Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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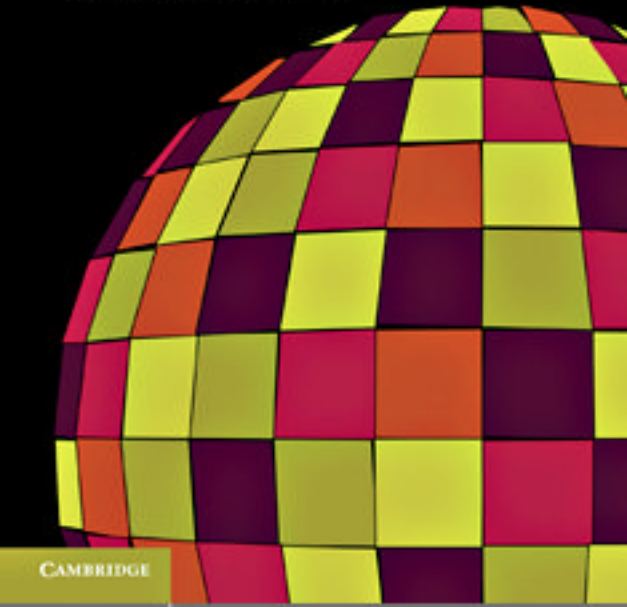

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One significant factor is that of language. While the English language is generally considered as the *lingua franca* of international contracts, the corresponding performance may occur anywhere on the globe. Where performance occurs in locations where neither the buyer nor the seller have the requisite ability to efficiently conduct business in the local language, not all of the relevant national legal requirements may form part of the negotiations.

> *For example, for an EPC project to be performed in Angola on behalf of a US oil major with an associated contract governed by US law, the supply contract was divided into two parts, as commonly is the case. One part was the offshore or international contract for the work to be performed outside of Angola and the other part was a local contract for the work to be performed in country. All three of the contracts were written in the English language. However, as both the buyer and the seller in the supply contract only had a very limited local presence in Angola, neither had the necessary language capabilities to review the local Angolan legal requirements written in Portuguese.*

A related issue is the actual state of law in the relevant national legal system. Legislation, decrees and special laws may in some cases create a myriad of rules that can cause the actual state of the law to be ambiguous or contradictory and, as a result, unknown to the parties. This difficulty is heightened by the fact that many complex issues will never have been brought before the courts and, as a result, there may be no indication on how a law or a series of different laws would be applied in practice. Furthermore, even where companies are willing to pay local counsel for opinions on certain aspects of the law, the answers provided may not be conclusive. Another issue is that in the author's experience, it has proved extremely difficult to access legal texts in some countries, for example, in certain countries in the Middle East.

> *In a contract between a state-controlled Tunisian entity and a foreign seller, the buyer insisted that the warranty provisions should include the relevant Tunisian warranty law in addition to the warranties specifically agreed to under the contract. This apparently innocuous request caused the foreign seller a great deal of difficulty, as it was unclear as to how the request impacted the contractual obligations. In particular, the question arose as to which Tunisian laws were being referred to. Was the reference limited to the warranties set out in the Tunisian code of obligations or did it also include all warranty provisions under all Tunisian laws? What would occur if there were discrepancies between the contract and the Code Civile or other relevant Tunisian law? In the end, this issue was resolved not by a complete analysis of Tunisian law that would have been*

time-consuming and potentially inconclusive, but rather by stating that the only Tunisian warranty laws that would apply would be statutory laws from which the parties could not derogate.

Another set of factors that will commonly impact the consideration and implementation of the relevant national requirements are the time, resources and collective effort parties dedicate to the contract negotiation process. Parties may not be afforded sufficient time or allocate the necessary resources to negotiate all the terms and conditions. In other cases, parties simply do not take into consideration some national legal requirements that they are (or were previously) aware of, fail to keep their knowledge of national laws up-to-date or, alternatively, do not have the economic resources to take such legal requirements into consideration in the first place.

To take a pertinent example, state-owned public entities often issue public tenders for high-value and complex infrastructure projects with very tight deadlines. In one such project in South America, the bidders were international consortiums of engineering and construction companies along with their historic supply base and local companies providing materials and services in-country. The time constraints were severe on the parties forming consortiums to agree to contractual terms and conditions, as they were required to simultaneously prepare the technical aspects of the bid. Faced with this scenario, it was therefore not practicable for the bidders to consider all aspects of the applicable national law. Rather, the parties' past contractual dealings, along with their experience in-country, determined the extent of the inclusion of the national legal requirements. The parties that had a pre-existing contractual agreement relationship, where they worked together on a very similar project in-country, were able to save a great deal of time and could perform a more indepth review of the relevant national law. For the other bidders who did not have a past relationship, the time constraints effectively precluded the examination and inclusion of some aspects of the relevant national legal requirements, in particular, the local mandatory law.

