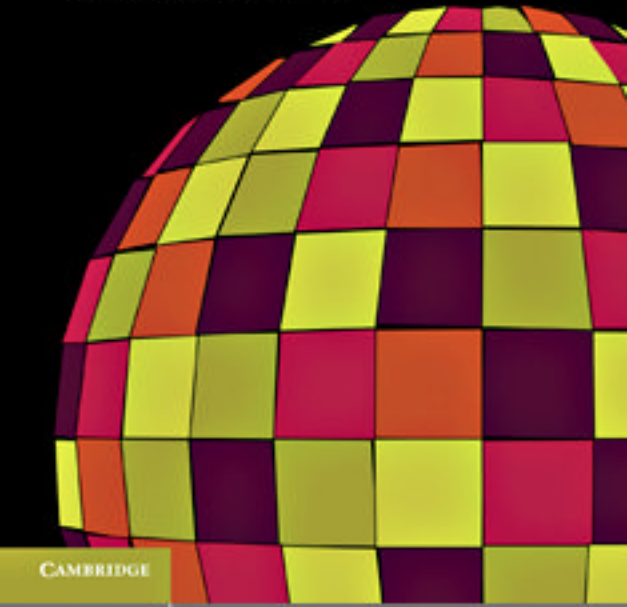
Boilerplate Clauses, International Commercial Contracts and the Applicable Law

EDITED BY
Giuditta Cordero-Moss



CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521197892

terminate the contract. The effect would be the same as where a commercial contract provides for the possibility of rescinding the contract unilaterally, no matter how substantial the breach is. The freedom of the parties' will is respected, unless it otherwise follows from statute or the nature of the obligation (Article 310 of the RCC).

If, under the circumstances, a party attempts to rescind the contract despite such a remedy being manifestly disproportional to the consequences of the breach, the opposite party might rely in its defence upon the prohibition of abuse of a legal right set forth in Article 10 of the RCC (see above).

2.5 Liquidated damages

In Russian practice, contractual clauses providing that, upon a failure of performance by one party, that party is obliged to pay an agreed sum to the other party are very common. International commercial contracts concluded by Russian entities with foreign companies do not constitute an exception in this regard.[18] As is well known, the legal concept of agreed and liquidated damages in English law and American law is not identical to the legal concept of penalty in continental laws, including Russian law.

Irrespective of the existing differences, the concept of agreed and liquidated damages is more similar to the concept of penalty in Russian law than to any other concept of that law. Consequently, the relevant contractual clause would normally be interpreted as a penalty clause under Russian law. A penalty is defined in Article 330(1) of the RCC as 'a monetary sum determined by a statute or a contract that the debtor must pay to the creditor in case of non-performance or improper performance of an obligation, in particular in case of a delay in performance'. Like the position of English law and American law, it is further added that when claiming payment of a penalty, the creditor does not have a duty to prove that he or she sustained losses.

Another alternative is to qualify such a clause as a provision specifying the amount of *damages* to be paid in case of a breach of an obligation. Russian law does not prohibit the parties from reaching such an agreement. As stated in Article 15(1) of the RCC, an aggrieved person is

[18] Very often, such contracts made in two languages use different legal terms to designate the said sum: agreed and liquidated damages in English and penalty ('neustoika') in Russian, thus creating some additional uncertainty.

entitled to full compensation of the damages suffered, unless a statute or a contract provides for a lesser amount of compensation. However, under Russian law, damages should be proved. The author is of the opinion that, in contrast with a penalty clause, the use of the adjectives 'agreed and liquidated' before the term 'damages' is not sufficient to abolish the requirement to prove the damages (see Article 330(1) of the RCC cited above). Therefore, the qualification of the clause as the damage clause under Russian law would defeat one of the main purposes of the clause, i.e., to relieve the creditor of the obligation to prove damages, which may be quite a difficult task. That is why, in my view, the analysed alternative is not a proper option.

Under English law and American law, when a contractual clause provides for payment of a sum which is manifestly excessive and unreasonable, it is then regarded as a penalty and is unenforceable. As follows from the above, in Russian law, the term 'penalty' has a broader and more neutral meaning, and denotes the clause as such, irrespective of whether the sum due is grossly excessive or not. Under Russian law, the clause providing for payment of a disproportionate sum is not void. However, a court has the right to reduce the penalty if the sum subject to payment is clearly disproportionate to the consequences of violation of an obligation (Article 333 of the RCC). The court could also exercise this power where the respondent does not make such a request. Article 333 of the RCC is a very important rule aimed at safeguarding the principle of the compensatory nature of liability for violation of obligations.[19] This very principle is characteristic of English law and American law.

One of the most notable differences of the Russian law approach to such clauses is that, as a general rule, the actual sum of compensation is not limited to the agreed sum. According to Article 394(1) of the RCC: 'If a penalty is provided for non-performance or improper performance of an obligation, then losses shall be compensated in the part not covered by the penalty.' The parties to an international commercial contract may provide otherwise in their agreement. Does the use of the English terminology 'liquidated damages' exclude the possibility of claiming damages? The answer is linked to the two alternatives to qualifying the clause (see above). I am inclined to answer the question in the negative. It could be recommended to the parties to expressly provide in their contract that a

[19] See also Informative Letter of the Presidium of the RF Supreme Arbitrazh Court, dated 14 July 1997, No. 17, entitled 'A Review of the Practice of Application by Arbitrazh Courts of Article 333 of the Civil Code of the Russian Federation'.

claim for damages is ruled out, in order to achieve the same result as where English law or American law is applied.

