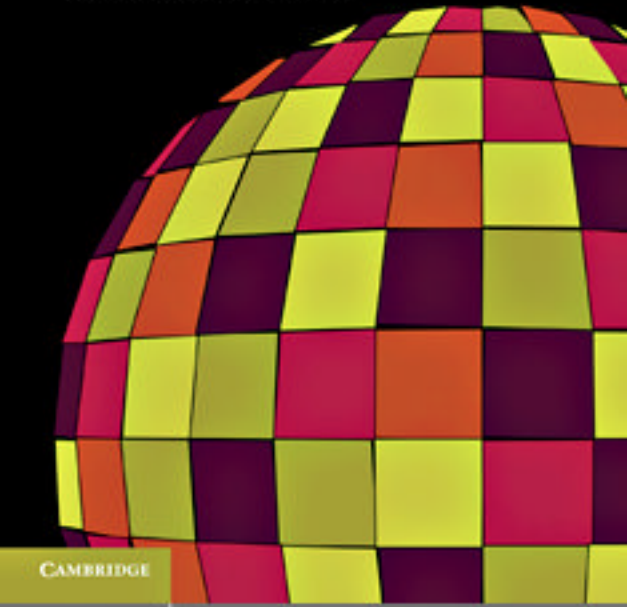
Boilerplate Clauses, International Commercial Contracts and the Applicable Law

EDITED BY
Giuditta Cordero-Moss



CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521197892

> person or persons or to the tug or tugs supplied, whether such damage loss or injury arise or be occasioned by any accident or by any omission, breach of duty mismanagement, negligence or default of any of such masters, crew or men or any servant of the authority or any other person or from or by any defect or imperfection in the tug or tugs supplied.[70]

While a towage was in progress, a collision occurred between the tug and the steamship, resulting in damage to both vessels. In the Authority's suit against the steamship owners, the owners counterclaimed for their damages. They alleged that the exculpatory provision was void due to it being against public policy. The court disagreed. Reaching a very different decision from *Bisso*, the *Van Buren* court held that the clause was *not* against public policy and granted full damages against the steamship owners. In a decision heavily laden with economic and freedom of contract discussions, the court held that the terms of the towage agreement were not against public policy despite the Authority's monopoly.[71]

Just how far apart were the judicial positions in both *Bisso* and *Van Buren*? One must consider that the *Bisso* court majority invalidated the exculpatory provision, largely motivated by public policy. The *Bisso* court was very concerned that a monopolistic tendency would cause overreaching. In a sense, freedom of contract was subordinated to a perceived important public concern. Even Justice Frankfurter's stinging dissent did not suggest that the clause should be upheld if a monopolistic situation existed. Rather, he found no evidence before the court that the tug owner could exercise any degree of monopolistic compulsion.

The English judge deciding *The President Van Buren*, Mr Justice Hill, clearly indicated in his opinion the divergent Anglo-American views of these clauses in the towage context, stating:

> On the first point as to whether the agreement is valid and not void as against public policy, I think the answer on this matter is that which I have already expressed, namely, that the English law, in my view, very fortunately regards business men as capable of knowing their own business and of making contracts for themselves and is very unwilling to limit the power of capable people to make what bargains they like.
>
> I can conceive no principle of public policy which should lead the Courts to say: 'We ought to step in and say "This or that contract ought not to be made by competent people," when the people making it are competent people. It is said that the Port of London Authority is a

[70] *Ibid.*
[71] Feingerts and Stein, 'Exculpatory Provisions in Towage Contracts', 392, 404.

> monopoly. It is said that everybody has a right to the use of the tugs on equal terms, but here, it is said, you cannot employ any other tugs than the Port of London Authority's tugs. There it is.
>
> If you do not like these terms and if they are too onerous, nobody forces you to use the Port of London Authority's docks. I do not like to enlarge upon it because it seems to me to be so clear that, if you are talking of public policy, the highest interest of public policy is that the law should not interfere with the transactions of business men when it can help it'.[72]

This demonstrates a complete divergence in results between the US and English legal systems.[73] In addition, it demonstrates a divergence in how freedom of contract is interpreted, at least in this specific issue, between both countries. In the *Van Buren* decision, where monopolistic tendencies widely existed, the English court upheld an exculpatory clause without hesitation. This strong belief in permitting such clauses within towage agreements in the UK can also be found today when reviewing the Unfair Contract Terms Act 1977.[74] This Act regulates agreements by restricting the operation and legality of many contract terms.[75] It creates obligation in contract and tort. Nevertheless, the provisions of this Act generally do not apply to any towage contract, unless the tow owner is dealing as a consumer, which is generally not the case. In those limited instances where the owner is acting in such function, the Act prohibits exemption clauses for the tug's negligence if the clauses are unreasonable.