1.3 Non-negotiated contracts

Another point is worthwhile noting. In actual practice, the large majority of contracts placed by companies are automatically generated and performed without the parties ever reaching a final written agreement or complying with the formal legal requirements regarding acceptance. While such a state of affairs may cause a certain degree of astonishment, it can be explained as being due to the sheer volume of contracts

generated by companies that are necessary for the performance of day-to day-operations. Most of these contracts are for small values and often are repetitive in nature, making negotiation a practical impossibility. While a great majority of these contracts are domestic in scope, a certain number are international. Needless to say, in these cases there is no review of the relevant national legal requirements and its inclusion will be entirely dependent upon whether the boilerplate language accurately captured the law in the first place and the formal requirements of the relevant governing law.

2 The end result

2.1 The contract as an imperfect compromise

Where the parties come from different legal systems, the final negotiated contract will often reflect this fact and contain a mixture of principles from both the buyer's and seller's respective legal traditions. This fact alone will often not cause difficulties in the performance of the parties' respective contractual obligations. In the event of a dispute, however, such issues, along with the extent to which national legal requirements were incorporated into the final agreement, may have serious consequences.

2.2 Consequences

The legal and commercial consequences vary when the parties' final agreement does not incorporate all of the relevant national legal requirements.

In one sub-set, the party that has assumed the contractual responsibility in question will bear the associated costs. Taking the example of a seller performing services in Angola, if, in the final contract, the seller contractually agreed to take responsibility for all taxes related to its performance, it follows that it will be held to bear any additional costs imposed under Angolan law. This will be the case regardless as to whether the seller was unaware of the particular service tax during the negotiation phase.

In other cases, both parties will assume the consequences of the failure to include the relevant national law requirements, such as the requirement for international Russian contracts to be written in Russian and English. Should the parties fail to respect this particular obligation, they

collectively run the risk of the contract being found to be null and void by the competent legal authority. In such cases, the parties' rights and obligations under the final contract may, in fact, be very different from what the parties actually intended, and the validity of the contract itself may be put into question. Such a result would come as a surprise even to sophisticated parties.

2

Multinational companies and national contracts

MARIA CELESTE VETTESE

1 Introduction

Using a critical approach, the aim of this chapter is to analyse the use of international contracts in day-to-day business in order to assess the limits and the enforceability of clauses contained in standard documents with respect to local legislation.The use of common structures becomes the normal way of drafting international contracts, and these documents are the basis for the discussion between the parties. But where do those standard documents come from? It is important, especially for in-house lawyers, to critically understand the origin of these common contractual structures in order to assess problems that may be related to their use. This analysis will then start by explaining the origin of such standardisation practice and the reasoning behind it.

The globalisation of business, due to the global footprint of corporate transactions, allowed the development of standard international contracts. Terminology and legal concepts related to these international contracts do, in fact, come more often from common law environments rather than from civil law systems. The reason for this influence by the common law system can be found in the strong economic push given in the last century to the development of business[1] by the Anglo-American system. The continuous use of the same type of international contracts creates standard documentation for day-to-day business.

On the other hand, companies have a strong need for internal standardisation, which in turn enhances the use of standard documentation in day-to-day working life. Standardisation means a reduction of internal costs because the complexity in the exchange of information is

[1] G. Cordero-Moss, 'Harmonized Contract Clauses in Different Business Cultures', in T. Wihelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Main Cultures of Europe* (Kluwer International, 2007), pp. 221–239.

a very costly activity. In the legal field, the discussion over interpretations and the definition of applicable rules are costs that can cause losses in terms of competitiveness and/or economic perspectives. As a matter of fact, it has also been observed that legal communities create networks that reduce transaction costs between agents, and their value increases as more agents adopt them.[2] Therefore, one important step of the standardisation process is to find a common language that can help to create a harmonisation of concepts. For all these reasons, the use of standard documents is strongly supported in day-to-day business life.