2.6 Sole remedy

Russian law permits the inclusion of sole remedy clauses in commercial contracts (see, in particular, Articles 15, 394, 397, 397 and 400 of the RCC). Hence, such a contract could provide for the payment of a certain amount as the sole remedy in case of a breach. Even if the aggrieved party is able to prove that the breach has caused much more substantial damage than the agreed sum, the liability of the debtor would be limited to the agreed amount. As expressly stated in Article 394(1) of the RCC, a contract may provide that recovery only of a penalty but not of losses is allowed.

However, it should be borne in mind that 'an agreement concluded in advance for eliminating or limiting liability for the intentional violation of an obligation is void' (Article 401(4) of the RCC). This is a mandatory requirement applicable to all obligations. It should be added that Article 10 of the RCC, which prohibits the abuse of a legal right, might also be applicable if the clause is manifestly unfair.[20]

2.7 Subject to contract

It is often the case that prior to concluding the main contract, the parties sign certain documents aimed at facilitating the reaching of a final agreement. The name of such documents might be different (a letter of intent, a memorandum of understanding, a protocol of negotiations, etc.). When determining whether these documents are binding on the parties, it is not their title but the contents showing the parties' intent that is of primary importance.

Under Russian law, the parties are free to enter into a preliminary contract whereby they have, in the future, a duty to conclude the main contract on the terms provided for by the preliminary contract (Article 429 of the RCC). The preliminary contract creates legal obligations and entails liability in the event of its breach.

[20] See note 8 above. See also Kanashevskiy, *Foreign Economic Transactions*, p. 166; O. N. Sadikov, *Damages in the Civil Law of the Russian Federation* (Statut Publishing House, 2009), pp. 133–157 (in Russian).

Suppose that the parties executed an instrument specifying that the failure to reach a final agreement will not expose any of them to liability. What happens if one party never really intended to enter into a final agreement and used the negotiations only to prevent the other party from entering into a contract with a third party? Russian law does not have specific provisions in this regard. The well-known Russian scholars arrive at the conclusion that the liability in such a case could be based on the general rules of the law of torts (Articles 1064–1083 of the RCC). The aggrieved party might also rely upon Article 10 of the RCC, which prohibits the abuse of a legal right in any form.[21] As stated above, the future reform of the Russian civil legislation envisages the application of the principle of good faith to the relations of the parties at the precontractual stage (see Section 1 above).

2.8 Representations and warranties

It is impossible to find direct general legal equivalents in Russian law to the notions of representations and warranties in English law and American law. Still, in certain particular instances, some equivalents could be found. The most notable examples in this regard are Article 470, 'Guarantee of Quality of the Goods', and Article 722, 'Guarantee of Quality of the Work', of the RCC. Normally, clauses providing for representations and warranties are not found in domestic commercial contracts in Russia, one notable exclusion again being provisions concerning the guarantee of quality of goods and works.

The clauses analysed under this heading often vary considerably in substance. Sometimes they are formulated in such a way that one may even doubt whether they have any legal effect under Russian law at all. Not being in a position to examine each and every clause of this kind, the discussion here will be limited to a more general legal assessment.

The legal effect of the clauses in question depends upon whether they may be qualified as an obligation. The obligation may arise from a contract and from other grounds provided by the law (Articles 8(1)

[21] M. I. Braginskiy and V. V. Vitrianskiy, *Contract Law*, Book 1, 2nd edn (Statut Publishing House, 1999), pp. 229–239 (in Russian). See also A. N. Kucher, *Theory and Practice of the Pre-Contractual Stage: The Legal Aspects* (Statut Publishing House, 2005), pp. 29–31, 210–296 (in Russian). Article 10 is reproduced in note 8 above.

and 307 of the RCC). The substance and the language of the clause may count in order to determine the existence of the obligation.

Two situations should be distinguished further in case of a breach by a party of the representations and warranties having legal effect. First, when the contract remains valid, the aggrieved party is then entitled to damages and other available remedies (Articles 15, 309–310, 393–396 and 453(5) of the RCC). Secondly, when the contract is invalid, this generally entails restitution (Article 167)[22] and the application of the rules on unjust enrichment (Articles 1102–1109).

Two more articles of the RCC dealing with specific grounds of invalidity of a transaction are directly relevant: Article 178 on the invalidity of a transaction made under the influence of misapprehension;[23] and Article

[22] Article 167 of the RCC runs as follows:

1. An invalid transaction does not entail legal consequences other than those that are connected with its invalidity and is invalid from the time of its making.
2. In case of the invalidity of a transaction, each of the parties has the duty to return to the other everything received under the transaction and in case of the impossibility of returning what was received in kind (including when what was received consisted of the use of property, work done, or services provided) to compensate for its value in money, unless other consequences of the invalidity of the transaction are provided by a statute.
3. If from the content of a voidable transaction it follows that it may only be terminated for the future, the court, declaring the transaction invalid, shall terminate its effect for the future.

It should be pointed out that the RCC does not envisage the application of the law of torts in such cases. As a general rule, this code makes it possible to claim full compensation for harm from the tortfeasor.

[23] Article 178 of the RCC states:

1. A transaction made under the influence of a misapprehension having a substantial significance may be declared invalid by a court on suit of the party that acted under the influence of the misapprehension.

