# Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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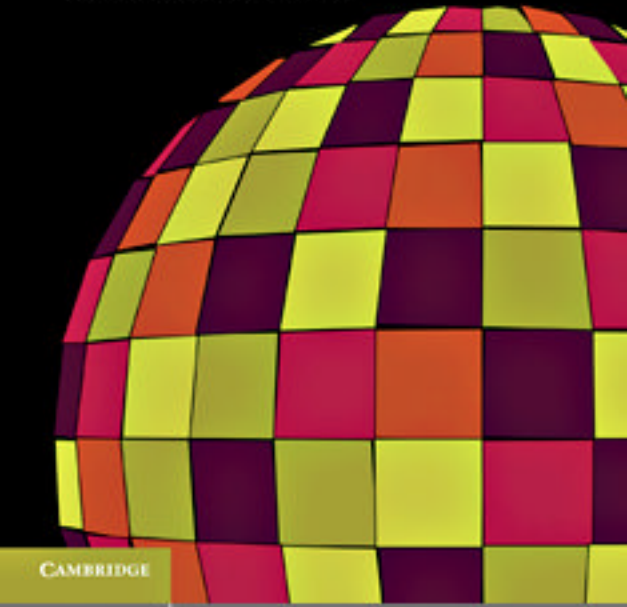

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## 4 No oral amendments

Such a clause is valid insofar as it contains an agreement on the form that an amendment should take. Indeed, parties can reach agreements on the issue of proof as recognised by the French Supreme Court.[17]

It is also useful insofar as, in commercial matters, there is no restriction on means of proof (Article L.110–3 of the Code of Commerce) so that a party could pretend that a written contract was amended orally.

However, it should be mentioned that it is very hard to establish that a contract was concluded orally before a French state court, as testimonies are generally not given significant weight and there is hardly any hearing of witnesses.[18] The best way to prove things in French court proceedings is still to bring written evidence, whether it be the contract itself or written documents evidencing an oral agreement. In that respect, Article 1341 of the Civil Code requires written evidence in civil matters and forbids testimonies against written documents. Even if this article is not binding in commercial matters, it is a model which is recognised by commercial judges.

The clause is also useful in that it not only forbids oral proof of a contract but also requires a signed document. In that respect, one may wonder whether a French judge would recognise the validity of a modification of contract by, say, a mere exchange of emails.

French law recognises electronic signature (Article 1316(4) of the Civil Code) and an electronic document can be considered as a written document (Article 1316(1) of the Civil Code). However, a mere email does not fulfil the requirements of reliability of Articles 1316(1) and 1316(4) and cannot be deemed to be an electronic document bearing an electronic signature that would be recognised as a 'signed written document' for the purpose of the Civil Code.

## 5 Severability

This clause, which purports to preserve the contract in case one of its clauses is deemed invalid, has to be considered in light of French law on the issue of severability.

[17] See Cass. Civ. 1, 8 November 1989, D. 1990, 369.

[18] Things are different in arbitrations where hearing of witnesses and cross-examination can usually take place.

On that issue, Articles 900 and 1172 of the Civil Code bring a distinction between onerous contracts[19] (where both parties bring consideration) and free contracts (where only one party brings consideration). This chapter shall only focus on the first category (onerous contracts).

In the case of onerous contracts, the principle is that the nullity of a stipulation results in the nullity of all others. However, this statutory solution was abandoned by case law. Indeed, the French Supreme Court now considers that the whole contract is only found void if the annulled clause was the determining and fundamental cause of the contract:[20] 'a void clause inserted in an agreement can only result in the nullity of that agreement if it constitutes an essential clause thereof.'

In these conditions and in order to avoid the uncertainty of judicial interpretation on the scope of the consequences of the nullity of one clause, it may prove useful to stipulate that the rest of the contract should be maintained notwithstanding the nullity of one clause.

However, the clause may be disregarded if the annulled clause was so fundamental that it constituted the 'cause' of the contract, i.e., the *raison d'être* of the contract. For instance, if a merchant rents material to develop a business and it is in fact impossible to develop this business, this impossibility will deprive the contract of its 'cause'.[21] Under French law, the requirement of a 'cause' of the contract is a condition of validity of any contract (Article 1131 of the Civil Code) and it cannot be contracted out even as a result of an explicit stipulation. There is often a dispute between the parties as to what constitutes the 'cause'.

In a recent case, the French Supreme Court annulled such a clause in a leasing agreement on the ground that it was contrary to the economic balance of the contract.[22]

## 6 Conditions

The purpose of this clause is to designate the obligations of which a breach will be considered a 'fundamental breach of the contract'.

[19] 'Contrats synallagmatiques'.

[20] See, for instance, Cass. Civ. 3, 24 June 1971, Bull. III No. 405; Cass. Com., 22 February 1967, Bull. III No. 67, No. 70–11730.

[21] Cass. Civ. 1, 3 July 1996, Bull. No. 286.

[22] See Cass. Com., 15 February 2000, No. 97–19.793, Bull. Civ. IV, No. 29, RLDA 2000/27, No. 1703.

