiMatteo, *International contracting: law and practice* (Kluwer Law International 2013), 37.

<sup>22</sup> Vettese (n 20), 22; DiMatteo (n 21), 38.

<sup>23</sup> G Cordero-Moss, *Anglo-American Contract Models and Norwegian or other Civilian Governing Law: Introduction and Method* (Skriftserie 169, Institutt for privatrett, University of Oslo 2007), 8.

<sup>24</sup> F Bortolotti, *Drafting and negotiating international commercial contracts: a practical guide* (International Chamber of Commerce 2013), 100.



extreme situation, some of the provisions originating from foreign law or contract models may not only be incompatible, but directly a breach of the governing law of the contract or the laws of the country where the contract is performed.<sup>25</sup> In order to avoid such negative effects, companies using common law-inspired contract models in contracts governed by a civil law system should systematically compare each provision of the contract model and each legal concept with the governing law of the contract to make sure that the content is consistent with it. However, such exercise is extremely time consuming and thus costly and would mean that the use of contract models does not reduce but escalate negotiation costs.<sup>26</sup> That is why companies often accept the original wording of a contract model without critically assessing it against the governing law and treat it as an acceptable legal risk.

Often, they are lucky; the inconsistency between the origins of contract models and the governing law usually does not cause troubles during the contract performance.<sup>27</sup> It may, however, bring uncertainties to the contractual parties when a dispute arises as to what effects these provisions will have under the governing law. Civil law judges and arbiters will have to ask the questions whether to respect the parties contractual text and approach it as a correction of the governing law or whether the principles underlying the governing law should prevail over the expressed words of the contractual parties.<sup>28</sup>

One of the major consequences of the use of common law-inspired contract models is the trend towards drafting self-sufficient contracts.<sup>29</sup> In the words of Cordero-Moss, self-sufficient contracts mean contracts that are '*uniformly interpreted on the basis of its own terms.*'<sup>30</sup> Logically, they are long and as exhaustive as possible.

Drafting such contracts is counter-intuitive in civil law countries. Traditionally, commercial contracts originating in civil law countries are concise and address only major aspects of the specific deal.<sup>31</sup> There are a couple of reasons for this. Firstly, the contractual parties in civil law

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<sup>25</sup> S Hecker et al., 'Between a Rock and a Hard Place: Anti-Corruption Compliance and Antitrust Law in Russia' (Debevoise&Plimpton, FCPA Update: A Global Anti-Corruption Newsletter, 2015-03), [http://www.debevoise.com/~media/files/insights/publications/2015/03/fcpa\\_update\\_march\\_2015.pdf](http://www.debevoise.com/~media/files/insights/publications/2015/03/fcpa_update_march_2015.pdf).

<sup>26</sup> ET Canuel, 'Comparative Commercial Law: Methodologies, Black Letter Law and Law-in-Action' (2012) *Nordic Journal of Commercial Law* 1, 24.

<sup>27</sup> In the Danish context, this can be proved by the small number of court decisions on the use of EA clauses in contracts governed by Danish law.

<sup>28</sup> Cordero-Moss (n 2), 19-21.

<sup>29</sup> G Cordero-Moss, 'Conclusion: The self-sufficient contract, uniformly interpreted on the basis of its own terms: an illusion, but not fully useless' in Cordero-Moss ed., *Boilerplate Clauses* (n 1).

<sup>30</sup> *Ibid*

<sup>31</sup> R Nielsen, *Contract Law in Denmark* (DJØF Publishing 2011), 90.

jurisdictions can rely on the definitions, regulation and principles codified in the governing law of the contract.<sup>32</sup> Thus, there is no point in drafting lengthy contracts just to repeat what is stated in the background law or to run the risk that such formulation could be overturned by an adjudicator applying the underlying principles of the governing law, such as the principles of fairness and reasonableness. Concise contracts are thus an expression of transaction efficiency.<sup>33</sup> Secondly, contract law in civil law countries, including Denmark, is based on the principle of consensualism.<sup>34</sup> According to this principle, a contract is born when the parties agree on the principal matters of the object of the contract. This is reinforced by the subjective theory of interpretation in determining contracts' content typical for civil law countries, when the subjective intent of the parties is the starting point.<sup>35</sup>

In contrast, contracts originating in common law countries are traditionally lengthy and detailed.<sup>36</sup> They are based on the principle of predictability.<sup>37</sup> A major aspect of predictability is that contractual parties are able to forecast an outcome if a dispute arises from their contract. While in civil law countries predictability is supported by codification of law, in common law countries it is secured by the parol evidence rule. Within the US context,<sup>38</sup> the parol evidence rule in essence means that when an adjudicator construes a contract, he will be bound by the actual contractual text and will not be able to use extrinsic evidence presented by the parties, which contradicts or alters the writing, if the parties intended the contract to integrate all their prior or contemporaneous agreements.<sup>39</sup> The background idea is that commercial parties are able to understand and

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<sup>32</sup> Vettese (n 20), 24.

<sup>33</sup> Tomas Lindholm in MB Andersen and J Christoffersen (eds), *Forhandlingene ved Det 38. Nordiske Juristmode i København, 21.-23. august 2008*, volume 2, (2008), available at <http://nordiskjurist.org/meetings/fremmede-retsbegreber-i-nordisk-kontraksret/>, 616.

<sup>34</sup> Nielsen (n 31), 76.

<sup>35</sup> There is no clear subjective or objective theory of interpretation, but shades and mixtures of both. However, civil law countries take most often subjective theory as their starting point in contract interpretation, while common law countries start from the objective theory. See JM Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69 *Fordham L.Rev.* 427; Fontaine and De Ly (n 12), 106-114.

<sup>36</sup> Vettese, (n 20), 23.

<sup>37</sup> Cordero-Moss (n 2), 1; Lindholm (n 33), 616.

<sup>38</sup> While shared by all common law countries, the rule has developed slightly differently in various common law jurisdictions. For a general overview, see Fontaine and De Ly (n 12), 114ff.

<sup>39</sup> RA Lord, *Williston on Contracts* (4th edn, Thomson Reuters 1990), para 33.1 (hereinafter *Williston on Contracts*); AL Corbin, JM Perillo and JE Murray, *Corbin on Contracts* (Lexis Nexis, Matthew Bender 2015; Release No. 15S2), chapter 5 (hereinafter *Corbin on Contracts*); UCC § 2-202 (amended 2002); Restatement (Second) of Contracts § 213 (1981).

evaluate business opportunities and risks and enter into agreements based on this understanding.<sup>40</sup> As a consequence, they should be able to rely on what they have agreed to in writing and judicial intervention into the deal should be limited. That is why business actors in common law countries aim to cover as many details as possible in the contractual text and to make the contract complete and integrated ‘on its face’, so that there is only a little room for determining the content of the contract based on other circumstances and documents. EA clauses are typical means to express the parties’ intention to conclude a completely integrated contract and to reinforce the parol evidence rules.<sup>41</sup> The substantive parol evidence contract is then accompanied by objective style of contract interpretation that is based on the principle of formalism.<sup>42</sup> When interpreting a contract, US adjudicators are not restricted to move within the four corners of a contract, but in case of a conflict between the wording of a contract and any extrinsic evidence, the express terms of the contract will prevail.<sup>43</sup>

The spread of the common law-inspired contract models brought not only the actual wording of contractual provisions, but naturally also the drafting style as such.<sup>44</sup> The unification of international contract drafting style, as we will show below on the example of EA clauses, obscures the presumed sharp distinctions between civil and common contract law and may even influence the legal interpretation of contracts.