The US Supreme Court dealt with opposing English and US legal perspectives on exculpatory clauses within the towing context in *The Bremen* v. *Zapata Off-Shore Co*, 407 U.S. 1 (1972). Zapata, an American corporation, entered into a contract with the Bremen's owner, Unterweser, a German corporation.[76] Unterweser would tow Zapata's oil rig from the US to Italy.[77] While towed in international

[72] *The President Van Buren* (1924) 19 Ll. L. Rep. 185, 187.

[73] Note that Canada follows its Commonwealth cousin, England, by similarly upholding towage exculpatory clauses. See *Mitsubishi Canada Ltd* v. *Rivtow Straights Ltd* (12 May 1977, sup. Ct. British Columbia) cited in Parks and Cattell, Jr. (eds.), *The Law of Tug, Tow and Pilotage,* p. 117.

[74] See, generally, Unfair Contract Terms Act 1977 (1977 c. 50) at www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1977/cukpga_19770050_fn_1 (last accessed 10 January 2010).

[75] See S. Rainey, *The Law of Tug and Tow (and Allied Contracts)* (LLP, 2002), pp. 19–20.

[76] *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 2 (1972); see also M. Mousa Karayanni, 'The Public Policy Exception to the Enforcement of Forum Selection Clauses', *Duquesne Law Review*, 34 (1996), 1009, 1016.

[77] *The Bremen v. Zapata Off-Shore Co*, 407 U.S. 1, 2 (1972).

waters, a storm damaged the rig and Zapata filed an admiralty suit in the US alleging negligent towage and breach of contract.[78] The contract's forum selection clause held that disputes were to be settled at the London Court of Justice.[79] The court recognised the forum selection clause. Since the agreement provided for adjudication in an English court and contained an exculpatory clause, the result was to permit the tower to reap the benefit from an invalid *Bisso* clause.[80] The court distinguished the case from *Bisso* where the towage took place strictly in American waters.[81]

Perhaps playwright George Bernard Shaw and Winston Churchill were quite correct when they claimed that 'England and America are two countries divided by a common language'.[82] As we have seen, perhaps that observation could be extended, as England and America are two countries divided by a common legal tradition.

3.3 *The role of legal technicalities*

In order to be enforced, contracts will be drafted to meet a legal system's specific requirements. Another system may demand different technicalities to have a contract validated in its jurisdiction. Contracts will thus be written differently in order to obtain the same results in different systems. As such, contracts moving beyond jurisdictions can produce different results. Comparing cases that limit, if not circumvent, the *Bisso* holding demonstrates the significance of legal technicalities.

Through insurance, creative lawyers achieved what *Bisso* denied – devising a strategy to shift liability to the tow insurers. But how did this shift occur? Since *Bisso*, bargaining on the cost of liability insurance replaced the effort to draft exculpatory clauses exposing the towed vessel to the consequences of tugboat negligence. The towed vessel owner has a choice. First, it can rely on the tug's insurers at an additional cost for towage.[83] Alternatively, it can rely on its own insurer at a reduced towage

[78] See *ibid*., 3–4.

[79] 'Any dispute arising [between the parties] must be treated before the London Court of Justice': *The Bremen v. Zapata Off-Shore Co*, 407 U.S. 1, 2 (1972).

[80] See *ibid*., 15–16.

[81] *Ibid. The Bremen* is a classic forum selection clause case and, in that respect, was later overruled at the federal level by statute. See 28 U.S.C., Section 1404(a). See also *Stewart Organization, Inc.* v. *Ricoh Corp*., 487 U. S. 22 (1988).

[82] This popular quotation may be found at www.quotationspage.com/quote/897.html (last accessed 10 January 2010).

