Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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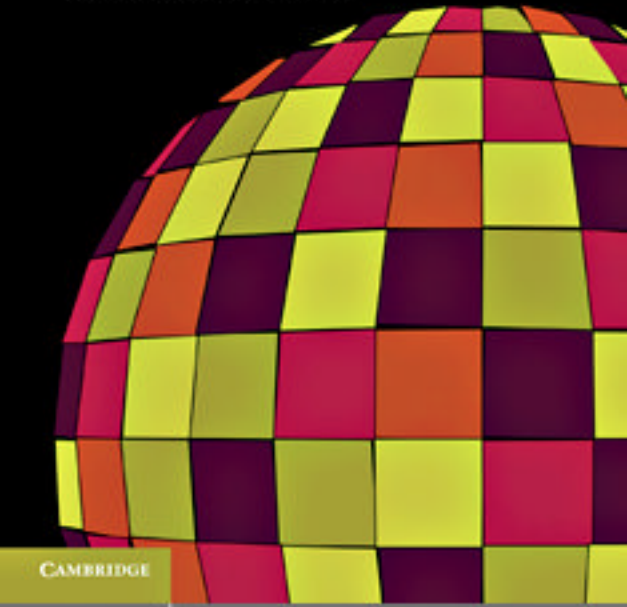

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While it may be possible to dismiss the clause in the former example as an irrelevant regulation allowed because the parties did not notice its incongruity, the interpretation of the latter example requires more consideration: representations and warranties are a contractual regulation of the information exchanged between the parties, a matter which is subject to the specific rules and principles of many civil law systems. Does such a clause mean that the parties intended to add the contractual regulation to the rules and principles of the governing law? Or does it mean that the parties wanted to regulate the matter as set forth in the contract instead of following the governing law's rules and principles? And, if so, are the parties allowed to depart from the governing law's rules and principles?

Contract laws generally do not contain many mandatory rules, apart from areas relating to the protection of the weaker contractual party or other areas of regulatory concern, which are generally not relevant to the questions that may arise out of commercial contracts and boilerplate clauses. Therefore, most of the results that the parties wanted to achieve will be compatible with the governing law. However, in exceptional situations, particularly where the contractual mechanism is abused for speculative purposes, the governing law might put a stop to the full implementation of the parties' will. When this happens, a common law contract model subject to a civilian governing law might be interpreted in a different way from the one envisaged by the original drafters.

The drafting style may be deemed to be an expression of the parties' will to exhaustively regulate their legal relationship in the contract. A document that sets forth a very extensive regulation, that specifies, in every detail, all the consequences of various situations that may arise during the life of the contract, that contains clauses with long lists of information exchanged between the parties, and that also contains a clause specifying that the contract document is to be deemed the exhaustive regulation of the relationship between the parties seems clearly to indicate that the parties wanted their contract to regulate all aspects of their relationship and intended to exclude any addition from outside the contract.

As is well known, most civilian doctrines of interpretation do not operate with the maxim *inclusio unius est exclusio alterius*, which is at the root of the assumption of exhaustiveness. Traditionally, if the circumstances so require, a civilian judge will not refrain from extending, by analogy or otherwise, the scope of the written contract. An antithetic interpretation, according to which anything that the parties have not

expressly regulated in the contract may not be deemed to have been intended to be part of the contract, is not usual in the civilian tradition. Should the contract contain a choice-of-law clause in favour of a civilian governing law (and even more so if the governing law was determined on the basis of other conflict rules), this might seem to contradict the intention by the parties to have the contract interpreted as if it were exhaustive. How can this contradiction be overcome?

It seems that within international commercial transactions, the use of this drafting style is so widespread that it may, to a certain extent, be considered to be an acknowledged contract practice. This may render it more likely that the parties have desired to limit, to whatever extent possible, any interference from outside the contract by taking the regulation of most of the conceivable details into their own hands. The size of and degree of detail in the contract regulation make it evident that this is the intention, and it may be inferred even if the contract was looked upon individually. When the majority of international commercial contracts adopt this style, it is even easier to conclude that the parties were aware of the habit of giving an exhaustive character to the contract and that they wanted to adhere to this contract practice.

However, this exhaustiveness-intention by the parties does not give them more power to regulate their relationship than they already have under the freedom of contract that the governing law grants them.

