Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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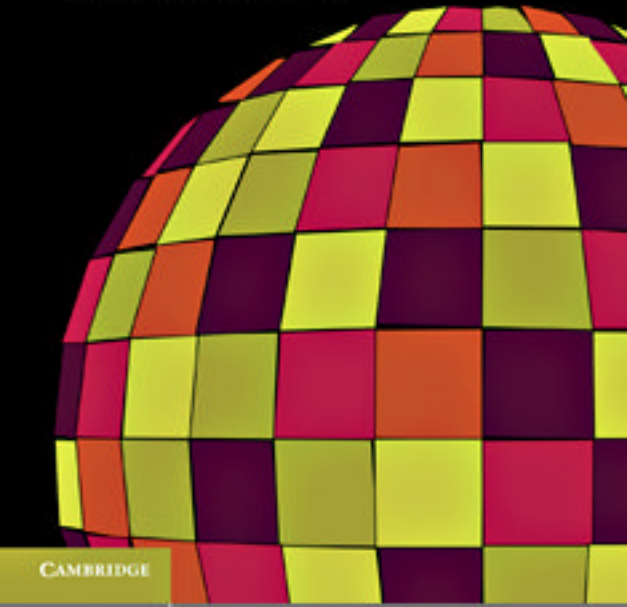

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the change in the market. The no waiver clause, if applied literally, permits this conduct. A literal interpretation of the clause in such a situation is allowed in some systems,[26] but would in many legal systems be deemed to contradict principles 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.

because its performance requires the involvement of numerous officers of the parties, who are not necessarily all authorised to represent the respective party. In the former scenario, third parties who assess the value of the contract must be certain that they can rely on the contract's wording. If oral amendments were possible, an accurate assessment of the contract's value could not be made simply on the basis of the document. In the latter scenario, the parties must be certain that the contract may not be changed by agreement given by some representatives who are not duly authorised to do so. In a large organisation, it is essential that the ability to make certain decisions is reserved for the bodies or people with the relevant formal competence.

Therefore, the clause has a legitimate purpose and the parties are free to agree to it. Under some circumstances, however, the clause could be abused – for example, if the parties agree on an oral amendment and afterwards one party invokes the clause to refuse performance because it is no longer interested in the contract after the market has changed.

A strict application of the written form requirement is imposed in Russia by mandatory legislation.[34] An application of the clause, even for a speculative purpose, would be acceptable under French law, which has a rule excluding the possibility of bringing oral evidence in contradiction to a written agreement.[35] A similar rule is also present in Italian and Hungarian law, although case law on the matter seems to be unsettled.[36] In German law, the opposite approach applies: German law does not allow the exclusion of evidence that could prove a different agreement by the parties and does not permit terms of contract that disfavour the other party in an unreasonable way.[37] The Nordic systems would give effect to the wording of the clause by raising the threshold for when it can be considered as proven that an oral amendment was agreed upon. However, once such an oral agreement is proven, it would be considered enforceable due to the principle of *lex posterior*,[38] loyalty[39] or good faith.[40]

Even under English law, in spite of the alleged primacy of the contract's wording, it is uncertain whether the clause would be enforced if there was evidence that the parties had agreed to an oral variation.[41]

[34] See Chapter 16, Section 2.3. [35] See Chapter 9, Section 4.
[36] See Chapter 10, Section 3 and Chapter 15, Section 4.
[37] See Chapter 8, Section 5.1.2.1. [38] See, for Denmark, Chapter 11, Section 2.2.
[39] See, for Finland, Chapter 12, Section 2.3; and for Norway, Chapter 13, Section 3.3.
[40] See, for Sweden, Chapter 14, Section 5.3.2. [41] See Chapter 7, Section 2.3.

The no oral amendments clause is yet one more example of a clause that will not necessarily always be applied in strict accordance with its terms.

4.1.4 Severability

The purpose of a severability clause is to regulate the consequences for the contract if one or more provisions of the contract are deemed to be invalid or illegal under the applicable law. The clause aims at excluding the possibility that the effects of an external source rendering a provision ineffective spread to the rest of the contract. As already mentioned in respect of the previous clauses, the parties are free to determine the effects of their contract. However, a literal application of this clause may have effects that seem unfair if the provision that became ineffective had significance for the interests of only one of the parties, and the result is that the remaining contract is unbalanced.