The trend of self-sufficient contracts, however, goes beyond the use of common law-originated contract models. It has also been tied with the effort to disconnect a contract from its governing law as much as possible, to create ‘a barrier from the real world.’<sup>45</sup> This comes from the fact that when a contract’s governing law is different from the one of a contracting party, this party will most often not have as detailed knowledge of the governing legal system as needed to understand the system’s consequences for the contract and the business. It is thus safer for the contracting party to secure that the contract itself will be self-sufficient and that the influence of the governing law will be minimal.<sup>46</sup>

Although various tools have been developed in contract practice to secure the contract’s self-sufficiency, the idea that a contract may be entirely self-sufficient and completely disconnected from the governing law is rather illusory. First of all, the contractual parties cannot naturally

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<sup>40</sup> Similarly, in regard to English law, see Cordero-Moss (n 2), 4-5.

<sup>41</sup> See below section IV.A.

<sup>42</sup> ML Movsesian, ‘Formalism in American Contract Law: Classical and Contemporary’ (2012) 12 *Ius Gentium* 115; LA DiMatteo, ‘False dichotomies in commercial contract interpretation’ (2012) 11 *Journal of International Trade Law and Policy* 27.

<sup>43</sup> UCC § 1-303 (e) (amended 2001).

<sup>44</sup> D Plechinger, ‘Der skal være en udløbsdato på sådan en post’ (based on an interview with Søren Jenstrup), *Advokaten* 4/2015, 21-22.

<sup>45</sup> Vettese (n 20), 26.

<sup>46</sup> Cordero-Moss classifies EA clauses as clauses ‘aiming at fully detaching the contract from the applicable law’, see Cordero-Moss ed., *Boilerplate Clauses* (n 1), 353-358.

foresee all possible events and thus no contract can be fully complete. Nevertheless, detailed wording lowers the possibility of contract interpretation using extrinsic evidence.<sup>47</sup> Secondly, the governing law may contain some mandatory provisions that the contractual parties cannot ignore. And finally, the governing law's rules on interpretation will affect the extent to which the contract can be considered the whole agreement between the parties.

Still, EA clauses are a major means aiming to establish self-sufficiency of a contract and detaching a contract from its governing law. Their main function is to exclude all or specifically named extrinsic evidence, such as prior agreements, precontractual documents and communication, and sometimes even general conditions and trade usage from the contract for the purpose of its interpretation.<sup>48</sup> EA clauses seem to contain both substantive and evidentiary elements to it; though this view differs across jurisdictions. In the USA, the parol evidence rule and thus also EA clauses are considered a substantive contract law issue.<sup>49</sup> In civil law countries, EA clauses have a stronger evidentiary connotation.<sup>50</sup>

A common EA clause may read as follows: *'[t]his Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein, and supersedes all prior agreements, representations and understandings of the parties.'*<sup>51</sup> The general motivation for inclusion of an EA clause into a contract is to achieve certainty as to the scope of the understanding between the contractual parties, especially for the purpose of its interpretation by courts if a dispute arises.<sup>52</sup> However, as a typical boilerplate provision, an EA clause is often not given much thought during negotiations. After lengthy negotiations, the parties may truly believe that the contract is the complete understanding between them and that the EA clause merely restates this.<sup>53</sup> However, as we will see below, they may be mistaken.

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<sup>47</sup> EA Farnsworth, *Farnsworth on Contracts* (3rd edn, Aspen Publishers 2004), para 7.1, 219 (hereinafter Farnsworth on Contracts), para 7.3, 232; Bortolotti (n 24), 100-101.

<sup>48</sup> Fontaine and De Ly (n 12), 131.

<sup>49</sup> Williston on Contracts (n 39), para 33.1 (Stating that there is a general agreement in scholarship and case law that the parol evidence rule is a rule of substantive law of contracts.); and similarly Farnsworth on Contracts (n 47), para 7.2, 222.

<sup>50</sup> Gorton (n 12), 2; see also CISG-AC Opinion no 3, 'Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG', 23 October 2004, rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA.

<sup>51</sup> Example taken from Corbin on Contracts (n 39), para 25.8.

<sup>52</sup> Gorton (n 12), 1.

<sup>53</sup> TL Stark, *Negotiating and Drafting Contract Boilerplate* (Lexis Nexis, Law Journal Press 2003), para 18.01.

### 3. EA CLAUSES UNDER AMERICAN LAW

Before looking into the treatment of EA clauses by Danish law, we have to establish what the original purpose of these clauses is under American law and to what extent it is achieved in practice.

It may be a simplification to address American contract law as one set of legal rules since American contract law is essentially common law, which can develop differently among various states. Still, American contract law is more consistent among the states than one would expect. Firstly, common law of contracts in various states share basic principles. These can be found in the Restatement (Second) of the Law of Contracts, a treatise with a strong authoritative power that is frequently cited in American court decisions and jurisprudence. Secondly, the Uniform Commercial Code has been adopted with the purpose of harmonizing major parts of commercial law across the country. Finally, other aspects, such as one language and legal education, contribute to the integrated American legal culture.<sup>54</sup> It is this common core of American contract law that is considered in this article.

#### 3.1. EA CLAUSES AND DETERMINING THE CONTRACTUAL CONTENT

In the USA, the use of EA clauses emerged as a reaction to uncertainties connected to the application of the parol evidence rule;<sup>55</sup> specifically, as a defence against self-serving testimonies by the parties that they agreed on something different from what is covered by the text of their contract.<sup>56</sup> If an EA clause is found enforceable, it will (most often) not only invoke strict application of the parol evidence rule, i.e. prevent consideration of any extrinsic evidence contradicting, modifying or varying the contractual terms, but also prevent consideration of any additional terms when determining the contractual content.

The parol evidence rule applies when the contractual parties intended to conclude a completely integrated contract.<sup>57</sup> In order to establish whether a contract is completely integrated, the adjudicator considers primarily the text of the contract. However, the adjudicator may consider extrinsic evidence if it proves that the contract was not intended to be completely integrated.<sup>58</sup> In order to prove the intention to enter into a completely integrated contract, parties started including an EA clause in the contractual text. Traditionally, courts have found the presence of an EA clause to be conclusive evidence of the parties' intention to enter into

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<sup>54</sup> JM Smits, 'Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures' (2007) 67 *La.L.Rev.* 1181, 1183.

<sup>55</sup> Wallach speaks about the 'private parol evidence rule', see GI Wallach, 'Declining Sanctity of Written Contracts-Impact of the Uniform Commercial Code on the Parol Evidence Rule' (1979) 44 *Mo.L.Rev.* 651, 677.

<sup>56</sup> Farnsworth on Contracts (n 47), para 7.3, 233; Fontaine and De Ly (n 12), 118.

<sup>57</sup> UCC § 2-202 (amended 2002); Restatement (Second) of Contracts § 213 (1981).