While the parties may, by adopting a certain detailed and extensive style, avoid creative additions to the contract that the interpreter may be tempted to make under the applicable doctrine of interpretation, they cannot go further than regulating their interests in a way that is permitted under the governing law, i.e., they cannot use the drafting style as a tool to avoid interference by the governing law and obtain results that would violate mandatory rules or fundamental principles of the governing law.

In other words, fundamental principles of the governing law, such as good faith in the performance of the contract and the prohibition of abuse of a right, may still correct and limit the contractual regulation. However, the only purpose of applying these rules would be to prevent a violation of these mandatory rules. These principles should not correct and limit the contract if the only purpose is to integrate the contractual regulation in order to obtain a better result, a more balanced contract or a fairer distribution between the parties. This latter integration of the contract regulation, which might be permissible

under certain civilian systems, is excluded by the exhaustive character of the contract.[1]

The following chapters will examine the interaction between the contract and the governing law from the point of view of English law and of laws representing the main sub-families of the civil law: the Germanic, Romanistic, Scandinavian and East European families. Thus, in Chapter 7, the analysis will be made under English law by Edwin Peel; in Chapter 8, under German law by Ulrich Magnus; in Chapter 9, under French law by Xavier Lagarde; in Chapter 10, under Italian law by Giorgio De Nova; in Chapter 11, under Danish law by Peter Møgelvang-Hansen; in Chapter 12, under Finnish law by Gustaf Möller; in Chapter 13, under Norwegian law by Viggo Hagstrøm; in Chapter 14, under Swedish law by Lars Gorton; in Chapter 15, under Hungarian law by Attila Menyhárd; and in Chapter 16, under Russian law by Ivan S. Zykin.

As the next chapters will show in detail, it does not seem possible to fulfil the ambition of creating a fully self-sufficient contract that is completely isolated from the governing law. Interestingly, a full isolation is not even possible in respect of English law, which has indirectly provided the basis for the comprehensive drafting style and the connected desire of an exhaustive contract regulation. Drafters are advised to consider the effects of the contract under the governing law and not to rely on the pure text that they have signed.

1 Clauses analysed in Part 3

To ensure consistency in the analysis carried out in various chapters, the authors were given a list of clauses containing examples of contractual regulations particularly apt to create coordination problems with the governing law. The list was based on the material examined in the research project upon which this book is based, which included contracts actually seen in the practice of the project's participants as well as standard contracts issued by companies, branch organisations or international organisations. As should be expected for boilerplates, the

[1] That commercial contracts should be interpreted objectively on the basis of their wording is even recognised in legal systems that traditionally give significant importance to the necessity of obtaining a fair decision, thus allowing for relatively free interpretations on the basis of the purpose of the contract, of good faith principles, etc. In the past few years, the Norwegian Supreme Court has repeatedly affirmed that commercial contracts should be interpreted objectively, so as to respect the parties' interest in predictability (Rt. 1994 s. 581, Rt. 2000 s. 806, Rt. 2002 s. 1155, Rt. 2003 s. 1132).

wording of each clause on the list varies very little from source to source. Therefore, the clauses listed below may be seen as examples of typical boilerplates.

The authors were also given a list of cases that may help illustrating the need for coordination with the governing law. Both are reproduced below.

1.1 Entire agreement

The Contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract.

1.2 No waiver

Failure by a party to exercise a right or remedy that it has under this Contract does not constitute a waiver thereof.

1.3 No oral amendments

No amendment or variation to this Agreement shall take effect unless it is in writing, signed by authorised representatives of each of the Parties.

1.4 Severability

If a provision of this Agreement is or becomes illegal, invalid or unenforceable, that shall not affect the validity or enforceability of any other provision of this Agreement.

1.5 Conditions/essential terms

The obligations regulated in Section 13 are fundamental and any breach thereof shall amount to a fundamental breach of this contract [*alternative:* Time is of the essence].

1.6 Sole remedy

[Liquidated damages paid in accordance with the foregoing provision] shall be the Buyer's sole remedy for any delay in delivery for which the Seller is responsible under this Agreement.

1.7 Subject to contract

This document does not represent a binding agreement between the parties and neither party shall be under any liability to the other party in case of failure to enter into the final agreement.

1.8 Material adverse change

Conditions precedent to Closing

Since the date of [the Agreement], there has not been any Material Adverse Change in the condition (financial or otherwise), business, assets, liabilities or results of operations of [the Party and its Subsidiaries taken as a whole].