[83] See Sweeney, 'Collisions Involving Tugs and Tows', 596.

cost.[84] If the towed vessel owner opts for its own insurer, the owner will name the tugboat company as an additional insured, for which the vessel owner may be required to pay an added premium.[85]

When damage occurs to the barge (or cargo) as a result of the tug's negligence, the tug is protected under the insurance covering the damaged property. As these insurers have waived subrogation against the tug, once they have paid the loss, they have no right of recovery against the tug.[86] The tug owner remains liable in case the insurers fail to pay, for example, if the insurers became insolvent after issuing the policy. The tug remains responsible to the tow to the extent that there is an uninsured retention or deduction actually paid by the tow.[87] Within the post-*Bisso* insurance context, economics and cost-shifting are held to be of high importance.

In *Fluor Western, Inc.* v. *G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971), the court held that a cross-insurance scheme could be applied in the towage context without violating the *Bisso* rule.[88] The case involved an action by an underwriter who insured cargo lost when, due to the tug's negligence, a barge sank. At issue were clauses in two separate agreements. The first contract, between the cargo interest and the tug, stated that the cargo interest would provide insurance for the full value of the cargo and would waive subrogation rights against the tug. In the second contract, the policy specified that the insurance company would waive its subrogation rights against the barge owners and towers. The plaintiff insurance company contended that such contractual provisions essentially absolved the towage contractors of responsibility for negligence. Therefore, these clauses should presumably have been void against public policy, as set out in *Bisso*.

The Fifth Circuit viewed circumstances quite differently. The court disagreed with the plaintiff's argument and held that the parties' arrangement did *not* violate *Bisso*, providing three key reasons. First, the cargo owner did not waive any rights it had against any party responsible for loss.[89] As such, if the insurance company had not covered

[84] See *ibid.*

[85] See *ibid.* Given such circumstances, the towed vessel owner should obtain a waiver of subrogation against the tugboat company and the tugs used in the tow. See *ibid.* See also Parks and Cattell, Jr. (eds.), *The Law of Tug, Tow and Pilotage*, p. 117.

[86] See *ibid.*, pp. 78–81. [87] See *ibid.*, pp. 86–87.

[88] Sweeney, 'Collisions Involving Tugs and Tows', 596.

[89] *Fluor Western, Inc.* v. *G & H Offshore Towing Co.*, 447 F.2d 35, 39–40 (5th Cir. 1971); Feingerts and Stein, 'Exculpatory Provisions in Towage Contracts', pp. 392, 397.

the losses, the cargo owner had the right to sue the tower.[90] Secondly, the transport agreement itself contained no waiver of rights: the actual waiver of subrogation was between the cargo owner and the underwriter in a *separate* contract.[91] Finally, and key to *Bisso*, there was no inequality of bargaining position and public policy did not require any specific party to pay insurance premiums.[92]

Judicial approval of the liability insurance shift with waiver of subrogation was cemented under *Twenty Grand Offshore, Inc.* v. *West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974). The question there concerned the validity of towage contract provisions requiring both the tug owner and tow owner to do two things: (i) to fully insure their respective vessels; and (ii) to obtain in each of their insurance policies both a waiver of subrogation as to the other party and a designation of the other party as an additional insured.[93]

The tugboat crew was negligent and the towed barge ran aground. The barge owner breached its obligations under the towage contract, as: (i) it did not name the tugboat as an additional insured; and (ii) it failed to obtain the waiver of subrogation.[94] The District Court judgment was reversed by the Fifth Circuit, which held in favour of the barge owner. The court held that the *Bisso* doctrine was not:

> so encompassing that in instances of fair dealing, with no anti-competitive forces at work, the parties to a towing contract cannot agree to include an insurance clause and thereby reduce the towing rate while not affecting the rights of the tug and barge *inter se*.[95]

The question then became the amount of the towed vessel's damage covered by insurance. The tugboat company was found liable for damages *not* covered by insurance due to the tugboat's negligence.[96] However, the towed vessel would be responsible for the portion of its damages that should have been covered by its own insurance.

[90] *Ibid.* [91] *Ibid.* [92] *Ibid.*

[93] Under the agreement, each party was to 'fully insure its vessel, to effect a waiver of subrogation, and to name the other party as an additional insured'. *Twenty Grand Offshore, Inc.* v. *West India Carriers, Inc.*, 492 F.2d 679, 680 (5th Cir. 1974). See also Parks and Cattell, Jr. (eds.), *The Law of Tug, Tow and Pilotage*, pp. 78–79.

[94] *Twenty Grand Offshore, Inc.* v. *West India Carriers, Inc.*, 492 F.2d 679, 680 (5th Cir. 1974). See also Sweeney, 'Collisions Involving Tugs and Tows', 581, 596.