<sup>58</sup> Restatement (Second) of Contracts § 209(3) (1981).

a completely integrated contract.<sup>59</sup> However, this strict interpretation has since been relaxed. As Wallach wrote '[...] the erosion which the parol evidence rule has undergone under the Uniform Commercial Code is being paralleled, as yet to a significantly lesser degree, by an erosion of the impact of merger clauses.<sup>61</sup> Restatement Second then pointed out that 'a writing cannot of itself prove its own completeness.<sup>62</sup> This view has been picked up by a large amount of court decisions stating that the EA clause is a strong, but only one evidence to

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<sup>59</sup> Farnsworth on Contracts (n 47), para 7.3, 233; Wallach (n 55), 677; from a vast amount of case law, see e.g. *ADR North America, L.L.C. v Agway, Inc.*, 303 F.3d 653 (6<sup>th</sup> Circ. 2002) ('... a written integration clause is conclusive evidence that the parties intended the document to be the final and complete expression of their agreement and that the parties intended to supersede any prior contract on the same subject matter ...'); *Wayman v Amoco Oil Co.*, 923 F.Supp. 1322 (D. Kansas 1996) (EA clause given effect although not read); *Smith v Central Soya of Athens, Inc.*, 604 F. Supp. 518 (EDNC 1985) ('The existence of a merger clause generally provides unambiguous and unassailable evidence of the parties' intent with reference to the terms of the contract. It clearly precludes a court from admitting extrinsic evidence on a theory that the writing was not a final expression.');

*Rahemtulla v Hassam*, 539 F.Supp.2d 755 (M.D. Pa. 2008) ('Where a written contract contains an integration clause, the law declares the writing to not only be the best, but the only evidence of [the parties'] agreement.');

*Harbour Town Yacht Club Boat Slip Owners' Ass'n v Safe Berth Management, Inc.*, 421 F.Supp.2d 908 (D.S.C. 2006) ('... if the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term thereto. The parol evidence rule is particularly applicable where the writing in question has an integration clause.');

An EA clause is applied even in a stricter manner where one of the parties is the state, see e.g. *Sterling, Winchester & Long, L.L.C. v U.S.*, 83 Fed.Cl. 179 (Fed. Cl. 2008) ('When a document contains an integration clause, no additional terms may be added, whether consistent or inconsistent, through parol evidence.').

<sup>60</sup> This view still prevails in certain jurisdictions, such as N.Y., see A Schwartz and RE Scott, 'Contract Interpretation Redux' (2010) 119 *Y. L. J.* 926, 928.

<sup>61</sup> Wallach (n 55), 678.

<sup>62</sup> Restatement (Second) of Contracts § 210, comment b (1981).

be considered in determining parties' intention in regard to contract's integration.<sup>63</sup><sup>64</sup>

In relation to this, the question whether the clause was negotiated by the parties has gained importance. When EA clauses came to use, contractual parties were aware of why they included such a clause into their contract. This is, however, not common nowadays when EA clauses have to a large extent become standardized and included in commercial contracts as a part of boilerplate provisions. This has raised doubts about the factual intention of the parties, the understanding and the use of EA clauses.<sup>65</sup> Nowadays, it is widely accepted that non-negotiated EA clauses may be qualified as unconscionable,<sup>66</sup> and therefore easier dislodged.<sup>67</sup> A connected issue is the character of and the power balance between the contractual parties. The courts are more willing to give effects to an EA

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<sup>63</sup> JM Perillo, *Calamari and Perillo on Contracts* (6th edn, St Paul: West 2009), para 3.6 (hereinafter *Calamari and Perillo on Contracts*); from vast amount of case law, see e.g. *Enrico Farms, Inc. v H. J. Heinz Co.*, 629 F.2d 1304 (9<sup>th</sup> Circ. 1980) ('... an integration clause in the written agreement is not necessarily conclusive as to the parties' intent to include their entire agreement in the writing.');

*Mecklenburg Furniture Shops, Inc. v MAI Systems Corp.*, 800 F.Supp. 1328 (W.D.N.C. 1992) ('... where the instrument contains an integration clause, that clause may well be conclusive on the issue of integration. Nonetheless, the court must not limit its consideration to the integration clause. Rather, the court should consider all the surrounding circumstances, including the prior negotiations of the parties, and the terms of the collateral agreement.');

*Sicor Ltd. v Cetus Corp.*, 51 F.3d 848 (9<sup>th</sup> Circ. 1995) ('... an integration clause in the written contract is but one factor in this analysis');

*Judson Atkinson Candies, Inc. v Kenray Associates, Inc.*, 719 F.3d 635 (7<sup>th</sup> Circ. 2013) ('Because an integration clause is only some evidence of the parties' intentions, the court should consider an integration clause along with all other relevant evidence on the question of integration. As such, the mere inclusion of an integration clause does not control the question of whether a writing is or was intended to be a completely integrated agreement.');

*Budnick Converting, Inc. v Nebula Glass Intern., Inc.*, 866 F.Supp.2d 976 (S.D. Ill. 2012) ('... a merger or integration clause is strong evidence of the parties' intent, not only to be bound by the agreement, but to have it override conflicting provisions that may have been contained in previous or contemporaneous dealings between the parties ...');

*Haywood v University of Pittsburgh*, 976 F.Supp.2d 606 (W.D. Pa. 2013) ('An integration clause which states that a writing is meant to represent the parties' entire agreement is also a clear sign that the writing is meant to be just that and thereby expresses all of the parties' negotiations, conversations, and agreements made prior to its execution.')

<sup>64</sup> This view prevails for example in California, see Schwartz and Scott (n 60), 928.

<sup>65</sup> RJ Mooney, 'A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule' (2005) 84 *Or.L.Rev.* 369, 387 (If, however, as is more generally true, one or both parties did not read the clause, did not understand it, or had no realistic choice with respect to it, the court should declare it to be unenforceable boilerplate...).

<sup>66</sup> UCC § 2-302 (amended 2002); Restatement (Second) of Contracts § 208 (1981). See also KL Macintosh, 'When Are Merger Clauses Unconscionable?' (1988) 64 *Dem.U.L.Rev.* 529; and *Seibel v Layne & Bowler, Inc.*, 56 Or.App. 387 (Or. Ct. App. 1984).

<sup>67</sup> *Calamari and Perillo on Contracts* (n 63), para 3.6.

clause if both parties are experienced commercial subjects with a comparable negotiation power.<sup>68</sup>

### 3.2. EA CLAUSES AND CONTRACT INTERPRETATION

If given effect, an EA clause will prevent extrinsic evidence in determining the content of a contract. However, it will generally not affect the use of extrinsic evidence for interpreting ambiguities in the contractual text.<sup>69</sup> This means that in a dispute decided upon by a US court about a contract including an EA clause, the judge should proceed in the following way. First he should decide whether the contract is a (fully) integrated one taking into consideration the merger clause. If the answer is positive, then he moves to the question of what is the content of the contract. In answering this question, he will disregard any extrinsic evidence that would contradict, modify or add any terms to the actual contractual text. Finally, if there are any ambiguities in the contract, he will interpret the meaning of such provisions with the aim of respecting the parties' intention. When interpreting the contractual text, he may use all extrinsic evidence. However, following the formalist (textual) interpretation, the extrinsic evidence must not contradict the contractual text.<sup>70</sup> While this process seems quite straightforward, it is not as simple to follow in practice as the issues of determining the contractual content and its interpretation may overlap and may be (and indeed often are) easily confused.<sup>71</sup>

In order to avoid confusion and give effect to an EA clause in regard to contract interpretation, it is advised that the parties expressly refer to what cannot be used when explaining the meaning of a contractual text. Such a clause could read as follows:<sup>72</sup>

This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained

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<sup>68</sup> *Rumsfeld v Freedom NY, Inc.*, 329 F.3d 1320 (Fed. Cir. 2003) ('Where, as here, the parties are both commercial entities or the government, integration clauses are given particularly great weight.').