'Material Adverse Change' means any result, occurrence, condition, fact, change, violation, event or effect that, individually or in the aggregate with any such other results, occurrences, conditions, facts, changes, violations, events or effects, is materially adverse to:

(1) the financial condition, business, assets, liabilities or results of operations of the Company and its Subsidiaries, taken as a whole,
(2) the ability of the Company to perform its obligations under this Agreement, or
(3) the ability of the Company to consummate the Merger; provided, however, that in no event shall any of the following constitute a Company Material Adverse Change:
    (1) any change or effect resulting from changes in general economic, regulatory or political conditions, conditions in the United States or worldwide capital markets;
    (2) any change or effect that affects the oil and gas exploration and development industry generally (including changes in commodity prices, general market prices and regulatory changes affecting the oil and gas industry generally);
    (3) any effect, change, event, occurrence or circumstance relating to fluctuations in the value of currencies;
    (4) the outbreak or escalation of hostilities involving the United States, the declaration by the United States of a national emergency or war or the occurrence of any other calamity or crisis, including acts of terrorism;
        [. . .]
        (14) any of the matters referred to in Schedule . . .

1.9 Liquidated damages

If, due to the fault of the Seller, the goods have not been delivered at dates according to the delivery schedule as provided in this Agreement, the

Seller shall be obliged to pay to the buyer liquidated damages for such delayed delivery at the following rates:

(1) For each complete week, the liquidated damages shall be 0.5% of the value of the goods delayed.
(2) The total amount of the above mentioned liquidated damages will not exceed 25% of the Price for the delayed goods.
(3) The payment of liquidated damages shall not release the Seller from its obligation to continuously deliver the goods.

1.10 Indemnity

(1) 30.1 Contractor shall indemnify Company Group from and against any claim concerning personal injury to or loss of life of any employee of Contractor Group, and loss of or damage to any property of Contractor Group, and arising out of or in connection with the Work or caused by the Contract Object in its lifetime. This applies regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Company Group.

Contractor shall, as far as practicable, ensure that other companies in Contractor Group waive their right to make any claim against Company Group when such claims are covered by Contractor's obligation to indemnify under the provisions of this Art. 30.1.

(2) 30.3 Until the issue of the Acceptance Certificate, Contractor shall indemnify Company Group from costs resulting from the requirements of public authorities in connection with the removal of wrecks, or pollution from vessels or other floating devices provided by Contractor Group for use in connection with the Work, and claims arising out of loss or damage suffered by anyone other than Contractor Group and Company Group in connection with the Work or caused by the Contract Object, even if the loss or damage is the result of any form of liability, whether strict or by negligence in whatever form by Company Group.

Contractor's liability for loss or damage arising out of each accident shall be limited to NOK 5 million. This does not apply to Contractor's liability for loss or damage for each accident covered by insurances provided in accordance with Art. 31.2.a) and b), where Contractor's liability extends to the sum recovered under the insurance for the loss or damage.

Company shall indemnify Contractor Group from and against claims mentioned in the first paragraph above, to the extent that they exceed the limitations of liability mentioned above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.

After issue of the Acceptance Certificate, Company shall indemnify Contractor Group from and against any claims of the kind

mentioned in the first paragraph above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.

1.11 Representations and warranties

Each Party represents and warrants to and for the benefit of the other Party as follows:

(1) It is a company duly incorporated and validly existing under the laws of . . . (in respect of the Seller) and of . . . (in respect of the Buyer), is a separate legal entity capable of suing and being sued and has the power and authority to own its assets and conduct the business which it conducts and/or proposes to conduct;
(2) Each Party has the power to enter into and exercise its rights and to perform and comply with its obligations under this Agreement;
(3) Its entry into, exercise of its rights under and/or performance of, or compliance with, its obligations under this Agreement do not and will not violate or exceed any power granted or restriction imposed by any law or regulation to which it is subject or any document defining its constitution and do not and will not violate any agreement to which it is a party or which is binding on it or its assets;
(4) All actions, conditions and things required by the laws of . . . to be taken, fulfilled and done in order to enable it lawfully to enter into, exercise its rights under and perform and comply with its obligations under this Agreement, to ensure that those obligations are valid, legally binding and enforceable and to make this Agreement admissible in evidence in the courts of . . . or before an arbitral tribunal, have been taken, fulfilled and done;
(5) Its obligations under this Agreement are valid, binding and enforceable;
(6) . . .
(7) . . .
(40) . . .