The notion of 'fundamental breach of the contract' in this clause appears to be close to the notion of breach of an essential obligation under French law. This notion of essential obligation of the contract is relevant in two fields:

- The interpretation and effect of clauses limiting or excluding liability in case of breach of such obligations.[23]
- The right to unilaterally terminate the contract whereas, in principle, under French law, the termination of a contract must be requested and ordered by a court.[24]

It is probable that obligations, the breach of which is considered as a fundamental breach of contract, will be considered as a breach of an essential obligation of the contract.

Under French law, one considers as 'essential obligations' those obligations that go to the root of the bargain, i.e., for a French judge, the rights and obligations of the parties that define the economic substance of the contract.

If the parties wish to avoid the intervention of a judge in the definition of what constitutes an essential obligation of the contract, they themselves should define the obligations that are essential in the eyes of the parties and/or those that warrant a termination of the contract. One may consider that a clause such as the one in the introduction to Part 3 of this book would be interpreted by a French judge as defining the essential obligations of the contract.

One should further add that the sanctions for breach of contract other than damages are not subject to the requirement to prove a loss. In these conditions, the clause that defines fundamental/essential obligations of the contract may not be disregarded by the judge on the ground that the breach of any such obligation (e.g., the breach of a time requirement) has caused a damage.[25]

However, it should be noted that the exercise of the rights conferred by such a clause (generally unilateral termination) should be made in compliance with the duty of good faith as explained in the preliminary observations.

## 7 Sole remedy

A sole remedy clause would probably be viewed as a clause of limitation of liability.

[23] E.g., Cass. Com., 30 May 2006, Bull. No. 132.
[24] Cass. Civ. 1, 13 October 1998, Bull. I No. 300.
[25] Cass. Civ. 1, 18 November 1997, Bull. I, No. 317.

In principle, this type of clause is not prohibited.[26] However, its validity is subject to certain conditions:

- It does not deprive an essential obligation of its substance. Interestingly, in respect of the clause under consideration, a clause limiting liability of an express courier company for *late delivery* to the price gave rise to the leading authority on this issue (*Chronopost* case).[27] In that case, it was considered that timely delivery was an essential obligation of such a company and a clause limiting liability for late delivery to the price would deprive the contract of its substance. Such clauses are therefore considered unenforceable.
- The breach of the obligation was not intentional or a result of gross negligence as provided by Article 1150 of the Civil Code. For that matter, gross negligence is defined as extremely serious conduct, close to intentional breach and showing the inability of the party to perform the contractual obligation he or she had accepted.[28]

  Thus, taking the clause under consideration, if the delay was intentional or if the party in breach was grossly negligent, that party will not be able to rely on the clause.
- The damages concerned are not physical injuries.

Moreover, contracts between a professional and a consumer, the purpose or effect of whose clauses is to 'eliminate or reduce the right of compensation of the loss sustained by the non-professional or the consumer in case of breach by the professional of any of its obligations', are presumed to be illegal.

All the above exceptions result from mandatory rules.

Moreover, in case of a breach of an essential obligation of the contract, the aggrieved party could always try to seek a rescission ('résolution') of the contract in court even if that was not provided for as the 'sole remedy'.

It should also be noted that sole remedy clauses in contracts of sale may also see their scope restricted insofar as they may affect the scope of legal warranties for hidden defects ('garantie légale des vices cachés'), depending on whether the contract of sale is a for a domestic sale or for an international sale governed by the 1980 United Nations (Vienna)

[26] Cass. Civ. 1, 19 January 1982, D. 82, p. 457.
[27] Cass. Com., 9 July 2002, No. 99–12554; Cass. Com., 30 May 2006, No. 04–14.974, JCP E 15 June 2006, actualités 276; D. 2006, No. 38, pan. p. 2646.
[28] Cass. Com., 3 April 1990: Bull. Civ. IV, No. 108.

Convention on Contracts for the International Sale of Goods ('CISG'), which constitutes French law for international sales.

## 8 Subject to contract

A subject to contract clause could be quite useful under French law.

Indeed, when there is doubt as to whether a contract was concluded, judges may consider that a contract was concluded as soon as the parties agreed upon the essential elements of the contract (e.g., agreement on the subject matter and the price in the case of a sale). Thus, case law in the field of letters of intent[29] shows that French courts have a very extensive power of appreciation on the exact nature and effects of documents. French courts may consider that documents defining the objectives of a contract to be concluded but not indicating that they are preliminary documents constitute a first-frame contract even though parties are still in negotiation on the full and final contract.

Moreover, under French law, one considers that a contract is formed once so-called 'essential elements' of the contract have been agreed upon. For instance, in principle, a sale contract is deemed to be concluded once parties have agreed on the thing being sold and the price ('accord sur la chose et le prix').

However, it may be that an agreement on such first essential elements is not sufficient in the eyes of the parties and that there is not a final contract. It may also be that the parties have drafted an almost complete document but would like to have some time for reflection. In such cases, it may be desirable to indicate clearly what constitutes a contract and what constitutes a mere preparatory document.