   A misapprehension has a substantial significance if it is with respect to the nature of the transaction or of the identity or other qualities of its subject that significantly reduce the possibility of using it for its purpose. A misapprehension concerning the motives of the transaction does not have a substantial significance.
2. If a transaction is declared invalid as made under the influence of a misapprehension, the rules provided by Paragraph 2 of Article 167 of the present Code shall be applied correspondingly.

In addition, the party on whose suit the transaction was declared invalid shall have the right to claim from the other party compensation for the actual damage caused to it if it proves that the misapprehension arose due to the fault of the other party. If this is not proved, the party, on whose suit the transaction was declared invalid, shall be obligated to compensate the other party on its demand for the actual damage caused to it, even if

179, which envisages in particular invalidity of a transaction made under the influence of fraud.[24] Under these articles, the aggrieved party may seek from the other party not only a restitution of everything received by the latter under the transaction, but also a recovery of actual damage. However, a recovery of lost profit is not allowed.

It is widely recognised in Russian legal literature that a misapprehension and a fraud may take place both in an active manner (i.e., by making misleading and false statements) and in a passive manner (i.e., by a failure to disclose certain facts).[25] In line with this approach, according to my analysis, even if a contractual list of representations and warranties does not provide some information, this in itself would not serve as a bar for a court to declare the transaction invalid due to being made under the influence of misapprehension or fraud. Thus, though the legislation does not expressly establish that the parties are obliged to inform each other about all relevant material facts concerning the conclusion of the contract, such a duty may be drawn from Articles 178 and 179 of the RCC.[26]

2.9 Force majeure *and hardship*

Russian law bears express provisions dealing with these legal categories (Articles 401(3),[27] 416, 417 and 451 of the RCC). *Force majeure* clauses

the misapprehension arose due to circumstances not depending upon the misapprehended party.

[24] Article 179 provides in the relevant parts for the following:

1. A transaction made under the influence of a fraud . . . may be declared invalid by a court on suit of the victim.
2. If a transaction is declared invalid by a court on one of the bases indicated in Paragraph 1 of the present Article, then the other party shall return to the victim everything it received under the transaction and, if it is impossible to return it in kind, its value in money shall be compensated. Property received under the transaction by the victim from the other party and also due to it in compensation for that transferred to the other party shall be transferred to the income of the Russian Federation. If it is impossible to transfer the property to the income of the state in kind, its value in money shall be taken. In addition the victim shall be compensated by the other party for the actual damage caused to him.

[25] See Braginskiy and Vitrianskiy, *Contract Law*, pp. 813–815; Kucher, *Theory and Practice of the Pre-Contractual Stage*, pp. 228–239, 244–246 and the literature cited therein.

[26] Kucher, *Theory and Practice of the Pre-Contractual Stage*, p. 235.

[27] Article 401(3) of the RCC states: 'Unless otherwise provided by a statute or the contract, a person who has not performed an obligation or has performed an obligation in an improper manner in the conduct of entrepreneurial activity shall bear liability unless he proves that proper performance became impossible as the result of *force majeure*,

are often inserted into commercial contracts signed by Russian companies. To the extent that the above provisions are of a non-mandatory character (actually most of them), parties could depart from them in their contracts. However, this does not mean that the contract clauses automatically become the only applicable regulation, but rather that they should be interpreted and applied within the framework of the governing law. The parties are free to establish in their contract an exhaustive list of *force majeure* circumstances, thus assuming liability if events not mentioned in the clause occur.

It may be added that if a contract makes reference to circumstances beyond the party's reasonable control that it could not reasonably be expected to have taken into account at the time of the conclusion of the contract or to have avoided or overcome, the effect of such circumstances comes very close to the CISG, in which Russia participates (see Section 1 above). Such a clause also corresponds in principle to the definition of *force majeure* in Article 401(3) of the RCC. Hence, such a clause would be unlikely to create practical difficulties.

When the parties provide that events beyond their control relieve them of liability, they agree upon less stringent requirements to be applied since, under Russian law, *force majeure* is defined as 'extraordinary circumstances unavoidable under the given conditions' (Article 401 (3) of the RCC). Such a provision could give rise to some questions. Much depends upon the wording of the particular clause. If a contractual provision is qualified as the *force majeure* clause, then the specific circumstances mentioned therein should meet the legal criteria of *force majeure*.[28]

As a general legal rule, a person bears liability in the event of fault (intent or negligence) unless a statute or contract provides other grounds of liability (Article 401(1) of the RCC). In commercial relations, parties bear liability irrespective of their fault and are relieved of liability in the event of *force majeure* (Article 401(3)). This is an important exclusion from the above general rule. Since the above rule is of non-mandatory nature, the parties could provide in their contracts for liability in case of fault. If a contractual clause provides that events beyond the control of

i.e., extraordinary circumstances unavoidable under the given conditions. Such circumstances do not include, in particular, violation of obligations by contract partners of the debtor, absence on the market of goods necessary for performance, nor the debtor's lack of the necessary monetary assets.'

[28] See Rozenberg, *International Sale of Goods*, pp. 341–346; Kanashevskiy, *Foreign Economic Transactions*, pp. 169–173.

one party relieve it of liability, such a clause could be interpreted as an agreement on liability in case of fault. Then a party who violated an obligation must prove an absence of fault to be relieved of liability.[29]

Russian law allows transactions made on a condition (Article 157 of the RCC). According to Article 157(2): 'A transaction shall be considered made on a condition subsequent, if the parties have placed the termination of rights and duties in dependence upon a circumstance with respect to which it is unknown whether it will occur or not occur.' It could be argued that a certain circumstance not meeting the requirements of *force majeure* is to be regarded in appropriate instances as a condition subsequent. The legal consequence of an occurrence of such a circumstance is the termination of the transaction.