1.12 Hardship

(1) Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.
(2) There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the event was beyond its reasonable control and was one which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
(b) the event or its consequences could not reasonably be avoided or overcome.

If such hardship occurs the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

Alternative regulations

Alternative I

Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

Alternative II

Where paragraph 2 of this Clause applies, but where alternative contractual terms are not agreed upon, the contract remains in force in accordance with its original terms.

Alternative III

Where paragraph 2 of this Clause applies, but where alternative contractual terms are not agreed upon, the party invoking this Clause may bring the issue of revision before the arbitral forum, if any, provided for in the contract, or otherwise before the competent courts.

1.13 Force majeure

Alternative I

The Supplier shall not be liable for delay in performing or for failure to perform its obligations if the delay or failure results from any of the following: (i) Acts of God, (ii) outbreak of hostilities, riot, civil disturbance, acts of terrorism, (iii) the act of any government or authority (including refusal or revocation of any licence or consent), (iv) fire, explosion, flood, fog or bad weather, (v) power failure, failure of telecommunications lines, failure or breakdown of plant, machinery or vehicles, (vi) default of suppliers or sub-contractors, (vii) theft, malicious damage, strike, lock-out or industrial action of any kind, and (viii) any cause or circumstance whatsoever beyond the Supplier's reasonable control.

Alternative II

(1) Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more

of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:

(a) that its failure to perform was caused by an impediment beyond its reasonable control; and
(b) that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and
(c) that it could not reasonably have avoided or overcome the effects of the impediment.

(2) Where a contracting party fails to perform one or more of its contractual duties because of default by a third party whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party:

(a) if and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and
(b) if and to the extent that the contracting party proves that the same requirements apply to the third party.

(3) In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1 [a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:

(a) war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;
(b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
(c) act of terrorism, sabotage or piracy;
(d) act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;
(e) act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
(f) explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
(g) general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.

(4) A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the

contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.

(5) A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages or any other contractual remedy for breach of contract from the time indicated in paragraph 4.

(6) Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties.

(7) A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.

(8) Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.

(9) Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay to the other party a sum of money equivalent to the value of such benefit.

2 Cases illustrating the need for coordination with the applicable law

A literal interpretation of the contract may lead to a result conflicting with mandatory rules or principles of the applicable law. In particular, there may be difficulties in coordinating the contract with the applicable law in three different respects.

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

If the clause aims at fully detaching the contract from the applicable law, there may be a conflict with mandatory rules or principles of the

applicable law – such as the duty to cooperate loyally, to interpret the contract in good faith and to exercise remedies in good faith.

This may be relevant in particular to the following clauses:

Entire agreement What happens if the parties have, on a previous occasion, agreed on certain specifications for certain products, but have not incorporated those specifications into the present contract? Can the contract be interpreted in light of the previously agreed specifications, in spite of the entire agreement clause?

No waiver Assume that the contract gives one party the right to terminate in case of delay in the delivery. What happens if the delivery is late, but the party does not terminate until, after a considerable time, the market changes and the contract is no longer profitable? The real reason for the termination is not the delay but the change in the market. May the old delay be invoked as a ground for termination or is there a principle preventing it, in spite of the no waiver clause?

No oral amendments What happens if the parties agree on an oral amendment and afterwards one party invokes the no oral amendments clause to refuse performance (for example, because it is no longer interested in the contract after the market has changed)?

Severability Some contract laws provide that the invalidity of certain contract terms renders the whole contract invalid. This conflicts with the clause. Moreover, a literal interpretation of the clause may lead to an unbalanced contract if the provision that becomes invalid or unenforceable has significance for the interests of only one of the parties.

Conditions, fundamental breach Assume that the contract defines delay in delivery as a fundamental breach and that there is a delay, but it does not have any consequences for the other (innocent) party. What happens if the innocent party terminates the contract because the market has changed and the contract is no longer profitable? Can the clause on fundamental breach be invoked, even if the real reason for the termination is not the delay but the change in the market?

Sole remedy Assume that the contract defined the payment of a certain amount as the sole remedy in case of breach. What happens if the non-defaulting party is able to prove that the breach has caused a considerably larger damage than the agreed amount?