The French Supreme Court seems to give effect to such clauses.[30] This is subject to certain qualifications. First of all, it should be noted that the words 'subject to contract' alone would probably give rise to some discussion as to what the intentions of the parties were, as this expression does not correspond to a defined category under French law. Under these conditions, it is advisable to be as precise and specific as possible in the drafting of such a clause and not simply rely on the expression 'subject to contract' to achieve that objective (all the more so as the direct translation of that expression into French would appear quite strange to a French judge).

[29] *Paravision International* v. *Sté Aries*, Cass. Com. 18 March 1997, No. 94–21430.
[30] Cass. Civ. 3, 2 February 1983, No. 81–12036, Bull. Civ. No. 34.

Furthermore, even if there is a sufficiently precise clause, there remains a risk that a judge would give some effect to documents presented as being non-binding. One should bear in mind that interpretation of a contract is chiefly an issue of fact and there is therefore a huge discretion of first-instance judges on any particular clause, as explained in the preliminary observations.

Thus, one may not exclude the possibility that a judge considers that a complete document signed by parties in which one would find the mention 'subject to contract' would be viewed as a contract with a *condition potestative* (a sort of arbitrary condition whereby the existence of an obligation is made dependent upon the will of the person supposed to be bound by the obligation); in such a case, the 'subject to contract' stipulation would be ignored, since a *condition potestative* is null under French law. This risk is due to the fact that some judges still have a theoretical vision of contracts and contractual negotiations. It is fair to say that this risk is decreasing under French law. For instance, in the merchant shipping field, judges understand that numerous precontractual documents may be exchanged before a contract has been reached.

In any event, the parties have an obligation to negotiate in good faith and a party may incur liability in tort (Article 1382 of the Civil Code) for having wrongly let the other party rely on his or her apparent intent to conclude the contract. Such reliance could be characterised if the parties have exchanged quasi-final documents and one of them suddenly declares that he or she does not want to sign the contract. However, such liability is limited to reliance loss and cannot cover expectation damages or loss of a chance to make profits under the contract.

## 9 Material adverse change

Material adverse change clauses, such as the one under consideration, are recognised by French courts. Their interpretation of the clause would generally be very close to that prevailing in common law jurisdictions. It is different from a hardship clause in that it may result in a termination of the contract as opposed to a mere renegotiation of the terms and conditions with a view to restoring the balance between the parties.

Particular attention should be paid to the drafting of the clause so that it is not considered to be a 'condition potestative' (an arbitrary condition – see above) and thus be found null. It is therefore essential that the events authorising the implementation of the clause be clearly defined

and based on objective criteria that 'objectively' affect the interest of the contract. In other words, the implementation of the clause shall not be dependent upon the arbitrariness of the beneficiary of the clause and must be precise. These events should be highly unpredictable. If such events are too linked with the usual economic risks of the beneficiary, the clause will also be deemed 'potestative' and, as such, will be ignored.

## 10 Liquidated damages

The interpretation of a liquidated damages clause by a French judge may well surprise the parties.

To summarise the position, an English lawyer would wonder first whether it is in fact a penalty clause.[31] In such a case, the clause would be invalid. Otherwise, the clause would be applied regardless of whether the contractual damages are disconnected from the actual loss sustained.

The position is different under French law. There is no prohibition of liquidated damages (interestingly called 'clauses pénales', which literally translates as 'penalty clauses'). However, such a clause is subject to the moderating power of the judge, which is mandatory (Articles 1152 and 1226 of the Civil Code).

In these conditions, in the presence of a liquidated damages clause which is disconnected from the actual damage sustained by the victim of the breach, it is probable that a French judge: (1) systematically validates the clause; and (2) also systematically reduces the amount thereof. It seems difficult to avoid such a result.

It should also be noted that if the amount of the liquidated damages clause is manifestly too low, it may also be treated as a limitation clause (as to which, see Section 7 above).

## 11 Indemnity

An indemnity clause deals with the outcome of recourse actions and does not raise any difficulty, as French courts would give effect to such a clause.

Insofar as such clauses contain limitations of liability, reference should be made to the comments on the limitation clause above.

[31] In the sense of a provision in a contract that stipulates an excessive pecuniary charge against a defaulting party (*Webster's New World Law Dictionary*, 2010, Wiley Publishing, Inc.).

It is customary to find a mutual waiver of recourse consented by the parties in indemnity clauses. Such waivers of recourse are valid and enforceable as a matter of law when they relate to contractual liability.

They are considered as exclusions of liability and, as such, cannot be invoked in cases of gross negligence ('faute lourde') and wilful default ('dol'), in accordance with Article 1150 of the Civil Code.

It is important to stipulate whether the parties' insurers are also covered by the waiver. The victim's own insurer, subrogated in the rights of his or her insured, is normally bound by the waiver consented to by his or her insured (since he or she cannot gain more rights than the insured as a result of the subrogation). In order to preserve the insurance coverage, it is obviously necessary to get the insurer's consent to this waiver of recourse.