<sup>69</sup> Restatement (Second) of Contracts § 216, comment e (1981) ('But such a [EA] clause does not control ... the interpretation of the written terms.');

see also GB Smith and TJ Hall, 'Merger Clauses and Parol Evidence Rule' (New York Law Journal, 20 February 2015), <http://www.newyorklawjournal.com/id=1202718353003/Merger-Clauses-and-Parol-Evidence-Rule?slreturn=20170124032213>.

<sup>70</sup> UCC § 2-202 (b) (amended 2002).

<sup>71</sup> MN Kniffin, 'Conflating and Confusing Contract Interpretation and The Parol Evidence Rule: Is The Emperor Wearing Someone Else's Clothes?' (2009) 62 *Rutgers L.Rev.* 75, 80-81. From scholarship, see example in Fontaine and De Ly, who categorize EA clauses as interpretation clauses despite their original purpose (i.e. to invoke the parol evidence rule), while discussing their effects both on contract determination and interpretation, see Fontaine and De Ly (n 12), chapter 3 (C).

<sup>72</sup> Example borrowed from Stark (n 53), para 18.05.



in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be explained, supplemented, or qualified through evidence of trade usage or a prior course of dealings.

### 3.3. SUMMARY ON US LAW

To summarize, under American law EA clauses are an important – though generally rebuttable – evidence of the parties’ intention to conclude an integrated contract.<sup>73</sup> Thus, it has exclusionary effect in determining the content of the contract, but – unless expressly stated – it does not affect the interpretation of the meaning of the text. The weight assigned to an EA clause is decided on a case-to-case basis<sup>74</sup> and depends, among other things, on the way the provision is drafted and the types and power of the contractual parties. It is thus advised that if contractual parties indeed want to secure enforceability of an EA clause in the USA, it should be carefully drafted and made as conspicuous as possible, for example by using bold letters.<sup>75</sup>

## 4. EA CLAUSES UNDER DANISH LAW

This part of the article moves to the analysis of the use of EA clauses in contracts governed by Danish law. Before entering into analysis of EA clauses under Danish law, a basic overview of Danish (contract) law is needed.

### 4.1. BACKGROUND COMMENTS ON THE DANISH LEGAL SYSTEM

While Danish law is commonly classified as pertaining to the civil law family, it is more correct to classify it as belonging to the Nordic legal subfamily as it carries features that distinguishes it from the Germanic and Romanic legal systems.<sup>76</sup> For example, the Nordic countries have not adopted the structure typical for civil legal systems.<sup>77</sup> Neither do they operate with big codifications, but with statutes dealing with specific

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<sup>73</sup> In fact, omission of an EA clause has been taken into consideration by some courts when determining completeness of contracts; see e.g. *Rajala v Allied Corp.*, 66 B.R. 582 (D. Kansas 1986).

<sup>74</sup> *Steak n Shake Enterprises, Inc. v Globex Company*, 110 F.Supp.3d 1057 (D. Colorado 2015).

<sup>75</sup> Stark (n 53), para 18.01 and para 18.03. See also *Seibel v Layne & Bowler, Inc.*, 56 Or.App. 387 (Or. Ct. App. 1984) (‘We think that a merger clause which would deny effect to an express warranty must be conspicuous to prevent an even greater surprise.’).

<sup>76</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 2011), part IV; however, Nordic legal systems are sometimes considered as a separate legal family, see e.g. J Lookofsky, ‘Desperately Seeking Subsidiarity: Danish Private Law in the Scandinavian, European, and Global Context’ (2009) 161 *Duke J.Comp.& Int’l L.* 161, 170.

<sup>77</sup> Lookofsky (n 76), 170.

topics.<sup>78</sup> In the contract law area, the Sale of Goods Act (*købeloven*)<sup>79</sup> and the Contracts Act (*aftaleloven*)<sup>80</sup> are the most important ones. These statutes date back to 1906 and 1917, respectively, and are examples of the Nordic legal cooperation which has led to the statutes being adopted not only by Denmark, but also by Sweden and Norway.<sup>81</sup> The acts are characterized by not being as exhaustive as civil codifications tend to be; rather they reflect the general principles of contract law, contract formation and contractual obligations.<sup>82</sup> For example, there is no general statutory regulation of contract interpretation, thus leaving this matter to the courts.<sup>83</sup> Hence, the courts play a particular role in the development of the law in areas like the one dealt with in the present article. Though courts do rely on previous decisions,<sup>84</sup> it is worth noting that Denmark does not adhere to the doctrine of *stare decisis*.<sup>85</sup> Instead, judges may simply signal what arguments led them to decide in a particular way,<sup>86</sup> and this combination of little non-exhaustive statutory regulation and the lack of official *stare decisis* has been described as ‘statutory light’ and ‘precedent light’.<sup>87</sup>

The fact that EA clauses are not subject to particular statutory regulation in Denmark makes it important to understand how the Danish judiciary approaches determination of contractual content and contract interpretation in order to predict the implications of including an EA clause in a contract governed by Danish law. Thus far, very few decisions from Denmark have been identified as clearly dealing with this issue, though as previously explained, EA clauses are increasingly being used by Danish corporations in contracts governed by Danish law. Two decisions by the Copenhagen Maritime and Commercial Court (*Sandrew Metronome International v Angel Scandinavia*<sup>88</sup> and *Rotate Aviation v Air Kilroe*<sup>89</sup>), however,

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<sup>78</sup> O Lando et al., *Restatement of Nordic Contract Law* 14 (Djøf 2016) (hereinafter *Restatement of Nordic Contract Law*), 14; P Møgelvang-Hansen, ‘The Nordic Tradition: Application of Boilerplate Clauses Under Danish Law’ in Cordero-Moss ed., *Boilerplate Clauses* (n 1), 233.

<sup>79</sup> Lovbekendtgørelse af 17.2.2014 nr. 140 Købelov (Købeloven).

<sup>80</sup> Lovbekendtgørelse af 2.3.2016 nr. 193 om aftaler og andre retshandler på formuerettens område (Aftaleloven).

<sup>81</sup> On Nordic cooperation, see Nielsen (n 31), 38-40.

<sup>82</sup> P Møgelvang-Hansen, ‘Contracts and Sales in Denmark’ in B Dahl et al., *Danish Law in a European Perspective* (2nd edn, Karnov 2002), 238.

<sup>83</sup> *Restatement of Nordic Contract Law* (n 78), 28.

<sup>84</sup> T Håstad (ed), *The Nordic Contracts Act: Essays in Celebration of Its One Hundred Anniversary* (Djøf 2015), 25-28 (at 28 stating that ‘... the Danish ... Supreme Court has changed over the last two decades from being a court of *appeals* to becoming a court of *precedents*.’).

<sup>85</sup> *Restatement of Nordic Contract Law* (n 78), 18.

<sup>86</sup> Lookofsky (n 76), 177-178.

<sup>87</sup> Lookofsky (n 76), 178.

<sup>88</sup> SH2005.H-0132-02.

<sup>89</sup> SH2012.H-0011-11.

do consider the implication of an EA clause, though due to the less formalistic approach by the Danish judiciary, the background law is not possible to decipher. While in the former case the Copenhagen Maritime and Commercial Court ignored the EA clause, in the latter the court adhered to it entirely; in both cases without further explanation as to the applicable background law. Instead, the court relied fully on contract interpretation as it saw fit in both decisions.