To sum up, the mere fact that a specific circumstance does not meet the criteria of *force majeure* does not necessarily mean that an occurrence of such a circumstance would not relieve the party from liability, as other concepts might turn out to be applicable.

[29] 'A person is recognized as not at fault, if with the degree of care and caution that was required of him by the nature of the obligation and the conditions of commerce, he has taken all measures for the proper performance of the obligation' (Article 401(1), the second passage).

Conclusion: the self-sufficient contract, uniformly interpreted on the basis of its own terms: an illusion, but not fully useless

GIUDITTA CORDERO-MOSS

The analysis carried out in this book shows that there is a gap between the way in which international contracts are written on the one hand and the way in which they are interpreted and enforced on the other. Contracts are often written as if the only basis for their enforcement were their terms and as if contract terms were capable of being interpreted solely on the basis of their own language. However, as Part 3 of this book showed, the enforcement of contract terms, as well as their interpretation, is the result of the interaction between the contract and the governing law. Considering contracts to be self-sufficient and not influenced by any national law, as if they enjoyed a uniform interpretation thanks to their own language and some international principles, thus proves to be illusionary. This contract practice may lead to undesired legal effects and is not optimal when examined from a legal point of view. Seen from a wider perspective, however, it may turn out to be more advantageous than employing large resources in order to ensure legal certainty.

1 International commerce fosters self-sufficient contracts

The gap between the parties' reliance on the self-sufficiency of the contract and the actual legal effects of the contract under the governing law does not necessarily derive from the parties' lack of awareness of the legal framework surrounding the contract. More precisely, the parties may often be conscious of the fact that they are unaware of the legal framework for the contract. The possibility that the wording of the contract is interpreted and applied differently from what a literal

application would seem to suggest may be accepted by some parties as a calculated risk.

As David Echenberg shows in Chapter 1, a contract is the result of a process, in which both parties participate from opposite starting points. This means that the final result is necessarily a compromise. In addition, time and resources are often limited during negotiations. This means that the process of negotiating a contract does not necessarily meet all the requirements that would ideally characterise an optimal process under favourable conditions. What could be considered as an indispensible minimum in the abstract description of how a legal document should be drafted does not necessarily match with the commercial understanding of the resources that should be spent on such a process. This may lead to contracts being signed without the parties having negotiated all the clauses or without the parties having complete information regarding each clause's legal effects under the governing law. What may appear, from a purely legal point of view, as unreasonable conduct is actually often a deliberate assumption of contractual risk.

Considerations regarding the internal organisation of the parties are also a part of the assessment of risk. In large multinational companies, risk management may require a certain standardisation, which in turn prevents a high degree of flexibility in drafting the single contracts. In balancing the conflicting interests of ensuring internal standardisation and permitting local adjustment, large organisations may prefer to enhance the former, as described in Chapter 2 by Maria Celeste Vettese.

In other words, it is not necessarily the result of thoughtlessness if a contract is drafted without having regard for the governing law. Nor is it the symptom of a refusal of the applicability of national laws. It is the result of a cost-benefit evaluation, leading to the acceptance of a calculated legal risk.

Acknowledging this circumstance is important when international contracts are interpreted. A judge or an arbitrator who assumes that all contracts are always written following the optimal process may assume a will by the parties to comply with the applicable law and may react to the lack of correspondence between the contract terms and the applicable law by proposing ingenious constructions in an attempt to reconcile the two. However, the parties may have taken a calculated risk that there was no compliance; the ingenious reconciliation may come as a bigger surprise than the incompatibility with the applicable law. Also, observers may induce from the practice whereby contracts are drafted without considering the applicable law that international

contract practice refuses national laws. On this assumption, observers may propose that contracts should be governed by transnational rules instead of national laws. However, that the parties may have disregarded the applicable law as a result of a cost-benefit evaluation does not necessarily mean that they want to opt out of the applicable law. The parties are still interested in enforcing their rights, and enforceability is ensured only by the judicial system of the applicable law.

2 Detailed drafting as an attempt to enhance the self-sufficiency of contracts

To minimise the risk of the governing law interfering with the contract, international contracts are drafted in a style that aims at creating an exhaustive, and as precise as possible, regulation of the underlying contractual relationship, thus attempting to render any interference by external elements redundant, be it the interpreter's discretion or rules and principles of the governing law.

To a large extent, this degree of detail may achieve the goal of rendering the contract a self-sufficient system, thus enhancing the impression that if only they are sufficiently detailed and clear, contracts will be interpreted on the basis of their own terms and without being influenced by any governing law.

However, this impression is proven to be illusionary and not only because governing laws may contain mandatory rules that may not be derogated from by contract.