Examples of this trend for standardisation can be found in most of the functions of a company (i.e., information technology, engineering, production, procurement, finance and, of course, legal matters). In the accounting area, for example, companies belonging to an international group, albeit based in different countries, are requested to adopt either international or local accounting principles. When analysing the standardisation of accounting principles, various legislative solutions have been established in order to supersede the differences existing between countries' legislations. To give an example, in Italy, a legislation intervention occurred so that companies that issue listed securities, and even financial institutions, are required to adopt International Financing Reporting Standards (IFRS) like companies belonging to international groups. Thus, in the field of accounting principles, the standardisation process took place by legislative intervention. Nevertheless, standardisation in the legal field is more challenging since it is more difficult to supersede local differences. As for the contractual area, this massive legislative intervention is ongoing. A lot of work has been done within the EU regarding the harmonisation process and further work is under discussion. In the Green Paper[3] on the conversion of the Rome Convention of 1980, the need for the harmonisation of international private law is described and seen as one of the ways to avoid a possible lack of uniformity and certainty that may create a disruption and unjustified advantage to the involved parties.

[2] Legrand defines legal culture as 'the framework of intangibles within which interpretative community operates, which has normative force for this community [. . .] and which, over the longue duree, determines the identity of a community as community': P. Legrand, *Fragment on Law-as Culture* (W. E. J. Tjeen Willink, Schhordijk Institute, 1999).

[3] Commission of the European Communities, *Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation*, COM (2002) 654 final.

The importance of harmonisation has been recognised at the Community level,[4] but there is still discussion regarding the extent of such harmonisation. In any case, notwithstanding the legislative discussion, in day-to-day business the use of standard documentation is widespread; however, standardisation in the legal field is not as easy as it is in other functions or areas of companies (such as finance). The difficulties lie in the historical differences existing between legal systems and, moreover, in the legal field, the harmonisation of documents does not mean the automatic harmonisation of concepts.

Another important reason as to why the use of standard documentation is strongly supported in a corporation is related to the stakeholder of these contracts. We have to consider that day-to-day contractual negotiations take place in many cases between commercial or technical people and without a lawyer being present. It is easy to understand how standard documents are very helpful in these situations. This reason, combined with a lack of sufficient time when discussing contracts, has allowed the further development of standard documents.

Now that we have defined and analysed the reasons as to why standardisation has become so important in day-to-day business life, we should then focus on which problems are related to the standardisation processes in the legal field.

Standardisation in the legal field encounters obstacles in the historical differences existing between legal systems. As we have observed, common structures originate from common law systems. These standard documents have been transplanted into other environments not pertaining to the original common law systems. Therefore, the use of common contracts developed in common law countries by 'different law' countries raises a variety of problems related to the legal theory of the transplant. We need, then, to focus our analysis on the transplanting problems related to the use of common law drafted contracts and also to the meaning that those contracts have in their country of origin.

2 Standard contractual structures, their impact on national legislations and the expectations of the parties

The transplant of standard instruments developed in common law countries into other specific legal systems can create problems related

[4] For a further analysis of the status of the Europeanisation of contract law, see C. Twigg–Flesner, *The Europeanization of Contract Law* (Routledge-Cavendish, 2008).

to the enforceability and validity of standard contractual clauses with respect to local legislation requirements. In order to carry out a proper evaluation activity, lawyers need to spend time and pay sufficient attention to the intended use of the clause they have decided to use and to the specific situation they are facing. These characteristics are seldom at our disposal in typical hectic working days. Standard draft contracts and, in particular, 'boilerplate' clauses represent a good summary of the best practice developed in day-to-day business life.

Boilerplate clauses, in fact, are the result of best practises developed with respect to the allocation of typical risk policies, as are present in contracts. In this respect and according to this point of view, the use of standard documents is useful as a basis for discussion in our daily work in this respect. Nevertheless, a critical assessment of these clauses must be done before using them, in order for them to remain viable instruments. Through some practical examples, implementation problems can be more easily understood.

Before analysing these practical examples, it is important to underline the role that contracts play in the company. Contracts are, in fact, the instruments that define roles, identify responsibilities and contain the expectations of the parties as a result of their contractual relationship. Contracts are considered to be an exchange of promises whereby the parties identify their common understanding of what their expectations are with respect to the transaction. Contracts are the principal instrument by which companies communicate with each other. Monateri defines the contract as the most important example of globalisation within the legal system.[5] The length or the complexity of contractual dispositions can dramatically change depending on whether the common law approach or the civil law approach is used.