Subject to contract Assume that the parties entered into a letter of intent specifying that failure to reach a final agreement will not

expose any of the parties to liability.What happens if one party 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?

Material adverse change What happens if one party invokes this clause to avoid a deal that it has lost interest in? The real reason for invoking the clause is not a change in external circumstances but in the party's own evaluation thereof.

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

Some clauses regulate remedies for breach of contract and reimbursement of damages by using a terminology with specific legal effects under English law. This may interfere with regulations contained in the applicable law.

This may be relevant in particular to the following clauses:

Liquidated damages Some legal systems permit the parties to agree on contractual penalties; these may be cumulated with reimbursement of damages. Does the use of the English terminology 'liquidated damages' prevent this?

Indemnity Some contracts use the term 'indemnity' to designate a guaranteed payment. Does the use of the English terminology, which assumes damage actually has occurred, prevent the guaranteed payment when no actual damage has occurred?

2.3 Clauses regulating matters already regulated in the applicable law

Some clauses regulate matters that are already regulated in the applicable law. How do these two regulations interact with each other: do they integrate each other or do they exclude each other?

This may be relevant in particular to the following clauses:

Representations and warranties In some systems, the parties are under a duty to inform the other party of material matters that may have an impact on the other party's assessment of its interests under the contract. If the list of representations and warranties left out one such matter, is the party nevertheless obliged to disclose it to the

other party? Or did the other party waive the legal protection that it has under the applicable law when it agreed to a detailed list of representations and warranties? Is the latter to be interpreted as being exhaustive or is it to be integrated by the information duties under the governing law?

Hardship In some systems, the law regulates the consequences of supervening, external events that make the performance excessively onerous for one party. If the parties regulate the matter in their contract, does it mean that the contract regulation will be the only applicable regulation or will it be integrated by the applicable law?

Force majeure Many *force majeure* clauses describe *force majeure* events as events beyond the control of the parties that may not be foreseen or reasonably overcome. Is this definition applied equally independently of the applicable law? In particular, what is deemed to be beyond the control of one party: is it sufficient to prove that a party has been diligent and has acted in good faith?

7

The common law tradition: application of boilerplate clauses under English law

EDWIN PEEL

1 Introduction

The majority of this chapter is taken up with an analysis of how English law regulates the types of clause that are the principal focus of this book. Before that analysis can be undertaken, it is necessary to make a few preliminary observations about the general approach of the courts to the policing of 'boilerplate' clauses.

1.1 Content

Freedom of contract remains the core principle at the heart of the English law of contract. The content of a contract remains almost entirely in the hands of the parties to it. There are few 'default' provisions which will be included in the absence of any express agreement of the parties. Prominent examples are the terms implied by statute in contracts for the sale of goods that the goods will comply with any description, or sample, and will be of 'satisfactory quality' and 'fit for purpose'.[1] Such terms will often be excluded by the contrary agreement of the parties, so that it is ultimately the intention of the parties which prevails.[2] In some instances, the parties may be quite happy to rely on the minimal content supplied by the operation of law, e.g., some building contracts, particularly in the residential context, may be entirely oral, or at the very least will remain informal and contain no more than the express obligation of the employer to pay the price and the implied obligation of the

[1] Sale of Goods Act 1979, Sections 13–15.

[2] Though such exclusions are themselves regulated by statute under the Unfair Contract Terms Act 1977, Section 6.

contractor to carry out the work with reasonable skill and care.[3] In other instances, the parties will wish to avail themselves of the opportunity to alter the content of the contract to provide additional protection for their interests. This of course can involve transaction costs, but one way to reduce those costs is to employ 'standard forms' for contracts of a recurring nature. If one continues with the example of building contracts, such standard forms are commonplace, with variations in the model depending upon the nature of the work undertaken.[4]

The use of standard forms has given rise to an obvious tension in the English law of contract. At the risk of oversimplification, it is a tension borne of two rather different 'types' of standard form.[5] As Lord Diplock put it in *A Schroeder Music Publishing Co* v. *Macaulay*:[6]

> Standard forms of contracts are of two kinds. The first, of very ancient origin, are those which set out the terms upon which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or ship owners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable.
>
> The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised

[3] Supply of Goods and Services Act 1982, Section 13.

[4] See the Joint Contracts Tribunal (JCT) series.