Regarding the liability insurer of the party liable, the position is more delicate. Indeed, under French insurance law, the victim has a direct claim against that insurer which is distinct from the claim against the party liable. In other words, failing a specific waiver of recourse as against that insurer, the victim or his or her subrogated insurer can still claim against that liability insurer.[32] In order to protect liability insurers, it is necessary to provide that the parties also waive recourse against these insurers. This stipulation is enforceable by a liability insurer under French law (it is considered as a 'stipulation pour autrui' on which a third party may rely against a party to the contract).

Obviously, the fact that the contract itself is governed by French law does not necessarily mean that there will also be recognition of direct claims against liability insurers. However, rules of conflict of laws on that point are complex and changing, and it is therefore wiser to insert specific wording to that effect.

Again, the party waiving recourse against the liability insurer of the other party must secure the prior approval of his or her own property insurer.

## 12 Representations and warranties

In this clause, the parties guarantee a number of elements pertaining to the validity of the contract (capacity of the parties, power of the signatories, etc.).

[32] Cass. Civ. 1, 20 July 1988: RCA 1988, comm. 51 and chr. 5; Cass. Civ. 1, 26 May 1993, Bull. No. 186.

Such a clause is given some effect under French law. The alleged nullity of a contract often gives rise to a discussion on the existence of a cause of nullity invoked, as well as a possible liability of one of the parties in the event of such a cause of nullity. It is a case of precontractual liability which is dealt with, in France, as liability in tort. In order to establish liability in tort, one must first establish the existence of a fault, in the sense of Article 1382 of the Civil Code, which does not systematically result from the existence of a cause of nullity. In this context, the interest of a representations and warranties clause is to confer a contractual dimension to the implicit guarantees of the precontractual period. It therefore avoids all discussion on the existence of a fault: the observation of a cause of nullity automatically constitutes a breach of contract.

Subject to these general rules, in French practice, the representations and warranties clause is mainly known in the context of share purchase agreements.

Whatever the detail of the list of representations and warranties, a purchaser may always claim that his or her consent was vitiated during the conclusion of the contract in order to seek nullity of said contract (a warranty of liability and assets is additional to the legal provisions protecting the buyer and does not prevent the latter, when his or her consent was vitiated, from invoking the nullity of the share purchase agreement, which is a legal protection that he or she has not waived).[33] Indeed, under Article 1109 of the Civil Code, 'there can be no valid consent if consent was given by mistake or if it was extorted by violence or deceived by fraud'.

In practice, nullity of the contract will only be sought on the basis of mistake or fraudulent misrepresentation and, more particularly, on the latter of these. Article 1116 of the Civil Code indeed provides that: 'fraud is one of the cases of nullity of a contract when the fraudulent manoeuvres of one party are such that it is obvious that, but for these manoeuvres, the other party would not have entered into the contract. Fraud cannot be presumed and must be proved.'

Thus, a party may always try to seek nullity of the contract if it manages to demonstrate that the other party had hidden an element that would have affected the first party's decision to enter into the contract: in other words, that it would not have entered into the contract had it known of the element.

[33] Cass. Com., 3 November 2004, No. 00–15725, Bull. Joly Sociétés April 2005, p. 519.

It is nevertheless preferable for the purchaser to stipulate that 'the share purchase is effected subject to the ordinary warranties, obligations and conditions of fact and of law and, notably subject to the Representations and Warranties defined hereafter' in order to avoid any useless discussion on that point.

It should be mentioned that in Anglo-Saxon practice, the term 'representations and warranties' covers the representations of the seller on the legal status of its company (the company has been validly formed, the contracts concluded by the company are in accordance with applicable law, etc.), whereas in French practice, one distinguishes between 'déclarations' (which may be translated as 'representations') on the legal status of the company and 'guaranties' (which may be translated as 'warranties') on the financial situation of the company.

This distinction is important due to the sanctions associated in practice with wrong representations and warranties on the legal status or on the financial situation of the company. In case law, a false 'déclaration' on the legal status of the company may result in the nullity of the contract even if the purchaser sustained no loss, whereas a false statement on the financial situation of the company will only give rise to damages.[34]

However, it is true that, very often, judges do not take into account these theoretical principles and focus their attention on the financial loss sustained by the purchaser or the company in order to make their decision, whatever it may be (the nullity of the contract or an award of damages).

## 13 Hardship

Such a clause is very important under French law as it avoids the traditional application of the theory of unforeseeability ('imprévision'). The loss of the economic balance of a contract due to unforeseen circumstances is not a cause of renegotiation of the contract. There may be future reforms of the Civil Code to recognise hardship as a cause of revision of the contract. For the time being, it is not. However, nothing prevents the parties from agreeing that the contract should be renegotiated in the event of defined circumstances.

In the way in which it is drafted, the clause suggests that the triggering event of the renegotiation is a *force majeure* event. Indeed, the clause puts an emphasis on the criteria of unforeseeability and irresistibility, which

[34] Cass. Com., 29 January 2008, No. 06–20.010.

are *force majeure* criteria.[35] It may therefore well be that this clause should be interpreted in light of French case law on this notion.