[95] See *Twenty Grand Offshore, Inc.* v. *West India Carriers, Inc.*, 492 F.2d 679, 683 (5th Cir. 1974).

[96] See *ibid.*, 679, 683. See also Sweeney, 'Collisions Involving Tugs and Tows', 581, 596.

Again, there is no uniform, uncontested US judicial resolution on this matter. As demonstrated in a discussion of liability-exempting clauses in cases of negligence, US jurisdictions do not always speak with one voice. Take for instance, the Third Circuit in *PPG Industries* v. *Ashland Oil Co.*, 592 F.2d 138 (3rd Cir. 1978). In this case, the United States Court of Appeals for the Third Circuit held that benefit-of-insurance agreements waiving rights of subrogation are incompatible with *Bisso*'s bar of contract provisions shifting responsibility for a tower's negligence. Finding that benefit-of-insurance arrangements were simply an indirect attempt at exculpation for negligence, the *PPG Industries* court was 'unpersuaded by [Fifth Circuit] cases tending to place a different focus on this issue'.

Through this comparative approach, the possibility of total legal convergence is called into question. Contract practice adapts and evolves to meet the technicalities of the applicable law. As demonstrated through a review of the various cases, sophisticated contracts, clauses and mechanisms are developed by lawyers to meet the requirements of the applicable law and will be interpreted in light of those requirements. If the same contract clauses are interpreted under a different law that does not have the same requirements, such provisions may not necessarily have the same effects. The foreign law may have other requisites only satisfied by employing a different clause. The difference in technicalities is not so easily annulled. Full legal convergence may be difficult to achieve when the contracts are shaped and developed on the basis of these technicalities.

4 Conclusion: a step away from total legal convergence

A journey of a thousand miles begins with a single step. That said, one must wonder what the likelihood is of a possible single, uniform step down a comparative law journey: that of legal convergence. Given the comparison of exculpatory clauses under American and, indeed, Anglo-American law, one must seriously question the possibility, in practice, of full legal convergence.

A comparison of American law revealed divergences among different courts. *American Oil* demonstrated that courts may wield principles of unconscionability and public policy to invalidate an exculpatory clause in the commercial context. Then again, courts may uphold the clauses. The *Hormel* and *Pinnacle Computer* courts did just that. Some jurisdictions require the specific word 'negligence' in a clause seeking to limit liability from negligence, while others do not.

These diverse holdings illustrate the practical tensions when exploring legal families, particularly when testing the possibility of legal convergence. Decisions from a broad sampling of different American regions, venues and jurisdictions have been analysed. Cases were discussed from states such as Indiana and Minnesota, cases from the Fifth and Third Federal Circuits. One must question whether divergent economic or social traditions played a role in different court approaches, a further factor questioning the possibility of total legal convergence.

When discussing towage contracts, the different approaches under the US, English and Canadian systems also illustrate a marked split within one legal family. For example, *Bisso* mandates that liability from negligence cannot be excluded from a contract. The *President Van Buren* case allows such liability under English law. These cases also demonstrate, on this specific issue, how freedom of contract is interpreted differently. The *Bisso* court intervened to halt possible monopolistic tendencies, preventing the enforcement of a clause agreed to by the contracting parties. The *Van Buren* court left the contracting parties to the freedom of their bargain, despite such actual monopolistic tendencies. Indeed, there is a continuous 'tug of war' between the freedom to enter into market exchanges and the possible limits imposed on those exchanges. The *Bisso* holding is also in stark contrast to the contractual freedom perspectives found in other Supreme Court decisions, including that in *Baltimore & Ohio SW. R.R. Co.* v. *Voigt*, 176 U.S. 498, 505 (1900). There the court held that 'If there is one thing which more than another public policy requires it is that . . . contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice'. Again, this demonstrates different perspectives within one legal system, let alone within one legal family.

In this journey of exploring convergence, post-*Bisso* cases do clearly reveal an important aspect of legal technicalities. These decisions demonstrate how law develops to answer socioeconomic needs or concerns, and how judicial systems and practitioners respond. The *Fluor* and *Twenty Grand* cases demonstrate an ingenious method to carve out exceptions to *Bisso*, allowing liability from negligence to be shifted to insurers.