[5] See, generally, O. Prausnitz, *The Standardisation of Commercial Contracts* (Sweet & Maxwell, 1937); D. Yates and A. J. Hawkins, *Standard Business Contracts* (Sweet & Maxwell, 1986), C. M. Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions', *International & Comparative Law Quarterly*, 17 (1968), 551.

[6] [1974] 1 WLR 1308 at 1316. See also *R W Green Ltd* v. *Cade Bros Farms* [1978] 1 Lloyd's Rep. 602 at 607.

> alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'

The principal focus of this book is on 'commercial transactions'. It may often be the case that, in such transactions, it is standard forms of the first type which will have been employed, but that will not always be the case.[7] It will be seen, in the analysis of particular clauses, that the tension between these two 'types' of form is evident in the approach of English law.[8]

Our concern is not just with standard *forms*, but with particular *clauses*. The term 'boilerplate' is understood to be derived from the metal plates on which syndicated or ready-to-print copy was supplied to newspapers. The point of such plates was that they could not be modified before printing, hence the borrowing of the term to refer to clauses in a contract which are not intended to be the subject of any negotiation. In fact, in the commercial transactions which are the principal focus of this book, a 'boilerplate' clause may well be the subject of negotiation, and perhaps of modification, in the particular contract at hand. The clause is 'boilerplate' or 'standard form' in the sense that one party (or possibly both) requires a clause of that *type*, but there is still room for negotiation as to its precise content. For example, a seller may require some limit on its potential liability but be required to negotiate what that limit should be, or a buyer may wish to have predetermined the level of damages payable for the seller's breach but be required to negotiate what that level should be.[9] Where the clause in question has been the subject not only of historical negotiation (standard forms of the first type), but also of negotiation in the particular contract before the courts, the grounds for intervention will have narrowed yet further. Put simply, the content of a contract is for the parties to determine for themselves, but a factor which the courts may take into account is whether it is *both* parties who have so determined and not just one of them.

[7] This is reflected most obviously in Section 3 of the Unfair Contract Terms Act 1977, which applies the test of reasonableness to exemption clauses in commercial contracts which have been entered into on the basis of one party's 'written standard terms of business'.

[8] For criticism of the decision in *Schroeder* in particular and the courts' ability to regulate anti-competitive practices via the medium of individual cases in general, see M. J. Trebilcock, 'The Doctrine of Inequality of Bargaining Power', *University of Toronto L.J.*, 26 (1976), 359.

[9] An apparent shift to a broader test of 'unconscionability' in the regulation of liquidated damages would seem to have expanded the room for negotiation: see Section 2.7 of this chapter.

One method of taking this into account which can be applied generally and is mentioned here, rather than by reference to any of the particular clauses which are analysed below, is incorporation, i.e., determining whether the parties have agreed, or must be taken to have agreed, to the particular clause in question. The English courts have left themselves very little room for manoeuvre when it comes to terms set out in a document which is intended to have contractual effect and which is signed by the party to be bound.[10] Beyond that, incorporation is determined by reasonable notice, a concept which, by its very nature, affords the courts a degree of flexibility. In particular, the courts have employed the principle that the more 'onerous or unusual' the clause in question, the more explicit the steps which must have been taken to have reasonably brought it to the notice of the party to be bound.[11] However, it is important to stress that, at least in its orthodox form, the concern of the courts is with clauses which are *unusual*, not with those which are simply *unreasonable*.[12] The limit of the common law tradition in this regard is that the courts may ask whether the parties have agreed to a particular bargain, not whether they should be held to the bargain to which they have agreed.[13]

1.2 Interpretation

If it is for the parties to determine the content of their contract in the first instance, it is nonetheless a legitimate question for the courts to ask: what exactly is it that they have determined? This is a question of interpretation. The English law of contract has a long history of interpretation being employed to curb the worst abuses of standard forms or boilerplate clauses. The prime example is the application of

[10] *L'Estrange* v. *F Graucob Ltd* [1934] 2 KB 394. For criticism, see *McCutcheon* v. *David MacBrayne Ltd* [1964] 1 WLR 125 at 133; cf. J. R. Spencer, 'Signature, Consent and the Rule in *L'Estrange v Graucob*' [1973] CLJ 104.