Most likely, the court in *Sandrew Metronome International v Angel Scandinavia* did not rely on any particular law. When deciding disputes, especially in the area of contract law, Danish judges are often unwilling to or not able to rely on strict formal statutes as these are very limited and even when such are available, they generally do not feel strictly bound by the wording of such statutes.<sup>90</sup> Instead, the judges will aim to reach a reasonable and fair outcome.<sup>91</sup> One scholar has described the ways of the Danish judiciary as one where the judge has an idea about the outcome and then reasons backwards to test the correctness of his conclusion.<sup>92</sup> This particular style may seem unfamiliar and perhaps even inappropriate to lawyers outside the Nordic region, and the Danish courts have indeed been criticized for their lack of transparency and predictability when they decide without any clear legal basis. One author critically describes the courts as giving oracle-like decisions.<sup>93</sup> However, dealing with contractual disputes through a weighing of values, principles and considerations of the particular trade rather than by formal rules is also a pragmatic one, and it has proved to be both an effective and respected way of dispute resolution.<sup>94</sup>

To provide but one example of the style of the Danish judiciary, one may again turn to *Sandrew Metronome International v Angel Scandinavia*.<sup>95</sup> The decision by the court is reasoned entirely by facts and is rather short – approximately 500 words. In no place does the court refer to applicable law, rules or principles. This style of the Danish judiciary is common in

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<sup>90</sup> Restatement of Nordic Contract Law (n 78), 16.

<sup>91</sup> The statutory expression of the principle of reasonableness can be found in Art 36 of the Contracts Act.

<sup>92</sup> J Lookofsky, 'The Limits of Commercial Contract Freedom: Under the UNIDROIT "Restatement" and Danish Law' (1998) 46 AJCL 485, 489-490.

<sup>93</sup> C Torp, 'I Anledning af Højesterets 250-aarige Bestaaen' (1911) Ugeskrift for Retsvæsen B 49, 54. See also MB Andersen, *Grundlæggende aftaleret* (4th edn, Gjellerup 2013), 446.

<sup>94</sup> Hästad (ed) (n 84), 30 ('For a pragmatist the *consequences* of a rule may be more important than its *contents*.').

<sup>95</sup> See also *Bonansa v Bombardier* Copenhagen Maritime and Commercial Court 1 December 2008 CISGNORDIC.net ID: 081201DK in which a similar approach is followed in clearly international contractual disputes. However, compare *MJM Athletic Surplus v Con.com* Copenhagen Maritime and Commercial Court 26 February 2010 CISGNORDIC.net ID: 100226DK in which the court's reasoning was clearly based on application of the CISG.

decisions both involving domestic as well as international disputes, and it makes it difficult to draw general conclusions to be followed in the future. Though particularly international disputes may place on the court a duty to carefully consider conflict of law rules or rules aiming at achieving uniformity in the field, the Danish judiciary has not felt compelled to change their style.<sup>96</sup>

#### 4.2. THE INSEPARABLE ISSUES OF CONTRACTUAL CONTENT AND CONTRACT INTERPRETATION

Danish contract law does not distinguish between determining the contractual content and contract interpretation as is done in common law.<sup>97</sup> As described above, in the USA the judge will first establish which terms form the contract and then interpret them. At least that is the starting point, although often confused in practice and theory.<sup>98</sup> In Denmark as well as in other civil law countries the two steps merge together. Ascertaining the borders of a contract – i.e. which terms are in and which are out – is a part of the contract interpretation exercise. Thus, as a result of interpretation, a term may be supplemented by other documents or even added to the contractual text.

The parol evidence rule is not known in Denmark. When interpreting a contract, including the determination of its borders, a Danish judge will consider the intention of the parties at the time of the conclusion of the contract.<sup>99</sup> Quite naturally, the intention is proven primarily by the text of the contract.<sup>100</sup> Prior negotiations, statements and agreements, whether written or oral, are thus *prima facie* irrelevant,<sup>101</sup> however, they may be furnished as proof without any restrictions according to the principle of freely admissible evidence in section 344 of the Administration of Justice Act.<sup>102</sup> The presence of an EA clause in a contract challenges this free admissibility of extrinsic evidence and is dealt with below.

<sup>96</sup> J Lookofsky, 'De danske domstoles håndtering af CISG' (2012) 2012(27,28,29) Ugeskrift for Retsvæsen B 281, 281-289.

<sup>97</sup> P Høghberg, 'Avtaletolkning' in MB Andersen et al. (eds), *Aftaleloven 100 år: Baggrund, status, udfordringer, fremtid* (Djøf 2015), 161.

<sup>98</sup> N 79

<sup>99</sup> Møgelvang-Hansen (n 82), 254.

<sup>100</sup> NJ Clausen et al., *Dansk Privatret* (19th ed., Djøf 2016), 140.

<sup>101</sup> Ugeskrift for Retsvæsen 1973.338 H (The Supreme Court decided that witness statement on prior negotiation is not admissible as the contract included a clear provision on the disputed matter.).

<sup>102</sup> Lovbekendtgørelse af 13.10.2016 nr. 1257 Retsplejeloven § 344. B Gomard, HVG Pedersen and A Ørgaard, *Almindelig Kontraktret* (5th edn, Djøf 2015), para 3.2.2; JM Lookofsky, *Consequential Damages in Comparative Context* (Djøf 1989), 59 (describes this as 'a Scandinavian version of the [parol evidence] rule.').

#### 4.3. PRINCIPLES GUIDING THE JUDICIARY

The pragmatic approach taken by Danish courts is not to be equated with an absolute power by the judge to render the decision he desires, nor is it to be understood as a complete vacuum of law in which no guidelines exist. Rather, the Danish judiciary adheres to a number of considerations. These considerations permeate the Danish legal system in general and in particular the field of contract law. To understand how the judiciary may receive EA clauses in practice requires insight into those guiding principles. Hence, they are elaborated further below as they explain the somewhat inconclusive answer to the question raised in this article.

The interpretation rules contained in the UNIDROIT Principles of International Commercial Contracts (hereinafter UNIDROIT Principles 2010) are similar to those applying in Danish law.<sup>103</sup> In relation to the topic of this article, it is worth noting that Danish interpretation rules include interpretation in accordance with the common intention of the parties,<sup>104</sup> interpretation of communication in line with a party's intentions when the other party could not be unaware of it,<sup>105</sup> and that all circumstances may be relied upon to demonstrate the party's/parties' intentions.<sup>106</sup>

The principle according to which any circumstance may be relied upon also links to the general rules on legal procedures that any evidence is permissible and can be weighed by the judge without any formal restrictions.<sup>107</sup> This principle goes before the parties' agreement regarding evidence,<sup>108</sup> and upholding clauses restricting this principle would be to uphold agreements not anchored in the will of the parties since the parties are precluded from proving the contents of the agreement that was in fact made.<sup>109</sup> However, there are authors calling for caution in setting aside an EA clause since the commercial parties' contractual freedom combined with the principle of *pacta sunt servanda* should prevail over the procedural rules in relation to evidence.<sup>110</sup> Though this may be true, Danish law relies heavily on considerations often tied to non-contractual circumstances. Due to the principle of freedom of form and since evidence can be freely admitted, agreements are interpreted as a whole, meaning that the parties may refer to the purpose of the agreement, gap-filling rules, written and oral communication, previous and subsequent conduct, usual conduct in

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<sup>103</sup> Andersen (n 93), 312.

<sup>104</sup> UNIDROIT Principles 2010 Art 4.1; Restatement of Nordic Contract Law (n 78), para 5-1.

<sup>105</sup> UNIDROIT Principles 2010 Art 4.2; Restatement of Nordic Contract Law (n 78), para 5-2.

<sup>106</sup> UNIDROIT Principles 2010 Art 4.3; Restatement of Nordic Contract Law (n 78), para 5-5.