There does not seem to be abundant case law on this matter; however, the material analysed in Part 3 shows that the clause would be disregarded in France, in case the invalid provision should be deemed to be essential or if the situation affected the economic balance of the contract.[42] In addition, in the Nordic systems, the general power of the courts to determine in their discretion the consequences of the inefficacy of a provision cannot be derogated from by contract if this creates an imbalance.[43]

4.1.5 Conditions/essential terms

The purpose of a conditions/essential terms clause is to give one party the power to terminate the contract early upon breach by the other party of specific obligations, irrespective of the consequences of the breach or of the early termination. By this clause, the parties attempt to avoid the uncertainty connected with the evaluation of how serious the breach is and what impact it has on the contract. This evaluation is due to the requirement, to be found in most applicable laws, that a breach must be fundamental if the innocent party shall be entitled to terminate the contract. By defining in the contract certain terms as essential or by spelling out that certain breaches give the innocent party the power to terminate the contract, the parties attempt to create an automatism

[42] See Chapter 9, Section 5.

[43] See, for Denmark, Chapter 11, Section 2.4; for Finland, Chapter 12, Section 2.4; and for Norway, Chapter 13, Section 3.4.

instead of allowing an evaluation that takes all circumstances into consideration.

As already mentioned above, it falls within the parties' contractual freedom to regulate their respective interests and to allocate risk and liability. Among other things, this means that the parties are free to determine on which conditions the contract may be terminated early. However, a literal interpretation of the clause may lead to unfair results, such as when the breach under the circumstances does not have any consequences for the innocent party, but this party uses the breach as a basis to terminate a contract that it no longer considers profitable, for example, after a change in the market.

In this context, the assumed primacy of the contract's language seems to be confirmed by English courts. If it is not possible to avoid unfair results by simply interpreting the clause, English courts are inclined to give effect to the clause according to its terms, even though the result under the circumstances may be deemed to be unfair. English courts do so, even if with evident reluctance, to ensure consistency in the law underlying the repudiation and termination of the contract.[44] In this context, therefore, properly drafted language achieves the effects that follow from a literal application of the clause even if these effects are unfair. The same result could be obtained under Hungarian law.[45]

Conversely, the other systems analysed here would not allow a literal application of the clause if this had consequences that may be deemed to be unfair, because of the general principle of good faith and loyalty[46] or under the assumption that parties cannot have intended such unfair results.[47]

This clause is an illustration of contractual regulation that may be applied literally when subject to English law, whereas it has to be applied in combination with the governing law when subject to most civil law systems.

4.1.6 Sole remedy

The purpose of a sole remedy clause is to ensure that no remedies other than those regulated in the contract will be available in case of breach of

[44] See Chapter 7, Section 2.4. [45] See Chaper 15, Section 6.

[46] See, for Germany, the principle of good faith in the performance contained in §242 of the BGB; for France, Chapter 9, Section 6; for Denmark, Chapter 11, Section 2.5; and for Finland, Chapter 12, Section 2.5. The same would be obtained under Russian law, based on the principle prohibiting abuse of rights: see Chapter 16, Section 2.4.

[47] See, for Norway, Chapter 13, Section 3.5.

contract. Like the clauses mentioned earlier, this is also an attempt to insulate the contract from the legal system to which it is subject. Rather than relating to the applicable law's remedies and the conditions for their exercise, which may differ from country to country, the parties define in the contract the applicable remedies, the conditions for their exercise and their effects, thus excluding the applicability of any other remedies. Also in respect of this clause, it must first be recognised that it is up to the parties to agree on what remedy to exercise. However, a literal interpretation of this clause could lead to a situation where one party is prevented from claiming satisfactory remedies: assume, for example, that the sole remedy defined in the contract is the reimbursement of damages; if the amount of the damage is quantified in advance in a liquidated damages clause that determines a very low sum, the innocent party would not have any satisfactory remedy available.