[11] *J Spurling Ltd* v. *Bradshaw* [1956] 1 WLR 46; *Thornton* v. *Shoe Lane Parking Ltd* [1971] 2 QB 163; *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433.

[12] This has been queried: 'The balance of authority is that the courts have no power to declare terms void because they are unreasonable. This is perhaps the nub of the matter: unable to declare a clause void because it is unreasonable, the courts are now declaring it unincorporated because it is unusual. A discredited rule of public policy has been reinstated as a rule based on an inference from the intention of parties: the plaintiff is only deemed to know of and assent to terms that are usual.' M. Clarke, 'Notice of Contractual Terms' [1976] CLJ 51 at 70.

[13] This is a matter for legislation: see text to note 22.

the principle of *contra proferentem*, in both of its forms: first, that 'in case of doubt, wording is to be construed against the party who proposed it for inclusion in the contract'[14] (applicable to boilerplate clauses generally) and, secondly, that 'wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation, or any common law duty which arises apart from contract'[15] (applicable to exemption clauses).[16] More generally, 'the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear'.[17]

This latter passage of Lord Reid highlights both the way in which interpretation can operate as a control against boilerplate clauses[18] and its limits. If the parties have made their intention sufficiently clear, there is no room for the 'indirect' control of unreasonableness via interpretation. It is when these limits have been reached that the courts have, on some occasions, felt it necessary to go beyond interpretation.[19] It is precisely at this point that they have been found to have overreached themselves so far as the common law is concerned.[20] The supervision of the fairness of

[14] *Youell* v. *Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127 at 134.

[15] *Ibid.* See, to similar effect, the comments of Staughton LJ in *Pera Shipping Corp.* v. *Petroship SA* [1984] 2 Lloyd's Rep. 363 at 365.

[16] See, generally, E. Peel, 'Whither *Contra Proferentem*', in A. Burrows and E. Peel (eds.), *Contract Terms* (Oxford University Press, 2007).

[17] *Wickman Ltd* v. *Schuler AG* [1974] AC 235 at 251. See, more recently, *Horwood* v. *Land of Leather Ltd* [2010] EWHC 546 (Comm).

[18] In *Schuler* itself, a clause by reference to which one of the parties claimed an entitlement to terminate for breach of 'condition'.

[19] Most notably in the form of the doctrine of 'fundamental breach' promoted by Lord Denning to control unreasonable exemption clauses: *Karsales (Harrow) Ltd* v. *Wallis* [1956] 1 WLR 936; *Harbutts 'Plasticine' Ltd* v. *Wayne Tank Co Ltd* [1970] 1 QB 447.

[20] In *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] AC 827, the House of Lords finally laid to rest the doctrine of fundamental breach and reasserted that whether a clause excluded or limited liability even for a serious or 'fundamental breach' was purely a matter of construction. It is reported that, shortly after this decision, Lord Denning addressed an after-dinner audience in Oxford along the following lines: 'I am told by Lord Diplock that I may no longer hold that an exemption clause is unenforceable because the breach is a fundamental one. It is a matter of construction. Let me tell you, ladies and gentleman, I know how to construe.' For recent examples of what this probably means in practice, see: *Internet Broadcasting Corporation Ltd* v. *MAR LLC* [2009] EWHC 84 (Ch), [2009] 2 Lloyd's Rep. 295; *A Turtle Offshore SA* v. *Superior Trading Inc* [2008] EWHC 3034 (Admlty), [2009] 1 Lloyd's Rep. 177.

the bargain is, to the extent that it is subject to supervision at all,[21] a matter for legislation.[22]

1.3 Good faith

This is a very brief excursus into good faith. Some will say that is the only type of excursus possible when it comes to English law. The rather obvious, but nonetheless important, point to make at the outset is that the English law of contract does not exclude consideration of 'good faith'. Indeed, it is just such a consideration that forms the basis of much of the law. Thus, one party will not be held to a contract which he entered into on the basis of a sufficiently important mistake in circumstances where that mistake was known to, or ought to have been known to, the other party,[23] all the more so if the mistake was induced by something said by the other party which was not true.[24] Similarly, one party will not be held to a contract which was obtained in circumstances where his consent was obtained by some form of illegitimate pressure,[25] or by taking advantage of a relationship of trust and confidence with that other party or a third party.[26] Other examples could be given. They show that, to the extent that there is any difference between English law and the law of other legal systems, it is a difference of degree. The point is well put by Bingham LJ:[27]

> In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing ... English law has, characteristically, committed itself to no such overriding

[21] Few of the legislative controls concern themselves solely, if at all, with the 'substantive' fairness of the bargain.