<sup>107</sup> Lovbekendtgørelse af 13.10.2016 nr. 1257, Retsplejeloven, para 344.

<sup>108</sup> Andersen (n 93), 328.

<sup>109</sup> Andersen (n 93), 328.

<sup>110</sup> Gorton (n 12), 8.

the trade, etc.,<sup>111</sup> as expressed in section 5-5 of the Restatement of Nordic Contract Law:

*In interpreting a contract [...] due consideration must be given to all the relevant circumstances of the relationship, and in particular to: (a) the wording of the contract; (b) the nature and purpose of the contract; (c) the circumstances in which the contract was concluded, including the preliminary negotiations; (d) the conduct of the parties, including conduct subsequent to the conclusion of the contract; (e) the interpretation which the parties have previously given to similar clauses and the practices established between the parties; (f) rules of law, usage and the meanings commonly given to terms and expressions in the branch of activity concerned; (g) reasonableness and loyalty; and (h) the principles in § 5-6 to § 5-10.*<sup>112</sup>

When engaged in contract interpretation, Danish law and the Danish judiciary do not distinguish clearly between contract interpretation and gap-filling. Rather, the two are seen as parts of an integrated process utilizing various methods and rules; hence it is crucial to know that the judiciary relies on a number of considerations that permeate the interpretation process.<sup>113</sup> Several considerations may be taken into account, and the most salient ones are described below. It is important to stress that these principles do not form part of a hierarchical structure. Instead, they must be balanced.<sup>114</sup> The considerations that may be relied upon contradict each other and form an enigma of equally plausible reasons for a particular court decision. The enigma consists of at least three primary considerations and a number of variations of them.

The first one is the consideration of the promisor's intentions according to which the judiciary is occupied by reaching an interpretation of the contract that does not impose an obligation on the promisor that it would usually not assume.<sup>115</sup> This entails two things. First, the subjective will of the promisor is relied upon to determine the agreement between the parties when the promisee could not be unaware of that intention.<sup>116</sup> The reasonable person standard plays a role when determining what the promisee should have been aware of.<sup>117</sup> Second, the parties' implied expectations may be decisive in determining the content of the agreement between them and where those implied expectations do not hold true, it may be a reason for modifying or setting aside the agreement in part or in total according to paragraph 36 of the Danish Contracts Act.<sup>118</sup> In relation to EA clauses, it is relevant to know that the parties' presumptions, that may not necessarily be expressed in the wording of the contract, may be

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<sup>111</sup> Andersen (n 93), 310-311.

<sup>112</sup> Restatement of Nordic Contract Law (n 78), para 5-5.

<sup>113</sup> Andersen (n 93), 312.

<sup>114</sup> MB Andersen and E Runesson, 'An Overview of Nordic Contract Law' in Andersen et al. (n 97), 39.

<sup>115</sup> Andersen et al. (n 97), 39.

<sup>116</sup> Andersen (n 93), 448.

<sup>117</sup> Andersen (n 93), 448. See also Restatement of Nordic Contract Law (n 78), para 5-4.

<sup>118</sup> Andersen (n 93), 448-449.

relied upon by the court to interpret the parties' agreement or to render parts of it invalid.<sup>119</sup>

The second consideration is whether to protect the promisee's reliance in the promisor and to uphold the understanding the promisee had of the promise made by the promisor.<sup>120</sup> This entails securing a predictable supply chain by not allowing deviations from the promisee's reasonable understanding of the promise made, by upholding the contract, and by protecting justified expectations that are based on or verified by for example conduct of the party/parties, practice between them, or usage in the trade.<sup>121</sup> Thus, it may be that a court would be reluctant to blindly apply an EA clause if it means to exclude considerations protecting the promisee's reliance when it appears only from non-contractual circumstances.

The third consideration is of public interest, such as eliminating unreasonable contract practice, protecting certain parties, or creating incentives for a certain behaviour.<sup>122</sup> Often, such considerations include thoughts on distribution of risk, protecting weak parties, promoting loyal behaviour, and discouraging abuse of legal or contractual rights.<sup>123</sup>

When two or more guiding principles are relevant for the dispute at hand, but they contradict each other, a weighing is necessary. This weighing is not governed by any rules. Instead, the judiciary will consider whether giving preference to one or the other consideration leads to a desired distribution of risk between the parties, and whether the result appears to be proportional.<sup>124</sup>

Therefore, knowing that non-contractual circumstances form an integrated part of establishing both the content of the parties' agreement as well as interpreting it, makes it difficult to support that EA clauses will have an effect resembling the one known in US law when the contract is governed by Danish law and decided upon by a Danish judiciary. It may simply be asking too much of the judiciary, and despite the lack of transparent reasoning in Danish court decisions, this article shall attempt to address the possible implications of EA clauses in a Danish context immediately below.

#### 4.4. POSSIBLE IMPLICATIONS OF EA CLAUSES GOVERNED BY DANISH LAW

Considering the many guiding principles, the unwillingness of Danish courts to adhere to strict formalistic rules, the sparse reasoning in

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<sup>119</sup> Andersen (n 93), 57-58.

<sup>120</sup> Andersen and Runesson (n 114), 40.

<sup>121</sup> Andersen (n 93), 449-459.

<sup>122</sup> Andersen and Runesson (n 114), 40.

<sup>123</sup> Andersen (n 93), 455-462.

<sup>124</sup> Andersen (n 93), 468-471.

decisions, and the low amount of decisions on EA clauses make it difficult to predict the effect of EA clauses governed by Danish law.

On one hand, *Sandrew Metronome International v Angel Scandinavia* shows that the judiciary is willing to consider extrinsic evidence no matter the unequivocal inclusion of an EA clause in the contract. In the particular dispute, ANGEL SCANDINAVIA had sublicensed the right to distribute a movie to movie theatres in Sweden, Norway and Finland, as well as the right to distribute the movie outside theatres in Denmark, Sweden, Norway and Finland to METRONOME INT'L. The latter were to pay for the sublicense by paying royalties, though a minimum payment of DKK 6 million was agreed upon. ANGEL SCANDINAVIA reserved the right to distribute the movie to theatres in Denmark. The dispute concerned whether the guarantee of a minimum royalty payment provided by METRONOME INT'L for the distribution of the movie should be reduced by the income ANGEL SCANDINAVIA had from distributing the same movie to theatres in Denmark. The dispute involved both the sublicense agreement and a number of standard documents. To shed light on the understanding of the royalty calculations, reference to the negotiations was made.

The decision rendered by the Copenhagen Maritime and Commercial Court illustrates not only the dissociation from the applicable background law by the court in its reasoning, but also that the circumstances of the dispute are weighed in light of the considerations described previously. The parties neither disputed that the EA clause formed a part of the agreement, nor did any of them argue that it was invalid. One party argued that the EA clause was irrelevant since there was no contradiction between the prior negotiations, the correspondence between the parties, and the final contract. The other party argued that the EA clause prohibited any extrinsic evidence. The court stated in its extremely brief reasoning that the understanding of the disputed crossing clause were to be based on an *'overall assessment of the parties' agreement, including the Schedule of Definitions, the General Terms and Conditions, the Standard Terms, the Delivery Schedule, and the prior negotiations.*<sup>125</sup> Hence, it seems like the EA clause was ignored by the court as it was willing to conduct an overall assessment of the contract and prior negotiations regardless of whether those were contradictory or not. On this background, it is questionable whether the inclusion of an EA clause in a contract will have any effect resembling what is expected under US law. Instead, it seems that EA clauses in a Danish context place the judiciary in a quandary; first, by asking it to distinguish between contract determination and contract interpretation, and second, by asking it to adhere to strict rules of formality contrary to the pragmatic principle-guided approach normally applied. In the case of *Sandrew Metronome International v Angel Scandinavia* there is no

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<sup>125</sup> *Sandrew Metronome International v Angel Scandinavia*, p. 20. Translation of the original text by Thomas Neumann.



evidence that the court considered the parties' intention of including the EA clause, thus setting aside both the principle according to which the understanding that will give terms of the contract effect is preferred<sup>126</sup> and the party autonomy.

