

Abstract

The project explores the relationship between contract law and the liberalised electricity supply market in Denmark and England through studying the influence of systemic public interest considerations on private contractual relations. Due to physical constraints and infrastructure requirements, electricity supply systems are ill suited to incubate competition. In the policy movement towards liberalisation, inescapable base conditions imply the need for regulatory controls of market behaviour to realise public ends. Additionally, despite efforts to isolate wholesale and retail power markets, there remains a connection to the physical market in retail supply relationships. Indeed, supply contracts are expressly relied upon as a governance tool within the (physical) organisation of the market. Accordingly, regardless of the regulatory choices made for designing retail supply arrangements, there appears to be an inescapable connection between the supply contract and regulation within liberalised supply markets. However, despite extensive sectoral regulation, concrete transactions between suppliers and end users remain contractual in essence. Thus, conditions for supply are found within the applicable contractual terms and are controlled predominately by contract law. Nonetheless, the regulatory framework holds clear potential private law implications. In this sense, contract law is exposed to the dual rationalities of the supply market: the regulatory control of behaviour (regulation) and the concurrent need for free competition (facilitation). Utilising a legal doctrinal method, the thesis considers the opaque relationship between contracts, contract law, and sectoral regulation in this dynamic context. A model of translation, as an operative process, is developed to provide a means of systematising the manner in which public norms come to be considered within contract law. Putting forward a pragmatic pluralist approach to contract law, based on the divergent orientation of pragmatism in the respective jurisdictions, the thesis considers the interaction between sectoral regulation and contract law along a spectrum of terms. The poles of this spectrum (regulated and commercial terms, respectively) reflect the fundamental duality underpinning the supply relationship within a liberalised market: systemic integrity and commercial freedom. Between these poles, hybrid terms reflect the cascading effects of regulated terms. In the absence of successful translation, both regulated and hybrid terms fundamentally challenge the classical distinction between mandatory and dispositive law. In exploring this relationship, the implications of the interaction between contract and regulation are considered across the lifespan of the contractual agreement, considering in particular the role of consent in contractual formation, discretionary aspects of performance, and the restriction of liability structures. At each stage, the prospects of successful translation are considered along with the capacity of contract law to legitimately foster this translation. Where translation is unsuccessful, or cannot be fostered legitimately within contract law, it is submitted that the hybridity of such 'instrumentalised' supply contracts challenges existing doctrinal structures. Overall, this study is undertaken to an end of promoting legal certainty and the rule of law, which in turn support efficient markets, and thus public policy goals fundamental to the legitimacy of the liberalisation process.