This is another illustration of clauses that, in civil law, may not be applied literally but have to be integrated by the applicable law. In particular, the clause may be disregarded if the default was due to gross negligence or wilful misconduct by the defaulting party;[48] moreover, the clause may be disregarded if it has the effect of limiting the defaulting party's liability in such a way that it deprives the contract's essential obligations of their substance.[49] Another line of argument is that the clause may not deprive the innocent party of adequate remedies, in which case the remedies available by the operation of law will be applicable notwithstanding the clause's attempt to exclude them.[50]

Under English law, assuming that the clause is drafted in such a clear and precise language that the courts do not have leeway in their interpretation of it, nothing at common law will limit the parties' freedom to regulate their interests in this context. However, under statutory law, the clause may be subject to control as if it were a limitation of liability clause.[51]

[48] See, for France, Chapter 9, Section 7; for Denmark, Chapter 11, Section 2.6; for Finland, Chapter 12, Section 2.6; for Hungary, Chapter 15, Section 7; and for Russia, Chapter 16, Section 2.6.

[49] See, for France, Chapter 9, Section 7. In Hungary, a similar line of argument requires that the sole remedy clause is accompanied by a corresponding benefit, such as a price reduction: see Chapter 15, Section 7.

[50] See, for Denmark, Chapter 11, Section 2.6. See also, for Sweden, Chapter 14, Section 6.3; and for Italy, Chapter 2, Section 2. The situation is more restrictive in Norway, where the clause may be set aside only under exceptional conditions as unfair; see Chapter 13, Section 3.6.

[51] See Chapter 7, Section 2.5.

4.1.7 Subject to contract

The purpose of a subject to contract clause is to free the negotiating parties from any liability in case they do not reach a final agreement. This clause, like those mentioned above, protects important interests in international commerce: it must be possible for the parties to wait until they have completed all negotiations before they make a decision on whether to enter into the contract. Often, negotiations are complicated and are carried out in various phases covering different areas of the prospective transaction, whereby partial agreements on the respective area are recorded and made 'subject to contract'. When all partial negotiations are concluded, the parties will be able to have a full evaluation and only then will they be in a position to finally accept the terms of the deal.

The parties may freely agree when and under what circumstances they will be bound. However, a literal application of the clause may lead to abusive conducts, such as if one of the parties never really intended to enter into a final agreement and used the negotiations merely to prevent the other party from entering into a contract with a third party.

In this case, as in respect of the clause on termination of the contract, there is a dichotomy between the common law approach and the civil law approach. English law seems to permit the parties to negate the intention to be bound, without concerning itself with the circumstances under which the clause will be applied. English courts seem to show a certain sense of unease when they permit the going back on a deal, but it seems that a very strong and exceptional context is needed to override the clause.[52] On the contrary, civil law, like the UPICC and the PECL, is concerned with the possibility that such a clause may be abused by a party entering into or continuing negotiations without having a serious intention of finalising the deal. Therefore, such conduct is prevented, either by defining the clause as a potestative condition and therefore null[53] or by assuming a duty to act in good faith during the negotiations.[54]

Therefore, parties may generally rely upon the possibility of negating the intention to be bound if the relationship is subject to English law. If

[52] See Chapter 7, Section 2.6.

[53] See, for France, Chapter 9, Section 8. Potestative conditions are also null under Italian law: see Article 1355 of the Civil Code.

[54] See, for France, Chapter 9, Section 8; for Denmark, Chapter 11, Section 2.7; for Finland, Chapter 12, Section 2.7; for Norway, Chapter 13, Section 3.7; and for Russia, Chapter 16, Section 2.7. The duty to act in good faith during the negotiations is also spelled out in §311 of the German BGB and in Article 1337 of the Italian Civil Code. See, for the UPICC and the PECL, Chapter 3, Section 2.4. For Hungarian law, see Chapter 15, Section 8.

the applicable law belongs to a civilian system, however, the parties will be subject to the principle of good faith under the negotiations, irrespective of the language they have used to avoid it.

4.1.8 Material adverse change

The purpose of a material adverse change clause is to give one of the parties the discretion to withdraw from its obligations in case of change in circumstances that significantly affect the creditworthiness of the other party or in case of other defined circumstances. As above, this clause serves a useful purpose by permitting agreement in advance on all terms of the transaction, though reserving for events that may have a negative effect and may supervene between the time of the agreement and the time at which the obligations are to become effective. The parties are free to define the list of events that are included in the clause. However, a widely formulated clause may lead to abuse if a party invokes it to avoid a deal in which it has lost interest.