[22] For example, in the context of exemption clauses, the Unfair Contract Terms Act 1977. See also the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), as amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001/1186); and the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006).

[23] So-called cases of unilateral mistake: G. H. Treitel and E. Peel, *The Law of Contract*, 12th edn (Sweet & Maxwell, 2007), paras. 8–033ff (referred to as *Treitel* hereafter).

[24] Misrepresentation: *ibid*., Chapter 9.

[25] Duress: *ibid*., paras. 10–002ff.

[26] Undue influence: *ibid*., paras. 10–008ff.

[27] *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433 at 439.

principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.

It is often the case that in 'demonstrated problems of unfairness', English law reaches the same, or a similar, solution on a 'piecemeal' basis as that reached by other legal systems through the application of an 'overriding principle' of good faith.[28] This observation might be borne in mind when considering instances of potential unfairness in the context of the particular clauses which are analysed in the remainder of this chapter. One further general observation that may be made is that the courts have very largely confined themselves to demonstrated problems of what is sometimes referred to as 'procedural' unfairness, i.e., unfairness in the bargaining process, rather than with 'substantive' unfairness i.e., unfairness in the bargain itself: 'Under English law there is no general duty to negotiate in good faith, but there are plenty of other ways of dealing with particular problems of unacceptable conduct occurring *in the course of negotiations* without unduly hampering the ability of the parties to negotiate their own bargains without the intervention of the courts.'[29]

1.4 Conclusion and methodology

This brief preliminary has sought to establish several broad propositions. The first is that freedom of contract lies at the heart of the common law tradition. It is entirely consistent with that freedom for the courts, nonetheless, to ask *whether* the parties had agreed on a particular clause (incorporation) and, if they had, *what* exactly it is that they had agreed (interpretation). One does not need to be a legal realist[30] to acknowledge that in answering these questions, the courts have room to take account of considerations of fairness, reasonableness or good faith. This is hardly surprising since such considerations are not unknown to English law, albeit they are largely confined to the supervision of the bargaining process rather than the bargain itself. It has therefore been suggested

[28] For a helpful survey, see R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge University Press, 2000). One notable example where the difference in degree seems capable of producing different solutions is the unwillingness of the English courts to recognise as enforceable an agreement to negotiate in good faith: E. Peel, 'Agreements to Negotiate in Good Faith', in A. Burrows and E. Peel, *Contract Formation and Parties* (Oxford University Press, 2010), Chapter 2.

[29] *Cobbe* v. *Yeoman's Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 WLR 2964 at [4], per Mummery LJ (emphasis added).

[30] And the author of *Treitel* is no legal realist.

that the difference between the approach of English law and that of other legal systems is one of degree. Differences in degree can matter, of course. Writing extra-judicially, Lord Steyn has observed that 'there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties',[31] but in English law there is *a* difference and it might be thought to be exemplified by the approach taken to the clauses about to be considered.

In approaching the analysis of particular clauses, I have adopted the illuminating technique employed by Giuditta Cordero-Moss in the last of the workshops around which this book is based of asking two very specific questions: (i) what is the legal background for the development of the clause in question, or, to put it another way, what would happen as a matter of English law if the clause was not there?; (ii) will such a clause be applied without restriction in situations where the result may be unexpected or unfair? I have eliminated from any specific consideration two types of clause – the severability provision and the 'material adverse change' provision. This is in part because of the confines of space, but is in part also a reflection of the fact that there is little, if any, direct judicial consideration of such clauses.

2 The clauses

2.1 Entire agreement[32]

As a matter of English law, it is necessary to draw a distinction between entire agreement clauses in two senses: the narrow and the wide. The sample clause which has been put forward for consideration states as follows:

> The Contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract.

The sample clause is an example of an entire agreement clause in the narrow sense. It is this narrow sense which will be considered first, but some consideration will also be given to the wider sense, if only to confirm the approach of the English courts to such clauses generally.

[31] (1997) 113 LQR 433 at 439. This is a theme about which his Lordship has also written judicially: *First Energy (UK) Ltd* v. *Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 194 at 196.

[32] G. McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2007), Chapter 24.