Writing a contract in one jurisdiction may not lead to the same consequences in another. Take, for example, the Fifth Circuit decisions in *Fluor* and *Twenty Grand* – allowing liability to be shifted from negligence through insurance schemes. If a contract in that jurisdiction was brought to the Third Circuit for interpretation as in *PPG Industries*, it is

doubtful whether such contractual liability-shifting would be upheld. There again we see that contracts migrating into other legal systems may annul any contemplated legal convergence.

Such is the role that exculpatory clauses play when testing total legal convergence. The provisions challenge jurists, invoke deep debate on fundamental viewpoints of freedom of contract and provide attorneys with fodder for exasperation, if not creativity. These clauses show divergent court decisions within the American legal system – not to mention between the US and English courts. In such contexts, one must seriously question whether total legal convergence is indeed possible.

6

Circulation of common law contract models in Europe: the impact of the European Union system

JEAN-SYLVESTRE BERGÉ

1 The European Union system and circulation of common law contract models

There are several ways to assess the reception by a legal system of contract models from another legal system.

The easiest way is to examine how a national judge applies his or her law to a foreign contract model. For instance, within the area of contract law could be considered the case law of the Cour de Cassation or the appellate courts and tribunals, in terms of their ability to enforce contract models from different systems of common law.

While not strictly speaking a specialist in contract law but rather in EU and comparative law, I will suggest another line of enquiry. My aim will be to try to show that EU law and, particularly, the case law of the European Court of Justice compel national lawyers to welcome into their systems legal situations located in another Member State. Thus, European law promotes the movement of models and leads the national lawyer to handle rules of foreign systems.

2 An almost perfect example: the *Courage* case

In an attempt to illustrate my demonstration, I will rely on an almost 'perfect' example: the *Courage* ruling: ECJ, 20 September 2001, Case C-453/99.

The referral requesting a preliminary ruling originates from a dispute in England involving a brewery and a publican, who were both bound by a lease agreement and an exclusive purchasing clause. The disagreement concerned the settlement of various bills corresponding to deliveries of beer. Pursued for payment, the publican opposes the nullity of the

contract under Article 81(1) and (2) EC and counterclaimed for damages. Both the defence claim and the counterclaim raised a difficulty in terms of English law.

According to the national judge (Court of Appeal – England & Wales), two obstacles arose. The first one related to the ability of a party to an illegal agreement to plead the nullity of a contract to which it had consented. The second concerned the ability of that same party to claim damages due to an abnormally high price levied against it by its co-contracting party.

In both situations, the English judge found that the defendant's participation in an illegal agreement was potentially such as to deprive him of the possibility of invoking an exception of nullity and, *a fortiori*, of the counterclaim for damages. While questioning itself on the compatibility of that solution with EU law, the Court of Appeal referred the following four questions to the Court of Justice:

1) Is Article 81 EC (ex Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that Article to seek relief from the courts from the other contracting party?
2) If the answer to question 1) is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his or her adherence to the clause in the agreement which is prohibited under Article 81?
3) Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his or her own illegal actions as a necessary step to recovery of damages be allowed as consistent with EU law?
4) If the answer to question 3) is that, in some circumstances, such a rule may be inconsistent with EU law, what circumstances should the national court take into consideration? (Para. 16)

3 The context of the case in EU law

The questions posed by the English court were in line with the broader theme of the relationship between national law and EU law.

In this case, the relationship is specifically about determining how the first two paragraphs of Article 81 EC – which lay down respectively: 1) a rule prohibiting agreements restricting competition; and 2) a principle of automatic nullity – should be implemented, especially in a basic contractual litigation.

The procedural treatment of the nullity of the contract is contrary to the rules of the economic public order (main action, exception of nullity),

its nature (absolute or relative), its extent (partial or total) and its consequences (restitutions and possibly damages). Are they solely abandoned to the cautiousness of the laws and state judges of each Member State or is EU law likely to intervene in one way or another?

The answer is known. It bears the name of the 'principle of procedural autonomy' that was formulated more than twenty-five years ago by the Court of Justice.[1]

The reasoning behind this principle consists of two stages:[2]

1) in the absence of Community rules [EU law], it is up to the domestic legal order of each Member State to designate the courts that have jurisdiction and to lay down procedural rules (and, quite often, substantive rules, the border between 'procedural' and 'substantive' being somewhat blurred in the present case situation, so that the principle of 'procedural autonomy' does not exclude any reference to considerations of substantive law), designed to safeguard the rights which individuals derive from the direct effect of EU Law;
2) however, these rules must not be less favourable than those governing similar domestic actions (principle of equivalence), and, most of all, they must not render practically impossible or excessively difficult the exercise of rights conferred by the European legal order (principle of effectiveness).