Case law on this clause is not abundant; therefore, it may be difficult to express a definite opinion on the enforceability of the clause under all circumstances.[55] What is clear is that under French law, the clause should be formulated in an objective way, so as to exclude the possibility that a party applies purely subjective criteria, thus rendering it a potestative condition.[56] In some Nordic systems, the principle of good faith[57] would impose a restrictive interpretation of the clause[58] in order to avoid abuse in its application.

Therefore, the language of the clause may not be understood purely on the basis of its terms, and it must be integrated with the principles of the applicable law.

4.2 Clauses using terminology with legal effects not known to the applicable law

4.2.1 Liquidated damages

The liquidated damages clause quantifies the amount of damages that will be compensated and has the purpose of creating certainty regarding

[55] On the difficulty of predicting the outcome of a case involving this clause under Swedish law, see Chapter 14, Section 5.3.3.4.

[56] See Chapter 9, Section 9.

[57] See, for Finland, Chapter 12, Section 2.8. Germany also has a principle of good faith in the performance of the contract: see §242 of the BGB.

[58] See, for Denmark, Chapter 11, Section 2.8. See also Hungarian law (Chapter 15, Section 9).

what payments shall be due in case of breach of certain obligations. In many civilian systems, this may be achieved by agreeing on contractual penalties. The liquidated damages clause has its origins in the common law, where contractual penalties are not permitted. The main remedy available for breach of contract in common law is compensation of damages. In order to achieve certainty in this respect, contracts contain clauses that quantify the damages in advance. As long as the clause makes a genuine estimate of the possible damages and is not used as a punitive mechanism, it will be enforceable. The agreed amount will thus be paid irrespective of the size of the actual damage. The common law terminology is also adopted in contracts governed by other laws, even when the applicable law permits contractual penalties. In the intention of the parties to these contracts, these clauses are often assumed to work as penalty clauses. This means that they are not necessarily meant to be the only possible compensation for breach of contract and are to be paid irrespective of the size of the actual damage. However, questions may arise as to the effects of the clause: shall they have the same effects as in English law and make the agreed sum payable in spite of the fact that there was no damage at all, or that the damage had a much larger value, or that the clause was meant to be cumulated with a reimbursement of damages calculated according to the general criteria?

It must be first pointed out that this is one of the clauses that demonstrate the primacy of the contract language in the eyes of the English courts. Structuring the clause as a liquidated damages clauses rather than as a penalty clause makes it possible to avoid the penalty rule under English law. This effect follows appropriate drafting rather than the substance of the regulation. Although the courts have the power to exert control on whether the quantification may be deemed to be a genuine evaluation of the potential damage, they are very cautious in making use of this power, under the assumption that the parties know best how to assess any possible damages.[59] Moreover, the penalty rule applies to sums payable upon breach of contract; an appropriate drafting will make it possible to circumvent these limitations by regulating payments as a consequence of events other than breach, thus excluding the applicability of the penalty rule.[60] This is a good example of how far the appropriate drafting may reach under English law.

[59] See Chapter 7, Section 2.7. [60] *Ibid.*

In civil law, on the contrary, no matter how clear and detailed the drafting, there are some principles that may not be excluded by contract. Thus, the agreed amount of liquidated damages will be disregarded if it can be proven that the loss actually suffered by the innocent party is much lower[61] or much higher.[62] Under certain circumstances, contractual penalties may be cumulated with other remedies, including the reimbursement of damages.[63] The English terminology that refers to 'damages' may create a presumption that the parties did not intend to cumulate that payment with other compensation. This may come as a surprise to the parties that used the terminology on the assumption that it is the proper terminology for a contractual penalty; however, if it is possible to prove that the parties intended to regulate a penalty and did not intend to exclude compensation for damages in spite of the terminology they used, the presumption may be rebutted.[64]

Relying simply on the language of the contract, and particularly if the contract also contains a sole remedy clause, a party could be deemed to be entitled to walk out of the contract if it pays the agreed amount of liquidated damages. The liquidated damages clause could thus be considered as the price that a party has to pay for its default, and as an incentive to commit one if the agreed amount is lower than the benefit that derives from walking out of the contract. In many countries, however, the principle of good faith prevents the defaulting party from invoking the liquidated damages clause in the event that the default was due to that party's gross negligence or wilful misconduct.[65]

The liquidated damages clause is one more example of the different approach to drafting and interpretation in the common law and civil law traditions. Whereas the former makes it possible to circumvent the law's rules by appropriate drafting, the latter integrates the language of the contract with the law's rules and principles.