As a matter of fact, not many mandatory rules affect international commercial contracts; therefore, this is not the main aspect that this book focuses on (there are, however, important mandatory rules, particularly in the field of liability, that are also relevant in the commercial context). What mostly interests us here is the spirit underlying general contract law. This will vary from legal system to legal system and will inspire, consciously or otherwise, the way in which the contract is interpreted and applied. Notwithstanding any efforts by the parties to include as many details as possible in the contract in order to minimise the need for interpretation, the governing law will necessarily project its own principles regarding the function of a contract, the advisability of ensuring a fair balance between the parties' interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally towards each other, and the existence and extent of a general

principle of good faith – in short, the balance between certainty and justice. The clauses analysed in this book were chosen with the purpose of highlighting the relevance of the governing law in these respects. With these clauses, the parties try to take into their own hands those aspects where the balance between certainty and justice may be challenged.

The drafting impetus may reach excesses that are defined as 'nonsensical' by Edwin Peel in Chapter 7 on English law,[1] such as when, among the matters that the parties represent to each other, the ubiquitous representations and warranties clause lists that their respective obligations under the contract are valid, binding and enforceable. This representation and warranty is itself an obligation under the contract and is itself subject to any ground for invalidity or unenforceability that might affect the contract, so what value does it add? It is particularly interesting that this observation is made by an English lawyer, because it shows that the attempt to detach the contract from the governing law may go too far even for English law, and this notwithstanding the fact that the drafting style adopted for international contracts is no doubt based on the English and American drafting tradition. Extensive contracts do not reflect the tradition of civil law: a civilian judge reads the contract in the light of the numerous default rules provided in the governing law for that type of contract, so extensive regulations are not needed in the contact.[2] In turn, the common law drafting tradition requires extensive contracts that spell out all obligations between the parties and leave little to the judge's discretion or interpretation, because the common law judge sees it as his or her function to enforce the bargain agreed upon between the parties, not to substitute for the bargain actually made by the parties, one which the interpreter deems to be more reasonable or commercially sensible.[3] Thus, the English judge will be reluctant to read into the contract obligations that were not expressly agreed to by the parties. Since the English judge often affirms that a sufficiently clear contract wording will be enforced, parties are encouraged to increase the level of detail and to circumvent legal obstacles by formulating clauses that will not fall within the scope of

[1] Chapter 7 of this book, note 160.

[2] For a more extensive argument and references, see 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', *Global Jurist (Advances)*, 7, 1 (2007), Article 3, 1–38.

[3] *Charter Reinsurance, Co. Ltd* v. *Fagan* [1997] AC 313.

the problem.[4] This enhances the impression that a well-thought-out formulation may solve all problems. When adopting the common law style, however, drafters may apparently be tempted to overdo and to write regulations that tend to elevate the contract to the level of law,[5] such as the above-mentioned representation and warranty. This clause, as noted above, seems nonsensical even in an English law context, because a contract obligation does not have the power to determine whether it is valid or enforceable – it is for the law to decide what is valid and enforceable. This clause is, though, symptomatic of the intense desire to detach the contract from the applicable law so that it becomes its own law.[6]

[4] The liquidated damages clause, for example, is designed to escape the common law prohibition of penalty clauses. In addition, this clause and the possibility of converting it into a price-variation clause provide a significant example of how drafting may be used to achieve a result that otherwise would not be enforceable. This is defined as the possibility for the parties to manipulate the interpretation in order to avoid the intervention of the courts; see Chapter 7, Section 2.7.

[5] A similar attempt to elevate the contract to the level of law may be found in the assumption that the contract's choice-of-law clause has the ability to move the whole legal relationship beyond the scope of application of any law but the law chosen by the parties. However, the choice of law made by the parties has effect mainly within the sphere of contract law. For areas that are relevant to the contractual relationship but are outside the scope of contract law, the parties' choice does not have any effect. Areas such as the parties' own legal capacity, company law implications of the contract or the contract's effects towards third parties within property law are governed by the law applicable to those areas according to the respective conflict rule, and the parties' choice is not relevant. A research project that I run at the University of Oslo assesses such limitations to party autonomy, particularly in connection with international arbitration: more information on the project may be found at www.jus.uio.no/ifp/english/research/projects/choice-of-law, last accessed 6 October 2010. See also G. Cordero-Moss, 'International Arbitration and the Quest for the Applicable Law', *Global Jurist (Advances)*, 8, 3 (2008), Article 2, 1–42; and G. Cordero-Moss, 'Arbitration and Private International Law', *International Arbitration Law Review*, 11, 4 (2008), 153–164.

[6] A representation on the validity and enforceability of the contract is a typical part of boilerplate clauses. See, for example, Section 5.2, Article V, Form 8.4.01 (Form Asset Purchase Agreement); and M. D. Fern, *Warren's Forms of Agreements*, vol. 2 (LexisNexis, 2004). This is also the first representation recommended in the Private Equity Law Review, 'Representations and Warranties in Purchase Agreements', Section 2.1 (www.privateequitylawreview.com/2007/03/articles/for-private-equity-sponsors/deal-documents/acquisition-agreement/representations-and-warranties-in-purchase-agreements/, last accessed 23 May 2010). See also Sample Representations and Warranties, 3.2, Documents for Small Businesses and Professionals, www.docstoc.com/docs/9515308/Sample-Representations-and-Warranties, last accessed 23 May 2010). Numerous examples of the actual use of this representation may be found in the contracts filed with the US Securities and Exchange Commission; for example, Section 25.1.3 of the contract dated 21 November 2004 between Rainbow DBS and Lockheed Martin Commercial Space

The representation on the validity and enforceability of the contract is not the only attempt to detach the contract from the governing law: other clauses analysed in this book regulate the interpretation of the contract and the application of remedies independently of the governing law.