## 14 *Force majeure*

Rules relating to *force majeure* under French law are not public policy. Parties may therefore freely extend the definition of *force majeure*[36] or restrict it by a limitative list of *force majeure* cases.[37] It is also possible to stipulate the consequences of *force majeure*, notably whether and in which conditions the contract should be terminated as a result of the occurrence of a *force majeure* event, except in contracts with consumers, in which such clauses are held to be illegal.[38]

French courts will therefore give effect to such a clause on *force majeure*. They will respect the intention of the parties.

[35] See Cass. Ass. Plén. 14 April 2006, No. 02–11.168.
[36] Cass. Com., 8 July 1981, Bull. IV No. 312.
[37] Cass. Com., 11 October 2005, Bull. IV No. 206.
[38] E.g., Cass. Civ. 1, 10 February 1998, D. 1998, 539, note D. Mazeaud.

# 10

# The Romanistic tradition: application of boilerplate clauses under Italian law

GIORGIO DE NOVA

## 1 Entire agreement clauses and no oral amendments clauses as clauses provided in alien contracts

Entire agreement clauses, also known as merger clauses as well as no oral amendments clauses, are not a usual part of traditional Italian contractual practice for two main reasons.

The first reason is that in traditional Italian practice, contracts, including those between companies, are usually short and the parties agree only on the main issues, leaving statutes to rule on the other issues: Article 1374 of the Italian Civil Code accordingly provides that 'a contract binds the parties *not only as to what is expressly provided, but also to all the consequences deriving from it by law* or, in absence, according to usage and equity' (emphasis added).

The second reason is that the problem of oral agreements made prior to or at the same time as the written agreement, or after the drawing of the document, is expressly covered by two articles of the Italian Civil Code. Article 2722 states that 'proof by witnesses is not permitted to establish stipulations which have been added or are contrary to the contents of a document, and which are claimed to have been made prior to or at the same time as the document', while Article 2723 states that 'when it is alleged that, after the drawing of a document, a stipulation has been made, in addition or contrary to its contents, the judge can admit proof by witnesses only if, in consideration of the character of the parties, the nature of the contract, and any other circumstances, it appears likely that verbal additions or modifications have occurred'.

Due to such legal limits to proof by witnesses, the Italian lawyer who drafts a contract does not see the necessity of providing clauses in the contract aimed to protect the written document.

Nevertheless, in recent years in Italy, it has become widespread practice to execute contracts written on the basis of Anglo-American models even though they are subject to Italian law. As has been stated with regard to civil law countries, 'today international commercial contracts are, with only few exceptions, drafted on the basis of common law models'.[1] These contracts, which I suggest should be called 'alien contracts',[2] aim to be complete, and they often provide entire agreement clauses and no oral amendments clauses between the so-called 'miscellaneous provisions'.

## 2 Entire agreement clauses and no oral amendments clauses as 'stylistic clauses'?

It has been said that 'it often happens that parties use standard form contracts containing a merger clause to which they pay no attention'.[3] The same can be said of no oral amendments clauses. This circumstance raises an issue under Italian law, because, according to Italian case law, a clause which is not based on the effective will of the parties is qualified by the courts as a 'clausola di stile' (a stylistic clause) and so is considered to be without effect.[4]

Whether a clause has been negotiated by the parties or not is a question of fact.

Assuming that an entire agreement clause and a no oral amendments clause are respondent to the effective will of the parties, the effects they can have under Italian law have to be ascertained.

## 3 No oral amendments clauses under Italian law

A clause which provides that no amendment or variation to the contract shall take effect unless it is in writing and signed by authorised representatives of each party shall be checked, with regard to Italian law, against the rules concerning the form and representation.

[1] See G. Cordero-Moss, *Anglo-American Models and Norwegian or other Civilian Governing Law*, Publications Series of the Institute of Private Law No. 169 (University of Oslo, 2007), p. 19.

[2] See G. De Nova, *Il contratto alieno*, 2nd edn (Giappichelli, 2010).

[3] See O. Lando and H. Beales, *Principles of European Contract Law* (Kluwer Law International, 2002), comment on Article 2: 105.

[4] See Italian Supreme Court, 16 November 1984; Italian Supreme Court, 15 October 1983, No. 6062; Italian Supreme Court, 12 November 1981, No. 5990.

As for the form, Article 1352 of the Italian Civil Code provides as follows: 'If the parties have agreed in writing to adopt a specified form for the future contract it is presumed that such form was intended for the validity of the contract.' If the parties are free to agree to adopt a form for a future contract, which is not required by law, there is no reason to discuss the validity of a clause which provides that a variation to a contract shall be made in writing. However, in Italian law there is discussion as to whether the agreement of the parties to adopt a specified form (e.g., the written form) can be considered as superseded in the event that afterwards the parties orally finalise the contract.

Case law is uncertain: some decisions accept that the agreement on the form can be cancelled by the conduct of the parties,[5] while other decisions require the written form to cancel the agreement on the form.[6]

As for the undersigning by an authorised representative, the clause can have effect under Italian law, because the parties can provide information on the power of the persons involved in a contract.

## 4 Entire agreement clauses under Italian law

As for the entire agreement clause, a clause which provides that the contract supersedes any prior agreement executed by the parties regarding the same subject matter is valid under Italian law.