In other words, when the law fails to deliver all means of its implementation, it relies on different national laws. Still, EU law does not entirely step aside. It continues to ensure compliance with its rules in the name of a double necessity of legal effectiveness and uniform application.

4 The three lessons drawn from the *Courage* case

One is allowed to draw different lessons from how EU law seeks to understand national law of contracts through the use of a framework governing the principle of procedural autonomy.

The most important lesson for our research is the third one. However, to understand it, it is necessary to introduce the two others beforehand.

[1] See, in particular, the first rulings on recovery of charges and taxes unlawfully collected by Member States: ECJ, 16 December 1976, *Rewe*, Case 33/76, ECR, p. 1989; ECJ, 16 December 1976, *Cornet*, Case 45/76, ECR, p. 2043.

[2] For a reminder see, e.g., the *Courage* ruling, para. 29.

5 First lesson: in contract law, the use of the principle of procedural autonomy is rather exceptional and of a subsidiary nature

Because it takes different paths from those traditionally used in national law and because it involves new protagonists that are more remote and less familiar than those we are used to at the domestic level, EU law may be perceived with an element of overstatement. Yet the caricature is not always appropriate, as suggested by the principle of procedural autonomy that, in contractual matters, plays a rather exceptional and altogether subsidiary role.

What is the importance of the phenomenon we are studying here? In the field of contract law, the European judge rarely has recourse to the principle of procedural autonomy. If one puts aside the (beautiful) purely procedural issues, in particular those relating to the definition of the position of the national judge regarding the implementation of the European rule,[3] two areas of EU law which affect contract law are mainly called upon. The first area, which we will not consider here, relates more or less to the European principle of free movement and the manner in which national regulations may be declared inapplicable in relations between individuals, including co-contractors.[4] The second area concerns us more, since it is in direct contact with the theme of this chapter: the law of free competition.

In this matter, barring any error on our part, there are only two case law manifestations of the principle of procedural autonomy, the very same ones that are the subject of this chapter. Yet, even through these two illustrations, one notes that the principle is called upon as a last resort, in a simply subsidiary manner.

As we have seen it in the (aforementioned) *Courage* case, different questions were put before the Court of Justice. For the record, the matter was whether, under EU law, a party to an illegal agreement must be granted the right to plead the nullity of the legal relationship to which it is party and, if so, whether it has the liberty, and under what conditions, to

[3] For an overview of solutions, see, for example, the collective work under the supervision of S. Guinchard *et al.* (eds.), *Droit processue,* 4th edn (Précis Dalloz, 2007).

[4] For a summary analysis of this very abundant question, see, in French, with numerous references cited, the analysis suggested by L. Soubelet in 'Le rôle conféré par le droit communautaire aux droits nationaux des États membres' *Chronique de droit européen,* III, Université de Paris Ouest Nanterre La Défense, *Les Petites Affiches*, 19 May 2003, No. 99, p. 6.

fill a claim for damages. Despite appearances, these two questions do not equally concern the principle of procedural autonomy. The Court of Justice understood it perfectly, as it takes special care to make the division between what concerns the pure and simple principle of primacy of EU law and what is solely delimited by it. In this regard, the Court considered that only the second question was likely to concern the principle of procedural autonomy.[5] Indeed, without any hesitation, the ruling was based on several major decisions of European case law in order to reaffirm: 1) the autonomous dimension of the European legal order (para. 19); 2) the essential nature of competition policy regarding the functioning of the internal market (para. 20); and finally 3) the direct effect, including relations between individuals, of Article 81(1) EC (para. 23). Hence the conclusion, according to which:

> any individual can rely on a breach of Article 81 Section 1 of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.
>
> (Para. 24)

When primary or secondary EU law delivers the principles that guide its implementation with sufficient strength and precision, there is no need to have recourse to a necessarily more subtle concept of a framework governing the procedural autonomy of the Member States. EU law is partially self-sufficient, without necessarily having an obligation to interfere with national law.