In fact, one of the main differences between the common law approach and the civil law approach to contracts was correctly expressed in the definition given by Monateri, who qualifies Anglo-American contracts as 'tough' contracts ('contratto rude') and European continental contracts as dewy contracts ('contratto rugiadoso'). Common law contracts have been characterised by the principle of certainty and predictability.[6]

[5] P. G. Monateri, 'Lex Mercatoria e competizione fra ordinamenti', *Rivista di Sociologia del Diritto*, 2, 3 (2005), 229–240.

[6] 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 (2007), 1.

Effects of this principle can be found in the extremely detailed definition of the duty and rights of the parties ('tough contracts' in Monateri's definition). Monateri deems that 'tough contracts' are the result of a market battle, and the contract can be defined as a 'temporary truce' between the parties.[7] For that reason, in the common law approach, everything referring to the parties' relation (duties, onus, etc.) is defined inside the contract with little possibility for the judge to intervene. On the contrary, civil law systems can rely on the definition contained in the civil or commercial codes whereby the substance and fundamental structure of the different types of contracts are clearly identified. For that reason, in Continental Europe, traditional contracts were less detailed than in the common law countries. In any case, the technique used in the common law system clearly prevailed in day-to-day business use even in the civil law countries, so that currently it is almost impossible to even draft contracts without having in mind the common law system structure.

After having clarified the importance of contracts for the company's life and the substantial differences existing between the common and civil law approaches, the practical effect caused by having an enforceability problem of specific contractual clauses becomes quite clear.

The first characteristic of a contract is to reflect the expectation of the parties and consequently their risk allocation. Therefore, the first negative impact of the unenforceability of contractual clauses will be on the expectations of the parties; parties will not be able to rely on a correct assessment of their expectations and will not have an efficient allocation of the economic (but also technical) risks connected to the transaction.

We can then start our analysis of specific boilerplate clauses in order to analyse the practical effect of what was discussed above.

One of the most frequently used clauses is the one related to transfer of title whereby INCOTERMS are often used as a reference. Transfer of title is one of the most important contractual clauses, considering its impact on revenue recognition. Generally accepted accounting principles (GAAP), in fact, state strict rules in order to assess if and how revenues can be recognised, and these rules are referred to in the occurrence of a transfer of title. It is easy to understand how the problem related to the transfer of the title of the goods plays an essential role in the overall economic risk assessment of a contract and how a wrong allocation of this risk can create a disruption caused by a discrepancy between the contractual instrument used and the expectation of the parties. In order

[7] Monateri, 'Lex Mercatoria e competizione fra ordinamenti'.

to have correct revenue recognition, transfer of title must be clearly identified and defined under the contract. If contractual clauses do not support the transfer of title in a proper manner, we may face severe problems. In day-to-day business, parties normally rely on INCOTERMS in order to define transfer of title. From a legal perspective, this is not a correct way of proceeding, as these rules are not applicable to the transfer of the title of the goods. INCOTERMS play an important role in the harmonisation and creation of a common basis of discussion in order to set up a way to define transportation and responsibilities connected with transportation. Nevertheless, rules defined in these conditions cannot be taken as a definition of rules applicable to transfer of title. If the parties want to achieve a clear transfer of title ruling, they must refer to the applicable legislation. INCOTERMS rule transportation and delivery but not transfer of title. Therefore, transfer of title must be treated in the contract in a proper autonomous way so that when and how goods become the property of the other party are clearly defined. This is one of the examples of a disruption with important economic effects caused by a negative or incorrect legal assessment during the negotiation phase. In the above-mentioned case, in fact, if the parties do not have a proper and clearly identified clause in the contract as to how to transfer the title, they can face problems in the realisation of their revenues.