On the other hand, one of the considerations is in fact the protection of the parties' will. In *Rotate Aviation v Air Kilroe* the court decided to uphold an EA clause agreed upon. More specifically, the court had to decide whether or not the meaning expressed in a letter of intent could be used to shed light on an understanding of the final sales contract. The dispute concerned whether ROTATE AVIATION was entitled to payment for acting as an agent regarding the sale of three aeroplanes from AIR KILROE to BLUE AIR. ROTATE AVIATION's efforts had resulted in BLUE AIR signing a letter of intent to purchase and to deposit a refundable sum and later non-refundable sums depending on the approval of the aeroplanes at a pre-inspection. Later, BLUE AIR decided to not take delivery of the aeroplanes and demanded the deposits to be returned with reference to the letter of intent. With reference to the agency agreement, ROTATE AVIATION demanded half of the non-refundable sums as payment for its efforts. As a part of sorting out the contractual relationship between AIR KILROE as the seller and BLUE AIR as the buyer, the court stated expressly that according to the EA clause contained in the sales contract '[...] the letter of intent cannot be given consideration.'<sup>127</sup> The court gave preference to the unequivocal and undisputed EA clause, thus following the supremacy of party autonomy and in turn also decided that ROTATE AVIATION as an agent could not rely on the initial letter of intent. The decision excluded terms of returning deposits from the letter of intent and gave preference only to the refund clauses contained in the final agreement. Thus, ROTATE AVIATION's share of the non-refundable deposits were calculated based on the main agreement leaving aside the letter of intent due to the EA clause included in the final agreement, but not in the letter of intent.

One way of reconciling these otherwise divergent decisions is looking towards the background of the parties in dispute. The Danish judiciary will often do this as a part of a three-step approach to contract clauses in dispute: is the clause agreed upon(?), how is the clause to be interpreted(?), and is the clause so unreasonable that it should be set aside or changed(?).<sup>128</sup> In neither of the two cases addressed previously was it disputed that the EA clause had been agreed upon, leaving it to the court to decide on the interpretation and effect of the clause, but in doing so, the court moved beyond the four corners of the contract.

In *Sandrew Metronome International v Angel Scandinavia* both parties were from Scandinavian countries. The former most likely from Sweden and

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<sup>126</sup> Restatement of Nordic Contract Law (n 78), para 5-7.

<sup>127</sup> *Rotate Aviation v Air Kilroe*, p. 16. Translation of the original text by Thomas Neumann.

<sup>128</sup> LL Andersen and PB Madsen, *Aftaler og Mellemand* (6th edn, Karnov 2012), 27.

the latter from Denmark. This means that the dispute essentially was between parties from the same Nordic legal tradition. A tradition that normally does not adhere to strict requirements in respect to contract form as explained earlier. In contrast, the parties in *Rotate Aviation v Air Kårløe* were from Denmark and the UK respectively, meaning that the dispute was a civil law/common law one. The parties could rightfully be thought to have different expectations as to the effect of an EA clause. The court could have considered this aspect in its decision, but due to the unfortunate tradition of oracle-like decisions, it is not possible to decipher this from the decisions themselves. A qualified guess is that the judiciary has followed the familiar three-step approach to tease out the proper application of the EA clause, thus ignoring the American effects and intentions behind such EA clauses and instead given priority to the likely expectations of the parties in the specific disputes.

#### 4.5. FINAL REMARKS ON THE TREATMENT OF EA CLAUSES UNDER DANISH LAW

There seems to be a common understanding in the Nordic scholarship that an EA clause can limit, but not eliminate the free admissibility of extrinsic evidence; an EA clause is considered to raise the burden of proof, i.e. particularly strong evidence is necessary to prove that the intention of the parties differs from what is expressed in the contractual text.<sup>129</sup> This conclusion seems to be grounded in the underlying values and principles of Danish (contract) law. The courts are presumed to weigh the freedom of contract against their own rules for free admissibility and assessment of evidence. As none of those principles are apparently stronger, the scholarship presumes that judges would likely give a limited effect to both.

The discussion on the two available Danish cases indicates, however, that Danish adjudicators might instead of taking the middle road turn fully one or the other way. As suggested above, the origin of the contractual parties might be the determining factor for establishing EA clauses' effect. If both parties come from Denmark (or Nordic countries for that matter), it might be too outstretched, in the face of the principle of free admission and assessment of evidence, to assign to the clause its original aim. However, if one of the parties comes from a common law country, and if the contract, although governed by Danish law, is clearly based on a common law model (and especially if there is other connection to a common law country), subjecting the EA clause to Danish interpretation

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<sup>129</sup> Møgelvang-Hansen (n 78), 236; Gomard et al. (n 102), para 3.2.2; EL Andersen and N Nørager, 'Hvorledes indgår erhvervslivet aftaler?' (2008) *Erbvervsjuridiske Tidsskrift* 34, 37; Andersen (n 93), 328.

rules might result in a situation where the clause does not make legal sense and the parties' intention is not respected.<sup>130</sup>

From the discussion so far, it becomes obvious that the scant reference to EA clauses in Danish case law can give us only hints of Danish courts' treatment of these US-originated provisions. What we can deduce is that when establishing the content of and interpreting commercial contracts in the light of an EA clause, Danish courts tend to give more importance to the underlying values and principles of reasonableness and fairness rather than going into technical details of the governing law's rules. This can be (even unconsciously) led by the objective of not compromising the Danish contract interpretation rules. Thus, the overall conclusion is that EA clauses do not keep their original function when inserted in contracts governed by Danish law, as their outcomes are at least uncertain. Does that mean that the effects of EA clauses in contracts concluded in the US jurisdiction and the Danish jurisdiction are fundamentally different?

## 5. DISCUSSION – LEGAL TRANSPLANTS, CONVERGENCE, TRANSNATIONALIZATION OR?

Part 3 and 4 above discussed the treatment of EA clauses in US and Danish law respectively. Originating in common law jurisdiction, EA clauses are foreign to civil law systems, and thus also to the Danish one. Yet, they are regularly used in contracts drafted by Danish companies and governed by Danish law. Is this practice an expression of a legal transplanting process, convergence between the two systems or neither of these, but rather a proof of transnationalization of commercial contract law?

The use of EA clauses by Danish companies can indeed be considered a legal transplant or more broadly an example of diffusion of law; a non-morally loaded rule originating from a foreign jurisdiction is through the means of commercial contracts applied in a new setting.<sup>131</sup> The question that should be answered is whether EA clauses maintain their original purpose in the Danish context.

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<sup>130</sup> For discussion on this issue, see G Cordero-Moss and C Wallgren-Lindholm in Andersen and Christoffersen (n 33); L Gorton, 'Syndicated Loans – Some Thoughts on the Reception of Anglo-American Contract Practice into Swedish Law' (2007) 18(2) *E.B.L.R.* 313, 334.