Interestingly, some of these clauses do not seem to achieve the desired results even under English law. As noted by Edwin Peel in Chapter 7, observers may tend to overestimate how literally English courts may interpret contracts. Be that as it may, contract practice shows that it is based on the illusion that it is possible, by writing sufficiently clear and precise wording, to draft around problems and circumvent any criteria of fairness that the court may find relevant. Peel's chapter actually shows that this is supported indirectly by English courts themselves, who often based their decisions on the interpretation of the wording rather than on a control of the contract's substance. In respect of some contract clauses, which interestingly attempt to regulate the interpretation of the contract precisely, it seems that the drafting efforts are not likely to achieve results that might be considered unfair by the court, no matter how clear and precise the drafted wording, and in spite of the courts' insisting on making this a question of interpretation. In respect of other clauses analysed in this book, the criteria of certainty and consistency seem to be given primacy by the English courts. This ensures a literal application of the contract notwithstanding the result, as long as the clause is written in a sufficiently clear and precise manner.

The treatment of boilerplate clauses by English courts has great relevance to the subject matter of this book: the assumption that a sufficiently detailed and clear language will ensure that the legal effects of the contract will be only based on the contract itself and will not be influenced by the applicable law was originally encouraged by English courts, and was then exported to contracts to which other laws apply.

The project upon which this book is based was intended to demonstrate the thesis that this assumption is not fully applicable under systems of civil law, because traditionally these systems are held to be based on principles (good faith and loyalty) that contradict this approach. The research in the project not only demonstrated the thesis, but even showed that the assumption is not always correct even under English law.

Systems for the construction of up to five television satellites (www.wikinvest.com/stock/Cablevision_Systems_(CVC)/Filing/8-K/2005/F2355074, last accessed 23 May 2010) and Section 5.02 of the merger agreement dated 14 May 2007 between eCollege.com and Pearson Education, Inc. and Epsilon Acquisition Corp. (www.wikinvest.com/stock/ECollege.com_(ECLG)/Filing/DEFA14A/2007/F4972482, last accessed 23 May 2010).

3 No real alternative to the applicable law

Before some concluding observations on the effects of the analysed clauses in the various legal systems, a brief comment should be made regarding the lack of alternatives to applying a national governing law.

Legal models do circulate and the European integration enhances this circulation, as Jean-Sylvestre Bergé shows in Chapter 6;[7] therefore, it is not necessarily problematic that contracts modelled on a certain law are governed by another law. However, as incisively formulated by Gerhard Dannemann in Chapter 4, these contracts suffer a loss of context and may (not necessarily always) presume the existence of legal institutions that cannot be found in the governing law, write around problems that do not exist in the governing law (or vice versa) or write on the basis of certain remedies that may not be available under the governing law.[8] Chapter 4 shows various examples of the consequences that may follow a loss of legal context, and so does Chapter 2.[9]

The question of what can go wrong if a contract is based on a law but is subject to the law of another system[10] requires various observations regarding the method and the sources applied in the analysis.

Courts seem to have had a less than consistent approach to the question, with results that may sometimes appear to be artificial.[11]

The question of which law applies to a contract is approached through private international law (conflict of laws). As the analysis in Chapter 3 shows, the simple use of a drafting style that is loosely inspired by the common law is not a sufficient connecting factor to determine the governing law, nor is the use of the English language.[12] Therefore, international contracts drafted according to the common law tradition and written in English will be subject to the law chosen on the basis of the applicable conflict rule, just like any other international contract. As such, a governing law may be selected that does not belong to the common law legal family.

The analysis made in Chapter 3 also shows that there are no real alternatives to a state governing law when it comes to principles of general contract law upon which the interpretation and application of the agreed wording is based. Restatements of soft law, compilations

[7] Chapter 6, Section 1. [8] Chapter 4, Section 2. [9] Chapter 2, Section 2.

[10] In this phrase, Dannemann summarises the purpose of this book; see Chapter 4, Section 2.

[11] Chapter 4, Section 4.

[12] Chapter 3, Section 1. This is also confirmed by Dannemann in Chapter 4, Section 1 and Magnus in Chapter 8, Section 3.1.2.

of trade usages, digests of transnational principles and other international instruments, sometimes invoked as appropriate sources for international contracts,[13] may be invaluable in determining the content of specific contract regulations, such as INCOTERMS are for the definition of the place of delivery in international sales.[14] However, these sources do not, for the moment, provide a sufficiently precise basis for addressing the questions that are focused on in this book regarding the function of a contract, the advisability of ensuring a fair balance between the parties' interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally towards each other, and the existence and extent of a general principle of good faith. As Chapter 3 shows, some of the previously mentioned transnational sources solve these questions by making extensive reference to good faith; however, good faith is a legal standard that requires specification and there does not seem to be any generally acknowledged legal standard of good faith that is sufficiently precise to be applied uniformly and irrespective of the governing law, as the analysis of the material available on the entire agreement clause shows.[15]

Not much help can be found in the observation that legal systems converge on an abstract level and that very similar results may thus be achieved in the various systems, albeit by applying different legal techniques. As Edward T. Canuel shows in Chapter 5, convergence cannot be said to be full. Even within one single legal family, there are significant differences, for example, between US and English law regarding exculpatory clauses. Moreover, even within the same system, there may be divergences, as the same clause may have different legal effects in the different states within the US.[16] Morevoer, reducing the divergence to a mere question of technicalities misses the point – it is precisely the different legal techniques that matter when a specific wording has to be applied. It would not be of much comfort for a party to know that it could have achieved the desired result if only the contract had had the correct wording as required by the relevant legal technique. The party is interested in the legal effects of the particular clause that was written in the contract, not in the abstract possibility of obtaining the same result by a different clause.