Another important boilerplate clause is the one related to the termination for breach of contract. The effect of the termination under most civil law and common law jurisdictions is different. Common law will, in most cases, expect a damage recovery from a breach of contract, whereby the civil law may experience the intervention of a specific performance awarded by the judge. As Oliver Wendell Holmes stated in 1881: 'The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass.'[8] Consequences on the expectations of the parties can be very different when considering these general principles of law. What will happen from a risk point of view if one of the parties does not consider the risk of specific performance as an actual risk? Specific performance can be expensive with respect to payment of damages (i.e., needing to reorganise the production in order to achieve the order of performance). Payment of damages can be less expensive. Let us then imagine the following scenario to help and clarify: a contract is entered into between A and B. A, which is expecting performance from B, is a

[8] O. W. Holmes, *The Common Law* (Little Brown, 1881), p. 301.

civil law-oriented party and B is a common law-oriented party. The contract, drafted in a common law style, contains an exclusion clause, whereby all remedies other than those referred to in the contract are excluded. The contract is governed by Italian law. If B did not identify the specific performance as an occurrence, once this happens it will face severe economic impact. In fact, under Italian law, termination remedies are defined by the law and there are serious doubts as to whether these remedies can be excluded by the parties. In this case, then, the parties may face enforceability problems with respect to their exclusion clause and one of the parties may be forced to execute the contract as a consequence of an award in that sense.

The above exclusion clauses underscore an important tendency existing in the drafting of an international standard contract that aims to eliminate any influence from local legislation by inserting specific exclusion clauses under the contract. The expectation of the parties is to create a barrier from the real world – the state legislation must not affect the contractual relationship, but can the parties actually avoid any influence from the 'real world?' It is not always possible to create a completely 'untouchable' contract. Considering the above-mentioned exclusion clause as an example, Article 1462 of the Italian Civil Code does not allow the parties to exclude remedies related to the nullity or validity of a contract. Another important boilerplate clause on exclusion of remedy is the one related to the exclusion of any increase in price. The expectation of the parties is to define a general waiver of the possibility to request an increase of price due to unforeseeable events in order to avoid, for example, any claim for extra costs or any possibility of requesting a price increase due to inflation of the costs of raw materials (these types of clauses are normally defined as 'hardship clauses' in the common law system).

It is the important impact on the profitability of a contract that is easy to understand. An increase in the cost of raw materials and the postponement of the execution of the contract are fundamental issues connected with the worldwide economic crisis. The possibility of excluding these types of remedies is still under discussion under Italian law. In particular, much discussion has taken place regarding whether the exclusion of these remedies is allowed on a specific type of contract, namely 'appalto' (construction contracts). What happens if exclusion clauses are not enforceable once the case is in front of an Italian court? Can these clauses be considered as a 'styled clause' and thus consequently have no effect, or are those clauses null and void and therefore we have to

assume the nullity of the entire contract? In any case, this matter of unclear interpretation is of paramount economic impact.

This issue is unclear from a doctrine point of view. From a practical perspective, it is an economic risk. What would happen in the event that the contractor applies for a price revision notwithstanding a contrary contractual disposition and the judge follows its position?

The solution is to insert at the end of any clause a borderline statement with the following wording – 'to the extent permitted by applicable law'. This can be a good knowledge-management solution once we have experience that a clause can become null, but from the allocation of a risk point of view, the problem was not treated and the risk was not allocated. Therefore, as a consequence, the expectations of the parties have not been met! However, if we have solved the legal problem connected with the nullity of a contract, from a risk management point of view, the expected effects of the clause cannot be met and therefore the parties cannot rely on the solution they identified at the beginning of the contractual negotiations. It is important to duly note that a proper allocation of risks from an economic point of view takes into consideration only the company and not the discussed legal solution.

As we showed at the beginning of this chapter, the aim of the standardisation is to create common principles, but we also observed that this activity is not so easily accomplished in the legal field considering all the differences between legal systems. Indirect and mostly consequential damages are a good example of the problem related to the definition of common principles.

Damages are one of the most 'important' legal ghosts existing in the field of contract law, due to their potential economic and financial impact. It is then easy to understand that a correct allocation of risk with respect to damages is of the utmost importance for the profitability of the entire contract. The expectation of the parties is doubled with respect to damages remedies: on one side, there is the expectation of one party that wants to be indemnified for all damages arising from the contract and caused by the other party; and, on the other side, there is the expectation of the other party to limit its liability. Therefore, the trigger point in the discussion of these clauses is the damages and what type of damages can be identified with regard to the responsibilities. Under the general name of damages we find, in standard clauses on limitation of liability, reference to the words 'indirect and consequential damages'. But what types of damages are identified by the words 'consequential' and 'indirect' damages? Problems connected to the lack of

uniformity in the definition of common principles arise with respect to these definitions.