Under Italian statutory law, there is no provision regulating such a clause. This clause is not customary under traditional Italian contract practice, as has been said before. However, to validate such a clause, the more general principle of novation can be applied.

On the contrary, under Italian law, a clause would not be valid which would derogate to Article 1362 of the Italian Civil Code, according to which 'that which was the common intent of the parties, not limited to the literal meaning of the words, shall be sought in interpreting the contract. In order to ascertain the common intent of the parties, the general course of their behaviour, including that subsequent to the conclusion of the contract, shall be taken into account'. It is clear that the wording 'behaviour, including that subsequent to the conclusion of the contract' also means that the behaviour prior to the conclusion is relevant for the purposes of the interpretation of the contract.

[5] Italian Supreme Court, 5 October 2000, No. 13277.
[6] Italian Supreme Court, 14 April 2000, No. 4861.

The issue of the validity of a clause aiming to bar the search of the common intent of the parties has been discussed by Italian scholars rather than in court, due to the fact that entire agreement clauses are not customary in traditional Italian contractual practice. It is very important to note that the prevailing opinion of Italian scholars is that Article 1362 of the Italian Civil Code cannot be derogated because it is an expression of the principle of good faith and it governs the activity of the judge, which is an activity based on public interest.[7]

With specific regard to an entire agreement clause, it has recently been pointed out that 'the search for the common intent of the parties holds a core position, not avoidable, in the interpretation, even if the contract is a written contract, including an Entire Agreement clause'.[8] Therefore, an entire agreement clause under Italian law cannot be interpreted as a clause derogating to Article 1362 of the Italian Civil Code, because otherwise it would be null and void. Moreover, it is a precise rule on the interpretation of a contract that 'in case of doubt, the contract or the individual clauses shall be interpreted in the sense in which they can have some effect, rather than in that according to which they would have none'.[9]

In short, under Italian law, an entire agreement clause cannot prevent the judge from interpreting the contract by examining the common intent of the parties in the light of their overall behaviour prior and subsequent to the execution of the contract. It is worthwhile noting that the same solution can be found in the UNIDROIT Principles of International Commercial Contracts 2004 at Article 2(1)(17): '*Merger clauses*. A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statement or agreements. *However, such statements or agreements may be used to interpret the writing* [emphasis added].'

## 5 Entire agreement clauses under the CISG

If the parties have chosen to apply Italian law to a contract for a sale of goods, the international conventions to which Italy is a contracting party

[7] See C. Grassetti, *L'interpretazione del negozio giuridico* (CEDAM, 1983), p. 258; C. Scognamiglio, 'L'interpretazione', in E. Gabrielli (ed.), *I contratti in generale*, vol. II, 2nd edn (UTET, 2006), pp. 1035–1146, 1044.

[8] See F. Mazza, 'Merger clause (o clausola di completezza)', in P. Cendon (ed.), *I contratti in generale*, vol. IV, *Clausole abusive* (UTET, 2001), pp. 725–755, 737.

[9] Article 1367 of the Italian Civil Code.

may apply. Therefore, it must be considered which effects the entire agreement clause can have with regard to the United Nations Convention on Contracts for the International Sale of Goods signed on 11 April 1980, the so-called Vienna Convention (hereafter also referred to as 'CISG').

Considering that the CISG (as provided by Article 6) can be derogated by the parties, the issue of the effects of an entire agreement clause in a contract governed by the CISG has been considered by the CISG Advisory Council in its opinion dated 23 October 2004, with the following conclusion (para. 4.6): 'Under the CISG, an Entire Agreement Clause does not generally have the effect of excluding extrinsic evidence for purposes of contract interpretation. However, the Entire Agreement Clause may prevent recourse to extrinsic evidence for this purpose if specific wording, together with all other relevant factors, make clear the parties' intent to derogate from Article 8 for purposes of contract interpretation.'

Therefore, it is necessary to check whether the specific entire agreement clause deals with contract interpretation and contains any derogation from Article 8 of the CISG, which governs the interpretation of the contract.

As for Italian law itself, according to the conclusions reached in Section 4, it can, in short, be said that: a) on the one hand, agreements, oral or written, prior to the contract are superseded by the contract, meaning that the obligations of the parties are provided by the contract, and obligations of the parties which are provided in previous agreements but not in the contract cannot be added to the obligations provided in the contract; but b) oral or written agreements, as well as the overall behaviour of the contracting parties before and after the execution of the contract, shall be considered in the interpretation of the contract.

## 6 Articles 2722 and 2723 of the Italian Civil Code with respect to interpreting the contract

In short, as a rule, under Articles 2722 and 2723, no oral evidence can be admitted to prove that the parties, *before* the execution of the contract, agreed orally on something which is an addition to or in contradiction with what is provided in the written contract. On the contrary, oral evidence can be admitted to prove that the parties made additions or modifications *after* the execution of the contract if it appears likely that oral additions or modifications have occurred. Regarding the last

possibility, it should be considered that the no oral amendments clause bars such a possibility.