[61] See, for Germany, Chapter 8, Section 5.2.2.1; for France, Chapter 9, Section 10; for Denmark, Chapter 11, Section 3.1; and for Russia, Chapter 16, Section 2.5.

[62] See, for France, Chapter 9, Section 10; for Finland, Chapter 12, Section 3.1; for Norway, Chapter 13, Section 4.1; for Hungary, Chapter 15, Section 10; and for Russia, Chapter 16, Section 2.5.

[63] See, for Finland, Chapter 12, Section 3.1; for Norway, Chapter 13, Section 4.1; for Hungary, Chapter 15, Section 10; and for Russia, Chapter 16, Section 2.5.

[64] See, for Finland, Chapter 12, Section 3.1; for Norway, Chapter 13, Section 4.1.

[65] See, for France, Chapter 9, Section 10; for Denmark, Chapter 11, Section 3.1; for Finland, Chapter 12, Section 3.1; for Hungary, Chapter 15, Section 10. The law seems to be unsettled on this matter in Sweden: see Chapter 14, Section 6.3.

4.2.2 Indemnity

Indemnity clauses have a technical meaning under English law and, among other things, they assume that there is a liability and that damage actually occurred. However, some contracts use the term 'indemnity' or 'indemnify' to designate a guaranteed payment. The analysis made in Part 3 shows that the simple use of the term does not imply that it shall be understood with the technical meaning that follows from English law. Therefore, if the parties intended the payment to be made irrespective of the occurrence of a damage, it will not be possible to avoid it by invoking the requirements that the technical meaning of indemnities have under English law. The clause will be interpreted in accordance with the substance regulated by the parties and the applicable law.

4.3 Clauses regulating matters already regulated in the applicable law

4.3.1 Representations and warranties

The representations and warranties clause contains a long list of circumstances that the parties guarantee to each other – from the validity of the parties' respective incorporation to the validity of the obligations assumed in the contract and the characteristics and specifications of the contract's object. As was seen above, some of these representations and warranties may not be deemed to have any legal effect, because they fall outside of the parties' contractual power;[66] however, most of the circumstances that are represented or warranted relate to specifications or characteristics of the contract's object. These representations and warranties create an obligation for the party making them and, if breached, will either allow the other party to repudiate the contract or to claim compensation for damages. Therefore, the clause has an important function. This function is particularly important in common law, where the parties are expected to spell out in the agreement their respective assumptions and obligations, and it may be difficult to convince a court to imply specifications or characteristics that were not mentioned in the contract. During contract negotiations, a party is under no duty to disclose matters relating to the contract's object and the representations and warranties clause is usually the occasion for the

[66] See Section 2 in this chapter.

parties to list all information that they consider relevant, and where they expect the other party to assume responsibility. Without the representations and warranties clause, there would be no basis for a claim.

On the contrary, in civilian systems, the parties are under extensive duties to disclose any circumstances that may be of relevance in the other party's appreciation of its interest in the bargain. It is not the party interested in receiving the information that shall request the other party to make a list of specific disclosures, it is the party possessing the information that is under a general duty to disclose matters that are relevant to the other party's assessment of the risk and its interest in the deal. This duty of information exists by operation of law even if the contract has no representations and warranties clause.

When the parties insert a long and detailed representations and warranties clause, and carefully negotiate its wording, they may be under the impression that this long list exhaustively reflects what they represent and warrant to each other. This impression is in compliance with the effects of the clause under English law, where accurate wording is crucial in deciding whether a party has a claim or not.[67]

Under civil law, the clause also has effects: if a certain characteristic was expressly represented or warranted in the contract, failure to comply with it will more easily be qualified as a defect in the consent or a breach of contract, without the need to verify whether it had been relied on, whether it was essential, etc. The clause therefore creates certainty regarding the consequences of the breach of the representations and warranties that were made.