Italian law, as well as law in other civil law countries, does not utilise the word 'consequential'. Therefore, if a clause drafted in a common law environment is transplanted in Italy and literally translated, what should the consequences be from a legal point of view? To thoroughly understand this question, the definition of 'consequential losses' under common law systems must be clarified. My research in the common law area had been promptly driven in the right direction by a good friend, the Queen's Counsel: the question is not to look for a definition of 'consequential damages' but to understand on which of the limbs of the famous *Hadley* v. *Baxendale* decision the damages fall. I then fully understood why, in the last few years, in the common law system, especially in England and Wales, the reason why the clause related to indirect and consequential losses suffered an important drafting alteration. It is primarily related to the deep debate on the distinction between the first and the second limbs of the *Hadley* v. *Baxendale* decision.[9]

A little history on the debate can be helpful to understand the historical background we are discussing. Since the time of the *Victoria Laundry*,[10] the standard clauses on exclusion of consequential losses had been drafted without further explanation or definition as to what kind of losses were part of the definition of consequential losses. After some important cases in the last decade,[11] a standard clause on exclusion or limitation of consequential losses would be drafted by including a list of the possible damages that could occur (e.g., loss of profit, loss of use and loss of revenues). This was done in order to avoid a general reference to indirect and consequential damages, as had been done in the past. In fact, before these milestone cases, we had clauses drafted in a way that did not provide for a specific list of indirect and consequential losses, thus providing only general references to indirect and consequential damages. After the intervention of the judges, reliable clauses on indirect and consequential damages have been drafted by making a list of different types of damages (e.g., loss of profit, loss of use and loss of revenues). Italian law does not contemplate the wording 'consequential losses'

[9] *Hadley* v. *Baxendale* (1854) EWHC Exch J70.

[10] *Victoria Laundry Ltd* v. *Newman Industries Ltd* [1949] 1 All ER 997, [1949] 2 KB 528, CA.

[11] Among the most representatives cases on this debate are: *Hotel Services Ltd* v. *Hilton International Hotels (UK) Ltd* [1997] EWCA Civ 1822; and *British Sugar Plc* v. *Nei Power Projects Ltd* (1997) 87 Build LR 42, CA.

because it defines two categories of damages related to *lucrum cessan* and '*danno emergente*'. As in the common law system, loss of profit and loss of use can be interpreted as falling into one category or the other by virtue of the application of the general principles existing on damages.

For that reason, due to the lack of uniformity in the interpretation of the word 'consequential', we had to figure out a practical solution that helped the day-to-day business community to supersede the uncertainty in the legal field. The evolution of indirect and consequential damages is very important for various reasons. First, it underscores the implied practical effects after some important cases failed in front of the court. Secondly, it also helped us to understand that transplanting clauses from other legal systems does not imply that the clauses are interpreted in accordance with the interpretation made in their country of origin.

We started our analysis by considering that standard contracts have been modelled on the common law system. We now have to consider the evolution given by solutions defined by day-to-day practices that do not strictly pertain to the common law system. The interpreter must pay more attention in order to verify the content and the extent of the clauses analysed, and therefore the interpreter must also consider their meaning in the respective country of origin.

To some extent, standard contracts are no longer strictly referred to in the common law system, as they have been manipulated in such a way that the origin has been obscured. We can refer to the Hayek[12] theory in order to understand this principle. Hayek stated that the law (as opposed to legislation, which is based on authority) drives the selection of the most efficient rules for all the community! This is the same process that occurs in the discussion related to international contracts where, at the end, the parties need to find out a common basis for discussion in an economically efficient way.

3 The in-house lawyer perspective

Therefore, given all of the above, from an in-house lawyer's perspective, and in addition to the standard contract models, we have to consider that the evolution of the drafting of the international contract was influenced by another important instrument related to the internal regulations of companies. Internal regulations provide rules and direction on some

[12] F. A. von Hayek, *Law, Legislation and Liberty, Vol. I, Rules and Order* (University of Chicago Press, 1973).

important issues related to risk allocation (e.g., best practice in the drafting of contractual clauses). Most of the time, this *corpus iuris* is a good mixture between common practice and the law, whereby the benchmark is often given by the law of the parent company.[13] For this reason, in-house lawyers need to face and deal with their own internal regulations in their analysis of the contractual relationship. Sometimes a risk can be the difficulty in finding the line between the company's internal regulations and the applicable state law, especially if the former is very detailed and strict. Internal regulations can then be considered as another important factor that influences the evolution of the drafting of international standard contracts.