[13] See, for example, Magnus in Chapter 8, Section 2.

[14] However, INCOTERMS do not cover all legal effects relating to the delivery: for example, they do not determine the moment when title passes from the buyer to the seller, as pointed out by Vettese in Chapter 2, Section 2.

[15] Chapter 3, Section 2.4.

[16] Chapter 5, Section 2.

An observer may be tempted to dismiss these considerations with a pragmatic comment: most international contracts contain an arbitration clause, and therefore disputes arising in connection with them will be solved by arbitration and not by the courts. International arbitration is a system based on the will of the parties, and arbitrators are expected to abide by the will of the parties and not apply undesired sources that bring unexpected results. Moreover, arbitral awards enjoy broad enforceability and the possibility of courts interfering with them is extremely limited, so that the court's opinion on the legal effects of the contracts becomes irrelevant.[17] While all these observations are correct, they do not necessarily affect the research conducted here.

It is true that an arbitral award will be valid and enforceable even though it does not correctly apply the governing law. Not even the wrong application of mandatory rules of law is a sufficient ground to consider an award invalid or unenforceable. Therefore, arbitral tribunals are quite free to interpret contracts and to decide how (and if at all) these contracts shall interact with the governing law.

This, however, will not supply the arbitral tribunal with a sufficient answer to the question of how to interpret the contract. This is not a mere question of verifying whether mandatory rules have been complied with. It is a deeper and more subtle question, and it regards the values upon which interpretation should be based.

The interpreter's understanding of the relationship between certainty and justice (described above as regarding the function of a contract, the advisability of ensuring a fair balance between the parties' interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally towards each other, and the existence and extent of a general principle of good faith) may lead to an interpretation of the contract that is more literal or more purposive. Some judges or arbitrators may be unaware of the influence that the legal system exercises on them: they may have internalised the legal system's principles in such a way that interpretation based on these principles feels like the only possible interpretation. Others, and particularly experienced international arbitrators, may have been exposed to a variety of legal systems and thus have acquired a higher degree of awareness that the terms of a

[17] On the enforceability of international awards and the scope within which national courts may exercise a certain control, see Cordero-Moss, 'International Arbitration'; and Cordero-Moss, 'Arbitration and Private International Law'.

contract do not have one natural meaning, but that their legal effects depend upon their interaction with the governing law. These aware interpreters face a dilemma when confronted with a contract drafted with a style extraneous to the governing law: on the one hand, they do not want to superimpose on the contract the principles of a law that the parties may not have considered during the negotiations; on the other hand, they have no uniform set of principles permitting them to interpret a contract independently of the governing law. Particularly if one of the parties invokes the governing law to prevent a literal application of the contract (notwithstanding that it might not have been aware of it during the negotiations), the dilemma is not easy to solve, not even for an arbitrator.

The clauses selected in this book and the cases proposed to highlight the interpretative challenges that may be faced are intended as an illustration of the dilemma faced by the interpreter.

4 The differing legal effects of boilerplate clauses

The analysis undertaken in this book shows that it is not possible to rely on one uniform interpretation of boilerplate clauses. Having the purpose of highlighting the possible influence that the governing law has on the interpretation and application of their wording, the book has divided the selected clauses into three groups: (i) clauses aiming at creating a self-sufficient system that does not depend upon the governing law for the interpretation or exercise of remedies; (ii) clauses that regulate mechanisms or use terminology that is not part of the governing law; and (iii) clauses that regulate matters already regulated by the governing law. For all these groups, cases have been proposed that put a strain on the literal application of the wording and highlight the impact of the governing law. The text of the clauses and the cases are listed in the introduction to Part 3. An analysis of the legal effects of these clauses under the various laws is given in Part 3. Some concluding observations follow below.

4.1 Clauses aiming at fully detaching the contract from the applicable law

4.1.1 Entire agreement

The purpose of an entire agreement clause is to isolate the contract from any source or element that may be external to the document. This is also

often emphasised by referring to the four corners of the document as the borderline for the interpretation or construction of the contract. The parties' aim is thus to exclude the possibility that the contract is integrated with terms or obligations that do not appear in the document.

The parties are obviously entitled to regulate their interests and to specify the sources of their regulation. However, many legal systems provide for ancillary obligations deriving from the contract type,[18] from a general principle of good faith[19] or from a principle preventing abuse of rights.[20] This means that a contract would always have to be understood not only on the basis of the obligations that are spelled out in it, but also in combination with the elements that, according to the applicable law, are integrated into it. A standard contract therefore risks having different content depending upon the governing law; the entire agreement clause is meant to avoid this uncertainty by barring the possibility of invoking extrinsic elements. It creates an illusion of exhaustiveness of the written obligations.

This is, however, only an illusion: first of all, ancillary obligations created by the operation of law may not always be excluded by a contract.[21]

Moreover, some legal systems make it possible to bring evidence that the parties have agreed upon obligations that are different from those contained in the contract.[22]

Furthermore, many civilian legal systems openly permit the use of precontractual material to interpret the terms written in the contract.[23]

[18] See, for France, Chapter 9, Section 2, as well as the general considerations on Article 1135 of the Civil Code in Section 1; for Italy, see Article 1347 of the Civil Code and Chapter 10, Section 1; for Denmark, see Chapter 11, Section 1.