However, it must be considered that the above rules do not bar proof by witnesses aiming not to give evidence of agreements adding to or contradicting the document, but to give evidence of the meaning of the document in interpreting the written agreement. Such a distinction is stated in case law and by scholars. As for the case law, the Italian Supreme Court has decided that: 'Legal limits to the admissibility of proof by witnesses stated by Article 2722 Civil Code (which does permit the giving of evidence of added or contrary agreements, prior or simultaneous to the document) do not act when such a proof is aimed not to challenge the content of the document, but to clarify its content.'[10]

As for the scholars, the following was stated: 'quite consequent appears the exclusion of the said limits, when the proof by witnesses is aimed to clarify the content of the written agreement.'[11]

## 7 Entire agreement clauses and implied conditions

Some entire agreement clauses also provide that 'there are no conditions to this Agreement that are not expressed herein'.

The term 'condition' does not refer to a *condicio facti*, i.e., to a future and uncertain event on whose fulfilment the effect of the contract depends, but to the implied terms (or conditions) of the contract.

An entire agreement clause can prevent the judge from making implications regarding the terms in the contract. Of course, it cannot prevent the application of the mandatory rules of law.

[10] Italian Supreme Court, Section III, 16 July 2003, No. 11141.
[11] COMOGLIO, *Le prove civili* (Wolters Kluwer Italia, 1999), p. 267.

# 11

# The Nordic tradition: application of boilerplate clauses under Danish law

PETER MØGELVANG-HANSEN

## 1 Danish contract law in general[1]

Denmark has no civil code but rather a variety of fragmentary statutes dealing with some special types of contract. The two central pieces of legislation in the area, *købeloven* (the Sales of Goods Act) and *aftaleloven* (the Contracts Act), date back to 1906 and 1917, respectively. New provisions protecting consumers have been added to the two Acts, but otherwise, with a few exceptions, they both look as they did when they were first enacted.[2] These old Acts are some of the finest examples of the legislative cooperation between the Nordic countries in the first half of the twentieth century.

When Denmark joined the 1980 United Nations (Vienna) Convention on Contracts for the International Sale of Goods ('CISG'),[3] the veneration for the two old Acts and the Nordic tradition was great and embodied in the fact that Denmark did not join the Convention's Part II (Formation of the Contract)[4] and that Denmark and the other Nordic countries invoked the so-called 'neighbouring country reservation'. The effect of the latter is that, according to the general rules on the conflict of

[1] For a general overview, see P. Møgelvang-Hansen, 'Contracts and Sales in Denmark', in B. Dahl, T. Melchior and D. Tamm (eds.), *Danish Law in a European Perspective*, 2nd edn (Thomson, 2002), pp. 237–276.

[2] An exception is the so-called General Clause that was inserted into §36 of Aftaleloven (the Contracts Act) in 1975. For more about §36, see below.

[3] See *International købelov* (International Sales of Goods Act), 733/1988.

[4] Neither did the other Nordic countries. The Danish Ministry of Justice has announced that a bill repealing the exception concerning Part II is being prepared in 2010. See www.justitsministeriet.dk/160.html.

laws,[5] the national Sales of Goods legislation applies to inter-Nordic sale contracts.[6]

The special status of the old (no longer joint) Nordic Sales of Goods Act from 1906 is also embodied in the fact that it is a general assumption in Danish legal theory and practice that, by and large, the Sales of Goods Act reflects the non-statutory, general principles of contractual obligations and thus that the rules of the Act, with a few exceptions consisting mainly of rather 'technical' rules,[7] are an important paradigm for the default rules applicable to those types of contracts that are non-statutory, for example, most service contracts and the purchase of real property.[8]

Expressed in a few words of generalisation, Danish contract law, and indeed Danish law as a whole, is characterised by a rather high degree of flexibility, informality and pragmatism. These principles are very prominent in legal theory and practice concerning the interpretation of contracts. Another characteristic feature is the relatively prominent role played by the principle of reasonableness generally (also) applied by the courts when interpreting contracts.[9]

The distinction between the interpretation of the contract and the process of filling it out with the default rules of contract law is not sharp. It is blurred by the fact that the importance of the default rules is not

[5] Denmark is a member of the European Union, but because of the Danish reservation to the EU Treaty as regards legal and home affairs, the Rome I Regulation (no. 593/2008, OJ 2008 L177/6) on the Law Applicable to Contractual Obligations does not apply in Denmark. Danish courts will continue to apply the Rome Convention, which was incorporated into Danish law by Act No. 188/1984. For more detail, see K. Hertz and J. Lookofsky, *EU-PIL. European Union Private International Law in Contract and Tort* (DJØF Publishing, 2009), pp. 75–76.

[6] See Article 94 of the CISG. Ironically enough, the other Nordic countries have passed legislation abandoning the old joint Nordic Sales of Goods Act and have adjusted their national sales law to the CISG, with the result that Denmark is now the only country where the Nordic Sales of Goods Act of 1906 is still in force.

[7] E.g., the two-year limitation period concerning non-conformity of goods: see §54 of the Sales of Goods Act. According to Danish tradition, a sharp rule to this effect must have positive statutory authority and would not be the result of judge-made law (unlike, for example, the general principle of the legal effect of failure to act – see Section 2.3).