<sup>131</sup> In line with the transferists, led by Watson, such transfer of rules may successfully happen regardless of the cultural and political differences between the two jurisdictions. Though, transferists have been criticized for disregarding such differences, Watson himself clarifies that the rule in the new setting will be affected and not work exactly the same as in the original jurisdiction, see Watson (n 10), 82. We do not take a position within this article in regard to the transferists v culturalists debate; instead we take what is common for the legal transfer theory as our point of departure.

The original purpose of EA clauses was to exclude any extrinsic evidence for the purpose of construing a contract; EA clauses were not to have any effect on contract interpretation. However, nowadays, as we have described in section IV, this original purpose is not always achieved even in the US jurisdiction and has developed in two directions. On the one hand, the effects of an EA clause, once taken as the ultimate proof that contractual parties intended to conclude a fully integrated agreement, have eroded.<sup>132</sup> It is now more often taken as only one and rebuttable evidence in this respect. On the other hand, when given effect in the question of determining the contractual content, EA clauses are sometimes also given effect in respect of interpretation.

Nor in a Danish context do EA clauses fulfil the original purpose as their interpretation by adjudicators is uncertain in the sense that Danish principles of contract law and rules on evidence will in general not be overruled by the text of a commercial contract. Therefore, it may very well be that an adjudicator decides to give a full effect to an EA clause as seen in *Rotata Aviation v Air Kibroe*, but that is most probably a result of application of the principles of reasonableness and the pragmatic approach. However, it should here be stated again that this is only a qualified guess of the authors, as the brief reasoning in the case does not reveal the arguments that led the judge to decide in this way. This conclusion is nevertheless supported by the fact that the same court decided in the exact opposite direction in *Sandrew Metronome International v Angel Scandinavia*.

In light of the above, the results in individual cases in the USA and Denmark may not be as different as we could reasonably expect, taking the varying rules on contract interpretation into account.<sup>133</sup> However, the differences in the legal cultures and the divergent reasons why EA clauses are not consistently interpreted in either of the jurisdictions persist; EA clauses are treated differently in the two jurisdictions despite the similar outcomes.<sup>134</sup> This makes it impossible to assess whether we can speak of a successful legal transplant. In this situation, it is thus necessary to move beyond the legal transplants theory to explain this phenomenon and its legal implications. The theory of legal convergence, and namely the natural legal convergence, comes into discussion here.<sup>135</sup> As the business community becomes increasingly transnational, the behaviour of companies is increasingly aligned. This is the result of the effectiveness of

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<sup>132</sup> Wallach (n 55), 678.

<sup>133</sup> Gorton (n 12), 8.

<sup>134</sup> As Teubner points out speaking about 'transplants' is misleading, suggesting that the transplanted material will stay the same in the new environment, see G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11, 12.

<sup>135</sup> JH Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' (1981) 17 Stan.J.Int'l L. 357, 369-371.

the business world and its 'yearning for simplicity'.<sup>136</sup> The presence of differences between national legal systems gives rise to legal uncertainty of commercial subjects and thus may hamper international transactions.<sup>137</sup> Elimination of the differences is desirable, though not easy to attain.<sup>138</sup> Unifying contractual content through its reuse by companies is one way to achieve such a convergence. The bottom-up (natural) convergence is considered by Merryman as *'the most effective mode of convergence of laws, superior to legal transplantation and to active unification in the depth and permanence of its consequences.'*<sup>139</sup> The fact that contractual parties adjust their behaviour to the clauses might then be seen as a proof that the law develops independently from scholarship, courts and legislation.<sup>140</sup> However, in the authors' opinion, it is too soon to speak about convergence of common and civil contract law or about existence of transnational contract law. As there is neither consistency in the application of EA clauses in various jurisdictions nor a single adjudication body to decide on international contract law disputes, the national contract law systems and national courts will remain the determining factor for assigning EA clauses any legal effects. For now, the available court decisions from the jurisdictions do not show mutual appreciation between the two legal systems, although the results are not as divergent as expected. Overall, what we are experiencing seems to be convergence or transnationalization of contractual practice rather than contract law. Moreover, looking at the overwhelming prevalence of American contract models, we can even speak of Americanization of contractual practice, meaning an active reception of an American contract drafting style rather than natural convergence.<sup>141</sup>

## 6. CONCLUSION

This article examined the diffusion process of EA clauses from the US to Danish jurisdiction. Through conducted interviews and study of available literature, it was established that Danish companies use EA

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<sup>136</sup> L Nottage, 'Comment on Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 32(3) *VUWLawRw* 843, <http://www.nzlii.org/nz/journals/VUWLawRw/2001/43.html> (citing Merryman).

<sup>137</sup> Merryman (n 135 **Error! Bookmark not defined.**), 363.

<sup>138</sup> The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) has been the major effort for unification of international law of contracts so far. While ratified by 85 states (as of 22 February 2017), due to the subjection of its interpretation to national courts, the convention faces problems with its unified application.

<sup>139</sup> Merryman (n 135 **Error! Bookmark not defined.**), 371 ('Often legal transplantation and unification of laws are merely ways of formalizing a legal consensus already reached by political-cultural rapprochement.')

<sup>140</sup> V Hagström in Andersen and Christoffersen (n 33), 632.

<sup>141</sup> W Wiegand, 'Americanization of Law: Reception or Convergence?' in LM Friedmann and HN Scheiber (eds), *Legal Culture and the Legal Profession* (Westview Press 1996), 148.

clauses regularly in international contracts. However, based on a scholarship review and discussion of two Danish cases, we find that EA clauses do not always keep their original effects in contracts governed by Danish law, similarly as they do not in contracts governed by American law. From Danish case law it is obvious that Danish courts are not ready to give up their wide discretion and their decision practice based on reasonableness and pragmatism reflected in short reasoning and ‘oracle-like’ decisions.

From the conducted analysis that identified the pertaining differing approaches of the judiciaries in the two countries in regard to EA clauses, we can conclude that while we cannot truly speak of convergence between the US and Danish contract law systems, we can speak of convergence, and specifically Americanization of the Danish contracting practice in this respect. This does not seem to be the case for Denmark only, but appears to be a common observation in other civil law jurisdictions as well.<sup>142</sup> In regard to transnationalization of commercial contract law, we might thus conclude that the contract drafting process overtakes the judiciary that is more attached to national rules and values. In line with the irritant perspective on the legal transplants theory presented by Teubner, it can then be expected that the contract drafting practice will in turn influence national legal rules and the courts’ approach.<sup>143</sup> This effect can already be seen in Danish legal scholarship and its presumption that the judges will not entirely disregard EA clauses, but take a middle road in interpreting them. However, the presumption that contracting practice influences the legal rules and judiciary approach would imply that there is a clear and unified purpose behind inclusion of EA clauses into contracts by Danish companies, which the legislative and judiciary powers will aim to protect. Whether such common purpose in reality exists, is however a topic for another article.

Based on the present research, an advice to Danish as well as arguably companies from other civil law jurisdictions using EA clauses is for them to adapt the clauses to the intended purpose rather than to the governing law. This means to specify in the clause whether it is intended to have a substantive (establishing the contractual content) or interpretation related (gap-filling, clarifying ambiguities) effect; and which documents, norms and conduct are to be excluded as evidence for establishing and/or interpreting the contract. Doing so may not secure that the adjudicators would feel obliged to follow such a clause, but would make it much more difficult for them to argue against it.

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<sup>142</sup> N 13

<sup>143</sup> Teubner (n 134).