After having considered the origins and the practical impact of the standardisation of international contracts, we can conclude that multiple factors influence the day-to-day business discussion over contracts. One of the most important driving factors that we have analysed is the reduction of the influence of local legislation. In fact, it has been observed that drafters of international contracts aim to reduce, as much as possible, the interpretation and 'uncertainty' relating to applicable contract law and to the interpretation in the litigation phase.[14] The drafters' strong desire is the achievement of self-management: the parties want to decide and govern their own rules with respect to the contract they are drafting.

Conversely, we can observe that contractual clauses are drafted in a specific manner in order to allocate the risks related to specific transactions and normally should come both from experience (a sort of distillation of best practices) and from the interpretation of the law. For that reason, considering that standardisation provides help in creating a common base of discussion between the parties and makes it possible to work on the differences, it is important to conclude that there are differences between legal systems and that those differences can create an unexpected situation if questions are raised in front of a court or in an arbitration. In addition, to ignore differences and to believe that it is possible to create a neutral legal system is a chimera and cannot be considered a correct allocation of the risks. It is of the utmost

[13] It is in fact likely to find a *corpus iuris* influenced by the common law in companies belonging to or owned by a company from a common law system, even though the business may be carried out in non-common law countries.

[14] M. Fontaine and F. De Ly, *La redazione dei contratti internazionali*, Italian translation by Renzo Maria Morresi (Giuffrè Editore, 2006), pp. 806–820.

importance for an in-house lawyer to know that differences exist between legal systems and also to understand the reason why clauses have been drafted in a specific manner. Only with this awareness will in-house lawyers be able to correctly allocate the expectations of their stakeholders.

We can then easily understand how the contract regulation effectively becomes a truce between different factors such as internal regulations, standard documents and the requirements of the stakeholders. The role of the in-house lawyer is to define and analyse, with respect to the expectations of the parties, if and how the instruments at the lawyer's disposal are the right ones.

The scope of an in-house lawyer's role is to best allocate the risk relating to the transaction by combining the need for the internal procedures of the company and the law applicable to the specific situation. The use of standard documents can be a helpful instrument in day-to-day business if used with a critical assessment during contract negotiations.

This critical allocation of the risk must follow a defined process: the first step is to understand the expectation of the parties (what we are intending to allocate); then it is necessary to verify the enforceability of the proposed instruments (by answering the following question: are the clauses that we are using enforceable under the applicable law?); and the last step is to verify that the correct instrument to be used. Without a critical assessment of the proposed standard contract, no positive risk allocation can be done.

PART 2

Methodological challenges

Introduction to Part 2

Part 1 showed that international contracts are often written on the basis of common law-inspired models and do not regard the applicable law as a guide to the drafting. Before turning to how the various national laws may affect the interpretation and application of an international contract (which will be the subject of Part 3), some methodological questions must be addressed. The circumstance that international contracts are drafted without taking into particular consideration the requirements and assumptions of any particular contract law may seem hard to reconcile with the necessity of interpreting and applying international contracts in accordance with a particular law.

Taking contract practice as a starting point, the observer could be tempted to question whether an international contract shall be subject to a law that was not considered during the drafting. However, when seeking solutions that adequately cater to the peculiarities of international contract drafting, it is necessary to bear in mind their feasibility and effectiveness. Does the drafting constitute a sufficiently clear basis for selecting the governing law? Are harmonised sources available on a transnational level and capable of fully regulating the interpretation and application of contracts, thus making national contract laws redundant?

In Chapter 3, Giuditta Cordero-Moss analyses the implications that the style of contract drafting may have when choosing the governing law. Chapter 3 verifies to what extent generally acknowledged rules, trade usages or transnational restatements of principles may contribute to overcoming the tension between the style of the contract and the law governing it. Gerhard Dannemann reports in Chapter 4 how German courts have been coping with the methodological challenges of contracts modelled on a foreign legal tradition. In Chapter 5, Edward T. Canuel analyses how common law courts interpret and apply the contractual mechanism of exculpatory clauses. He finds that these clauses have varying legal effects even within the same legal family, thus showing that it is not always appropriate to expect that the wording of the contract

will be applied equally irrespective of the governing law. If the same wording may have different legal effects within the same legal family, even larger discrepancies may be expected when the involved legal traditions belong to different families. Jean-Sylvestre Bergé observes in Chapter 6 that the circulation of legal models is a phenomenon occurring on different levels and shows that the system of the EU forces acceptance of legal concepts belonging to different legal traditions.