[8] See M. Bryde Andersen and J. Lookofsky, *Lærebog i Obligationsret I* (Thomson, 2010), p. 22; and J. Lookofsky and P. Møgelvang-Hansen, 'Ny indenlandsk købelov: KBL III?', *Ugeskrift for Retsvæsen*, B (1999), 240–252, 247 (nominating the Sales of Goods Act as 'Danish Contract Law's paradigm no. 1').

[9] See J. Lookofsky, 'Desperately Seeking Subsidiarity', in *Center for International & Comparative Law Occasional Papers Vol. 1: The Annual Herbert L. Bernstein Memorial Lecture in Comparative Law. The First Six Years* (Durham, 2009), pp. 111–130, 121ff.; and B. Gomard, 'Aftalelovens §36 og erhvervskontrakter', *Erhvervsjuridisk Tidsskrift* (2008), 14–26, 25.

limited to cases where there is no basis in the contract or the circumstances surrounding it for establishing that the parties intended to regulate a particular point. Even in cases where the parties actually intended to do so but where their common intention is not clear, the court will interpret/'fill out' the contract by assuming that it implies terms leading to the solution which seems most fair, reasonable and expedient in accordance with trade usage and the general principles of contract law. In this way, the interpretation of a contract, although based on the actual situation, tends to lead to an understanding of it that complies with the general rules and principles of contract law, which are generally assumed to express what is a reasonable balancing of the parties' loyal interests in typical situations. The default rules are thus important factors influencing the application of the reasonableness principle.[10] Among the other factors serving as interpretative aids influencing the general reasonableness (or even substituting it in certain types of cases) are the notions of loyalty between contract parties, of proportionality and of abuse of rights.[11]

The correlated notions of reasonableness and flexibility are expressed in §36, the so-called general clause of the Contracts Act. The general clause was added to the Act in 1975 as a supplement to the rather precise, 'classic' rules of voidability that were not considered flexible enough to secure modern, well-balanced solutions. According to §36, the courts can wholly or partly disregard an agreement if it would be 'unreasonable or contrary to the principles of fair conduct' to uphold it. The decision can rely not only on the circumstances surrounding the formation of the contract, but also on its contents and subsequent circumstances. An even higher degree of flexibility was achieved by an amendment in 1994 to the effect that the agreement can also be amended. The general clause applies to contracts in general, but its application by the courts is a long way from being an everyday occurrence as far as commercial contracts are concerned. In areas where there is a considerable difference in bargaining power between commercial parties to a contract and in extraordinary cases, beyond what can be considered actualisation of commercial risks, where there is a need to avoid clearly unreasonable results that cannot be

[10] See M. Bryde Andersen, *Grundlæggende aftaleret. Aftaleretten I*, 3rd edn (Gjellerup, 2008), p. 61.

[11] See J. Ewald, *Retsmisbrug i formueretten* (Jurist- og Økonomforbundets Forlag, 2001), Chapters 6–8 and 10; L. Lynge Andersen and P. B. Madsen, *Aftaler og Mellemmænd*, 5th edn (Thomson, 2006), pp. 444–453; and Bryde Andersen and Lookofsky, *Lærebog i obligationsret I*, pp. 68–71.

met by means of interpretation or other rules or principles, the general clause serves the function of last resort, a 'safety valve'.[12]

## 2 Clauses aimed at fully detaching the contract from the applicable law

### *2.1 Entire agreement*

When interpreting contracts, the courts aim at finding the common intention of the parties at the time the agreement was made, taking into account the reasonable expectations created by the contract, written and oral statements, and the behaviour of the parties, together with more pragmatic factors such as what is needed to fulfil the parties' interests in a fair and reasonable way. Information about the preceding negotiations, marketing material, previous agreements between the parties and other preceding and subsequent circumstances can be included in the basis for the decision. Whereas all kinds of facts relevant to ascertaining the intention of the parties in principle are admissible as evidence, the practical reality is often that it is hard to convince the court that the intention of the parties was in fact different from that expressed in the terms found in the parties' written contract. However, the principle of the court's freedom to assess the evidence implies that it depends on the facts of the individual case and what it would take to convince the court, and the chance that a party will be able to do so cannot be ruled out.

The entire agreement clause is, if taken literally, a far-reaching restriction of the general principles of interpretation. The purpose is to promote legal certainty in the sense that the clause, if taken literally, would exclude either party from claiming that the common intention of the parties was in fact different from what follows from the written contract. Often a claim to this effect will be unsuccessful because the written contract, e.g., due to its elaborate content, creates a strong presumption that the contract supersedes prior agreements. However, the critical point is that the entire agreement clause, if taken literally, would generally exclude a party from any attempt, including potentially successful ones, to try to convince the court that the common intention of the parties was in fact different from what can be read from the written contract. There seems to be no publicised Danish case law concerning this question. Danish courts are not likely to exclude evidence as

[12] See Gomard, 'Aftalelovens §36 og erhvervskontrakter', 14.