However, the clause does not have the reverse effect: if a certain characteristic was not included in the representations and warranties, it does not mean that it may not be deemed to be among the matters that the parties have to disclose or bear responsibility for. The parties may have invested considerable energy in negotiating the list and one party may intentionally have omitted certain matters, under the illusion that this would have been sufficient to avoid any liability in that connection. However, if the matter left out is material, the other party may be entitled to claim the nullity of the contract[68] or compensation for damages.[69] The

[67] See Chapter 7, Section 2.9.
[68] See, for France, Chapter 9, Section 12; and for Russia, Chapter 16, Section 2.8.
[69] See, for Denmark, Chapter 11, Section 4.1; and for Russia, Chapter 16, Section 2.8.

duty of disclosure may not be contracted out of[70] and is considered to be such a cornerstone that it applies even to sales that are made 'as is'.[71]

This clause is an example of where an accurate drafting may obtain results if the contract is subject to English law, because English law leaves it to the parties to determine the content of their bargain. Civil law, on the contrary, regulates this area extensively, and the drafting of the parties may not affect this regulation, no matter how clear and detailed it is.

4.3.2 Hardship

The hardship clause regulates, sometimes in detail, under what circumstances and with what consequences the parties may be entitled to renegotiate their contract because of a supervened and unexpected unbalance in the respective obligations. English law does not provide for any mechanism to suspend or discharge the parties from obligations in case the performance, though still possible, becomes more onerous for one party, and nor does French law. On the contrary, other civilian systems permit a party to request a modification to the obligations if changed circumstances seriously affect the balance in the contract.[72] The clause thus gives the parties greater rights than they would have under English or French law, while at the same time it may restrict the rights that the affected party would have under other laws. The parties may have introduced a hardship clause in an attempt to take the regulation of supervening circumstances into their own hands and to exclude the application of corresponding rules in the governing law. A clause permitting the affected party to request renegotiations will be enforced in a system where such a right is not recognised by the general law, because it will simply create a new regulation based on the contract but not prohibited by law. The reverse, however, is more problematic: a detailed hardship clause may restrict the right that the affected party has under the applicable law. For example, the clause may contain an intentionally restrictive definition of the events that trigger the remedy, significantly

[70] See, for Finland, Chapter 12, Section 4.1; and for Russia, Chapter 16, Section 2.8. Hungarian law is less absolute: see Chapter 15, Section 12.

[71] Under Norwegian law (see Chapter 13, Section 5.1) – although in the case of sales 'as is', the duty extends only to what the seller had knowledge of.

[72] See, for Denmark, Chapter 11, Section 4.2; for Finland, Chapter 12, Section 4.2; and for Norway, Chapter 13, Section 5.2. For Germany, see §313 of the BGB and for Italy, see Articles 1467–1469 of the Italian Civil Code.

more restrictive than the applicable law's standard of 'more burdensome performance'. Also, the clause may regulate that the only possible remedy is the request of renegotiation without suspending the duty to perform and thus exclude other remedies, such as withholding the performance, which may be permitted by the applicable law.

The parties may actually have written such a restrictive hardship clause with the purpose of limiting the application of the governing law's generous rules. However, the clause will not be understood as the sole regulation in case of supervened imbalance in the contract and will thus be cumulated with the applicable law's rules.[73]

4.3.3 *Force majeure*

This clause is meant to regulate, in detail, under what circumstances a party may be excused for non-performance of its obligations under the contract in case the performance becomes impossible. Corresponding regulations may be found not only in the legal systems that, as seen immediately above, have a regulation for hardship, but also in English and French law. *Force majeure* clauses thus regulate matters that are already regulated by the applicable law. The law's regulation, however, is not mandatory; therefore, it is quite possible for the parties to create a separate contractual regime and allocate the risk of supervened impediments differently from the allocation that follows from the governing law.

Often, *force majeure* clauses are detailed and extensive. This, combined with the above-mentioned non-mandatory nature of the legal regime, gives the impression that these clauses will be applied equally, irrespective of the governing law. However, the principles of the applicable law are likely to influence the understanding of the clause. For example, many *force majeure* clauses describe the excusing impediment as an event beyond the control of the parties that may not be foreseen or reasonably overcome. Different legal systems may have differing understandings of what is deemed to be beyond the control of one party: whereas many systems will consider this wording as an allocation of the risk in the sphere of either party (what is not under the control of one party is under the control of the other one), others may focus more on the

[73] See, for Denmark, Chapter 11, Section 4.2; for Finland, Chapter 12, Section 4.2; for Norway, Chapter 13, Section 5.2. See, however, German law and Hungarian law, which allow the parties to derogate from the statutory regulation: see Chapter 8, Section 5.3.2.1 and Chapter 15, Section 13.