[19] See the general principle on good faith in the performance of contracts in §242 of the German BGB. See Chapter 4, Sections 3.2 and 3.3 for examples of its application by the courts.

[20] See, for Russia, Chapter 16, Section 1.

[21] See, for France and Italy, note 18 above. For Finnish law, see Chapter 12, Section 2.1.

[22] See, for Germany, §309 No. 12 of the BGB, prohibiting clauses which change the burden of proof to the disadvantage of the other party: see Chapter 8, Section 5.1.1.1. Italy, on the contrary, does not allow oral evidence that contradicts a written agreement, see Chapter 10, Section 1.

[23] In addition to Germany (see previous note), see, for France, Chapter 9, Section 2; for Italy, Chapter 10, Section 4; for Denmark, Chapter 11, Section 2.1; for Norway, Chapter 13, Section 3.1; for Hungary, Chapter 15, Section 2; and for Russia, Chapter 16, Section 2.1 The situation seems to be more uncertain in Sweden (see Chapter 14, Section 5.2.4.2) and more restrictive in Finland (see Chapter 12, Section 2.1).

Finally, a strict adherence to the clause's wording may, under some circumstances, be looked upon as unsatisfactory even under English law. English courts, despite insisting that a properly drafted entire agreement clause may actually succeed in preventing any extrinsic evidence from being taken into consideration, interpret it so as to avoid unreasonable results. The motivation given by the courts in the decisions may create the impression that a proper drafting may achieve the clause's purpose, but the ingenuity of the courts' interpretation gives rise to the suspicion that a drafting would never be found to be proper if the result were deemed to be unfair.[24]

The entire agreement clause is an illustration of a clause by which the parties attempt to isolate the contract from its legal context, which is not completely successful and cannot be fully relied upon.

Incidentally, a literal application of this clause would not be allowed under the UPICC or the PECL either, both of which are based on a strong general principle of good faith that, furthermore, is specified by an express rule for the entire agreement clause.[25]

4.1.2 No waiver

The purpose of a no waiver clause is to ensure that the remedies described in the contract may be exercised in accordance with their wording at any time and irrespective of the parties' conduct. The parties try, with this clause, to create a contractual regime for the exercise of remedies without regard to any rules that the applicable law may have on the time frame within which remedies may be exercised and the conditions for such exercise. Many legal systems have principles that protect one party's expectations and prevent the abuse of formal rights. These rules may affect the exercise of remedies in a way that is not visible from the language of the contract. The no waiver clause is inserted to avoid these 'invisible' restrictions to the possibility of exercising contractual remedies.

The parties are, of course, at liberty to regulate the effect of their conduct. However, under some circumstances, this regulation could be used by one party for speculative purposes, such as when a party fails for a long time to exercise its right to terminate and then exercises it when it sees that new market conditions make it profitable to terminate the contract. The real reason for the termination is not the other party's old default that originally was the basis for the right of termination, but

[24] See Chapter 7, Section 2.1. [25] See Chapter 3, Section 2.4.

the change in the market. The no waiver clause, if applied literally, permits this conduct. A literal interpretation of the clause in such a situation is allowed in some systems,[26] but would in many legal systems be deemed to contradict principles that cannot be derogated from by contract: the principle of good faith in German law that prevents abuses of rights,[27] the same principle in French law that prevents a party from taking advantage of a behaviour inconsistent with that party's rights[28] and the principle of loyalty in the Nordic countries[29] that prevents interpretations that would lead to an unreasonable result in view of the conduct of the parties.[30] The clause may have the effect of raising the threshold of when a party's conduct may be deemed to be disloyal,[31] but it will not be able to displace the requirement of loyalty in full. Furthermore, in this context, a literal application of the clause would also be prevented by the UPICC and by the PECL, both of which assume good faith in the exercise of remedies.[32]

Also in the case of this clause, as seen above in connection with the entire agreement clause, English courts argue as if it were possible for the parties to draft the wording in such a way as to permit results that would be prevented in the civilian systems due to them being contrary to good faith or loyalty. However, the English courts' decisions leave the suspicion that even an extremely clear and detailed wording would not be deemed to be proper if its application would lead to unfair results.[33]

Thus, the no waiver clause promises self-sufficiency in the regime for remedies that may not be relied upon.

4.1.3 No oral amendments

The purpose of a no oral amendments clause is to ensure that the contract is implemented at any time according to its wording and irrespective of what the parties may have agreed later, unless this is recorded in writing. This clause is particularly useful when the contract is going to be exposed to third parties, either because it is meant to circulate, for example, in connection with the raising of financing or

[26] Neither in Hungarian nor in Russian law would the principle of abuse of right have the effect of depriving a party from its remedy in spite of a considerable delay in exercising the remedy: see, respectively, Chapter 15, Section 3 and Chapter 16, Section 2.2.
[27] See note 19 above. [28] See Chapter 9, Section 3.
[29] See, for Denmark, Chapter 11, Section 2.3; for Finland, Chapter 12, Section 2.2; and for Norway, Chapter 13, 3.2.
[30] See Chapter 11, Section 2.3. [31] See Chapter 12, Section 2.2.
[32] See Chapter 3, Section 2.4. [33] See Chapter 7, Section 2.2.