6 Second lesson: the European framework governing the principle of procedural autonomy aims at establishing a correlation between partly autonomous and partly hierarchised legal systems

Among the different ways of approaching the relationship between EU law (in this case competition law) and national law (in this case contract law), the most widespread consists in opposing systems, bringing them into conflict, so as to determine whether, within the scope of EU law, national law is compatible or not. However, this way of understanding the relationship between sets of rules does not allow us to grasp all of the legal reality. There are indeed situations where the primacy of EU law

[5] See comments below on this point.

does not totally deprive national law of its autonomy and, conversely, where a certain autonomy of national law resists the primacy of EU law.

Consequently, the idea is not to find an antinomy but rather a correlation between systems. It is neither more nor less than finding a way to harmonise national solutions with those from EU law.

The European framework governing the principle of procedural autonomy is unquestionably one of those situations, as it has no other aim than to establish a dialogue between EU law and national law. It reflects a will to seek 'balance between the principle of "judicial subsidiarity", which implies that the procedural autonomy of national law is respected, and the principle of the primacy of EU Law, which requires that an effective judicial protection of rights resulting from EU Law is ensured'.[6]

The *Courage* decision illustrates, in its own way, this inseparable double movement of autonomy and primacy.

Regarding autonomy, the power of the Member States has been reasserted in defining the consequences on civil law grounds, attached to a violation of Article 81 EC, such as the obligation to repair the damage caused to a third party or a possible obligation to enter into a contract (an implied, but hardly questionable solution in the *Courage* ruling).

Regarding primacy, the Court of Justice takes care to clarify that the effectiveness of European competition law would be called into question:

> if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the European competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU and [. . .] there should not [. . .] be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.
>
> (*Courage* ruling, paras. 26–28)

Ultimately, it is in the conciliation of contrary requirements that the intervention of EU law is emerging in a close relationship with national solutions. EU law does not entirely squash national law. On the contrary, it draws useful, sometimes necessary, tools from national law for its implementation. The situation is not that of an irreducible conflict of

[6] D. Simon, *Le système juridique communautaire*, 3rd edn (PUF, 2001), No. 335, p. 425.

rules. It is more likely a search for a concordance between a specialised European legal order, which is therefore incomplete, and national legal orders that have made the choice to confer primacy upon it.

7 Third lesson: the intervention of EU law leads to a rereading of national laws, which is rather nuanced and has a broad meaning

The understanding of national law conducted through the European prism with these broad guidelines may finally begin. There is no room here for snap judgments or attempts to retreat into oneself. The approach is deliberately nuanced. It also carries a broad meaning.

The analysis is unquestionably nuanced considering how, in the *Courage* case, the Court of Justice construed the rule of effectiveness contained in the European principle of procedural autonomy. The question posed by the English judge was to discover the circumstances under which EU law concedes that national law may refuse the possibility of seeking damages to a party to an illegal agreement. In the present case, the action of the publican aimed at obtaining compensation for damage suffered as a result of high tariff conditions offered by the other contracting party was determined, in accordance with national law, by his degree of liability in the conclusion of a contract considered as potentially contrary to the competition rules.[7] Yet it was precisely on the question of assessing the degree of liability that the Court of Justice was asked to give its opinion.

In order to do so, the Court proceeded in three steps. First, it started to draw all the resources from its case law so as to guide it towards the solution. For this reason, it noticed, in particular, that a certain amount of recognition has been given to the maxim according to which a litigant should not profit from his or her own unlawful conduct, where this is proven (para. 31). Secondly, the Court examined the circumstances that could be sufficient to let a national judge allow an action of the co-contracting party that is the victim of an illegal agreement. Based on the information added to the debate by the UK, it noted, for example, that a co-contracting party that is found to be in a markedly weaker position is deprived of its ability to avoid damage resulting from the

[7] For the presentation of this English rule and the use of the *ex turpi causa non oritur actio* adage, see, e.g., G. Samuel, *Law of Obligations and Legal Remedies*, 2nd edn (Cavendish Publishing, 2001), pp. 239ff.

illegal agreement, so it must be able to engage the liability of the other contracting party (para. 33). Finally, the Court rejected the objection according to which the reasoning conducted on the consequences in civil law of a breach of Article 81 EC would contradict the European definition of the agreement. In reality, there was no interference between the two parts of the reasoning, which were quite distinct one from another, since the first was solely part of EU law, whereas the second was more modestly delimited by the principle of procedural autonomy.

In the end, the Court found that EU law:

> does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

It can be seen that EU law gives, as a general guideline, indications that should enable a correct implementation of the national law of contracts. It is up to the state judge who is the European common law judge to implement them, which gives him or her substantial room for manoeuvre.