conduct of the affected party. If the non-performing party has been diligent and cannot be blamed for the occurrence of the impediment, it will be excused. In the former approach, it may be the case that a party is not excused even though it has acted diligently and cannot be blamed – the basis for liability is that the risk that materialised was deemed to have been assumed by that party. This approach is typical of the common law and may be also found in the CISG.[74] In the latter approach, the party will be excused if it did not have the actual possibility of influencing the circumstances that caused the impediment. This approach may be found in some civilian systems.[75]

The different approaches to what is beyond the control of the parties may be illustrated by comparing how the CISG and Norwegian law deal with a situation where performance is prevented by a failure made by the seller's supplier. The rule on liability for the seller's non-performance has the same wording in both systems: the Norwegian Sales of Goods Act is the implementation of the CISG, and its §27 translated the rule contained in Article 79 of the CISG. In spite of the rule being the same, its application is diametrically different. In the CISG, if the seller is not able to perform because of a failure by its supplier, it will not be excused.[76] The choice of supplier is within the control of the seller, so failure by a supplier may not be deemed to be beyond the control of the seller. Under Norwegian law, on the contrary, failure by the seller's supplier is deemed to be an external event that excuses the seller.[77] As long as the supplier was chosen in a diligent way, the seller may not be blamed for the supplier's failure because it does not have any actual possibility of influencing the supplier's conduct.

[74] For a more extensive explanation and bibliographic references, see G. Cordero-Moss, *Lectures on Comparative Law*, Publications Series of the Institute of Private Law No. 166 (University of Oslo, 2004), pp. 156–159, available at http://folk.uio.no/giudittm/GCM_List%20of%20Publications.htm, last accessed 6 October 2010.

[75] See, for Russia, Chapter 16, Section 2.9. See, for further references, Cordero-Moss, *Lectures on Comparative Law*, pp. 151–156.

[76] The United Nations Secretariat's *Commentary to the UNCITRAL Draft Convention*, adopted at the United Nations Conference on Contracts for International Sale of Goods, Vienna, 10 March–11 April 1980 (A/CONF./97/5), available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_travaux.html (last accessed 6 October 2010), is the closest to an official report to the CISG. In the comment to the second paragraph of Article 79 on the use of subcontractors, it specifies that the rule does not include suppliers of raw materials or of goods to the seller: see *Commentary*, p. 172.

[77] See Chapter 13, Section 5.3.

This different understanding of the rule on the supplier's failure is a good illustration of how different legal traditions may affect the interpretation of the same wording.[78]

5 The drafting style does not achieve self-sufficiency, but has a certain merit

The research undertaken in this book shows that the terms of a contract are not detached from the governing law: the governing law will influence the interpretation and application of these terms. To what extent the legal effects differ from what a literal application would suggest varies depending on the governing law.

Therefore, there is no reason to rely on a full and literal application of the contract's wording as if it were isolated from the governing law.

If this is so, why do contract parties go on drafting detailed (and sometimes, as seen above, nonsensical) clauses without adjusting them to the governing law? Why do they engage in extensive negotiations of specific wording without even having discussed which law will govern the contract?

Each of the parties may repeatedly send numerous delegations consisting of financial, marketing, technical, commercial and legal experts to meet and negotiate specific contractual mechanisms and wording to be inserted in the contract. All these people may spend hours and days negotiating whether the penalty for a delay in performance shall be $10,000 or $15,000 a day, or fighting over whether the contract shall include the word 'reasonable' in the clause permitting early termination of the contract in case the other party fails to perform certain obligations. All these negotiations are usually made without even having addressed the question of the governing law. The contract may end up[79] being governed by English law, in which case the clause on penalties will be unenforceable, or by German law, in which case the concept of reasonableness will be part of the contract irrespective of the appearance of the word. All the efforts in negotiating the amount of the penalty or in

[78] The interpretation referred to in Chapter 13, Section 5.3 is based on a Supreme Court decision rendered in 1970, long before the implementation of the CISG in the Norwegian system. However, the Supreme Court's decision is still referred to as correctly incorporating Norwegian law after the enactment of the Sales of Goods Act, as the reference made in Chapter 13 confirms (see, for further references, Cordero-Moss, *Lectures on Comparative Law*, pp. 152f.).