The approach of the Court of Justice is not simply nuanced; it also carries a broad meaning. Indeed, the decision does not exclusively apply to the English law of unlawful contracts. It can be transposed to all national laws of Member States and leads to understanding the comparative approach in a particular way – probably too little exploited.

Thus, for the French lawyer, the Court of Justice's ruling is an invitation to assess the adequacy of its rules faced with the European principle of procedural autonomy. Yet to notice that this ruling of the Court of Justice undoubtedly reinforces our national solutions is not the least reassuring of the lessons in these times of great European hesitation. First of all, it also has an effect on the ability of a party to an illegal contract to seek its annulment and to act, if necessary, in tort. Nothing in our civil law, as a rule, stands in the way of an action by the co-contracting party, a victim merely because it has participated in the conclusion of an unlawful legal act. The exception of indignity, formulated by the famous maxim *Nemo auditur propriam turpitudinem allegans*, has a reduced scope of application in our law. As we know, it affects only claims for restitution resulting from the nullity of the prohibited contract.[8]

[8] For an overall analysis, see, with numerous references cited: Ph. le Tourneau, *Juris-Classeur Civil, App. Articles 1131 to 1133* (LexisNexis).

But there is more. Should we stick only to the restitutions field, it is striking to notice how our national law is willing to adhere to the analysis used by the Court of Justice in an entirely different legal environment. Indeed, the expression *Nemo auditur* has a somewhat misleading nature.[9] It willingly gives way to the Roman maxim *In pari causa turpitudinis, cessat repetitio* and its variants, which allow us to explain why, when the illegality is unequal between the parties to the contract, the claim for restitution is sometimes available only to the least guilty of them.

Is this not the same reasoning as that implemented by the Court of Justice in the context of English law? In these two totally different situations, it ultimately comes down to ensuring that legal action is not totally closed to the party which, far from having orchestrated the illegal agreement, is the one suffering from its consequences. Clearly, the meaning of the Court of Justice's analysis exceeds the scope of one single state law. On the contrary, it intends to enable us to hold a dialogue between different national legal systems. This is perfectly normal when it comes to participating in a European construction (albeit modestly and by small steps), a process which necessarily requires the finding of renewed forms of community or unity of rights.

8 Conclusion

The *Courage* case helps us to think about the other way through which EU law promotes the movement of national models in Europe and their comparison.

Comparative law is no longer only concerned with comparing national laws. There is also an international dimension to the comparison and, as far as we are concerned, a European one.

The European framework modifies the comparative method. Comparing laws has become a triangular process: a contract model, which has been designed according to the rules of one particular national system, is taken into account in another one, because a third one, the EU system, requires such a circulation.

The search for a proper implementation of EU law in each Member State fosters interactions between national laws.

[9] See, in particular, on this discussed question, *ibid*., No. 121ff.

PART 3

The applicable law's effects on boilerplate clauses

Introduction to Part 3

Today, international commercial contracts are, with only a few exceptions, drafted on the basis of common law models. As Part 1 of this book showed, these models are only to a limited extent adapted to meet the requirements of the contract law that will govern them. As seen in Part 2, the simple adoption of a contract model inspired by common law may not be deemed to be a tacit choice of common law to govern the contract (particularly because common law is not a defined system). Part 2 also showed the difficulty of harmonising general contract law on an international level. Thus, contracts often present clauses and terminology that are not tailored to, or even not compatible with, the applicable law.

This drafting practice creates a need for coordinating the legal concepts upon which the contract is based, with the legal concepts that the governing law imposes on the contract.

There are various examples of clauses that are obviously inspired by a common law system and do not have a corresponding provision in the chosen law, if the law chosen by the parties to govern the contract belongs to a civilian system. For example, in a contract subject to a civilian law and with an exclusive jurisdiction clause in favour of the courts in a civilian country, a clause regulating the use of equitable remedies such as estoppels would not make sense. These are a phenomenon of common law and do not exist in civilian laws.

There are, however, examples where the poor coordination between the common law contract model and the civilian governing law is less evident. The function of the ubiquitous clauses of representations and warranties, for example, is primarily connected to the common law distinction between precontractual representations on the one hand and terms of the contract on the other hand, a distinction that does not exist, at least not with the same legal effects, in many civilian systems.

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