[79] Either because the parties chose it or because the applicable conflict rule pointed at it.

rendering the early termination clause stricter will have been in vain. Unfortunately, it is not at all rare that the choice-of-law clause is left as the last point in the negotiations and that it is not given the attention that it deserves.

This does not necessarily mean that the practice of negotiating detailed wording without regard to the governing law is always unreasonable. From a merely legal point of view, it makes little sense, but from an overall economic perspective, it is more understandable, as was seen in Part 1 of this book.

Thus, it is true that clauses, originally meant to create certainty, upon the interaction with the governing law may create uncertainty.[80] The uncertainty about how exactly a clause will be interpreted by a judge is deleterious from a merely legal point of view. However, this uncertainty may turn out to be less harmful from a commercial perspective: faced with the prospects of employing time and resources in pursuing a result that is unforeseeable from a legal point of view, the parties may be encouraged to find a commercial solution. Rather than maximising the legal conflict, they may be forced to find a mutually agreeable solution. This may turn out to be a better use of resources once the conflict has arisen.

In addition, this kind of legal uncertainty is evaluated as a risk, just like other risks that relate to the transaction. Commercial parties know that not all risks will materialise, and this will also apply to the legal risk: not all clauses with uncertain legal effects will actually have to be invoked or enforced. In the majority of contracts, the parties comply with their respective obligations and there is no need to invoke the application of specific clauses. In situations where a contract clause actually has to be invoked, the simple fact that the clause is invoked may induce the other party to comply with it, irrespective of the actual enforceability of the clause. An invoked clause is not necessarily always contested. Thus, there will be only a small percentage of clauses that will actually be the basis of a conflict between the parties. Of these conflicts, we have seen that some may be solved amicably, precisely because of the uncertainty of the clause's legal effects. This leaves a quite small percentage of clauses upon which the parties may eventually litigate. Some of these litigations will be won, some will be lost. Commercial thinking requires a party to assess the value of this risk of losing a lawsuit on enforceability of a clause (also considering the likelihood that it materialises) and compare this

[80] This observation is made by Hagstrøm in Chapter 13, Section 2.

value with the costs of alternative conduct. Alternative conduct would be to assess every single clause of each contract that is entered into, verify its compatibility with the law that will govern each of these contracts and propose adjustments to each of these clauses to the various other contracting parties. This, in turn, requires the employment of internal resources to revise standard documentation and external resources to adjust clauses to the applicable law, and possibly negotiations to convince the other contracting parties to change a contract model that they are well acquainted with. In many situations, the costs of adjusting each contract to its applicable law will exceed the value of the risk that is run by entering into a contract with uncertain legal effects.

The sophisticated party, aware of the implications of adopting contract models that are not adjusted to the governing law and consciously assessing the connected risk, will identify the clauses that matter the most and will concentrate its negotiations on those, leaving the other clauses untouched and accepting the corresponding risk.

6 Conclusion

The contract practice described above does not mean that the parties have opted out of the governing law for the benefit of a transnational set of rules that is not easy to define. Just because the parties decided to take the risk of legal uncertainty for some clauses does not mean that the interpreter has to refrain from applying the governing law or that the legal evaluation of these clauses should be made in a less stringent way than for any other clauses. The interpreter should acknowledge the parties' desire that the contract be, to the fullest extent possible, interpreted solely on the basis of its own terms. Therefore, extensive interpretation or integration of terms should be avoided. However, such a literal interpretation of the contract should be made in compliance with the principles underlying the applicable law, as well as its mandatory rules.

Therefore, taking the risk of legal uncertainty does not justify that the drafters neglect being aware of the legal effects that their clause may have under the governing law: a calculated risk assumes a certain understanding of what risk is being faced. Being fully unaware would not permit the drafters to assess the risk and decide which clauses should be adjusted and which ones do not justify using resources in negotiating. In the examples made above, the penalty clause should certainly be adjusted to the governing law in order to permit enforcement, whereas the clause

on reasonable early termination does not need to be negotiated because a change in the wording will not affect its enforcement. Knowing the legal effects under the governing law will permit the parties to apply their resources reasonably during the negotiations. This makes it possible to take a calculated risk. On the contrary, ignoring the problems and blindly trusting the effectiveness of the contract's wording resembles recklessness more than a deliberate assumption of risk.

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