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PUBLIC GOODS AND CONTRACT STANDARD CLAUSES: A NEW APPROACH

Enrico Baffi[330]

ABSTRACT

In this paper the author has tried to find different market failure in situations where many scholars think that the market doesn't work well. He has considered two hypotheses but the idea has surely a wider application. In the author's opinion some clauses are similar to those known in legal terms as "standard". Such clauses are often vague, imprecise, give judges a great discretionary power and need a lot of precedents to be clarified. In some situations a firm could insert a clause of this kind, and this would be efficient, but the problem is that that firm bears all the cost of the clarification of the clause. The other firms can wait and exploit learning externalities. The problem of these clauses is that are socially efficient but they are public goods in economics sense. It's impossible to avoid the situation wherein anther firm uses the clause once it has been clarified. So the first firm which has the idea of inserting the clause will decide not to spend money for the clause and it will start to hope that some other firm will produce the clause. It also wants to behave as a free rider in the same way as other firms. But in this way the efficient clauses are not produced. With mandatory rules the clause is produced according to Kaldor–Hicks efficiency criterion and there is the chance that many firms pay something toward it. For instance in case of the standard of good faith, if only the first firm introduces this clause it had to pay a lot of money for litigation and it could suffer a loss in terms of reputation so the legal system introduces a mandatory rules. The same problem is with the clause of corporate charter. The author hence argues that the idea has many and wide applications.

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[330] Enrico Baffi, professor of Law and Economics at University Guglielmo Marconi. I'm in debt with the participants of the Eight Annual Italian Law and Economics Conference, that have given me many ideas.

CONTENTS

I. INTRODUCTION……………………………………………………………………..101

II. STANDARD CLAUSES………..…………………………………………………………102

A. A First Meaning………..……………………………………………………………102

B. A Second Meaning……..…………………………………………………………..104

C. A Third Meaning…………………………………………………………………..107

III. TWO PROBLEMS OF FRAMING MANDATORY PROVISIONS IN ECONOMIC TERMS……………107

IV. A POSSIBLE SOLUTION TO THE PROBLEM IN TERMS OF MARKET FAILURE…………………...109

V. A SECOND CASE……………………………………………………………………….111

VI. SOME OBSERVATIONS…………………………………………………………………113

VII. CONCLUSION………………………………………………………………………..114

I. INTRODUCTION

The aim of this work is to show how it is possible to identify market failures other than those traditionally identified by lawyers and law and economics scholars to justify the mandatory provisions of contracts between professionals and consumers and the equally mandatory provisions governing the abuse of economic dependency. This is a new approach that can be extended to other situations and appears to rest on fairly solid microeconomic foundations. There is no doubt, however, that much criticism can be leveled against it. Very briefly, the author shall argue that the production of clauses characterized as being rather vague, indeterminate and open to discretionary interpretation by judges is a public good in the economic sense, insofar as the clarification of their content, which is normally achieved through court decisions, can also benefit persons who have not paid for their production and who have no intention of paying, i.e. free riders.

The costs would consist in those involved in the drafting of the clause and the legal costs due to disputes, as well as the reputational costs if the court decisions are unfavourable to the drafter. The consequence is that a producer who inserts a clause that is vague, i.e. not fully specified, would have to bear all the costs for its clarification and the operation would no longer be to his advantage. The result is that a potentially efficient clause is not inserted into contracts.

The paper starts by examining the concept of "standard clause", because this expression has different meanings, all of which are equally relevant for the analysis that will be carried out. Subsequently, reference will be made to these meanings in an attempt to re-examine the provisions specified above. The paper also considers a number of observations that emerge prima facie and closes with some concluding observations.

II. STANDARD CLAUSES

The term "standard clause" has essentially three meanings.

A. The first meaning

In the first case it refers to clauses in forms and general conditions of contract that are not negotiable. The phenomenon probably should not be seen as stemming from some presumed bargaining power[331] of the drafter with respect to the other party but is essentially due to transaction costs. Normally neither the drafter nor the other party has an interest in negotiating standard clauses.

[331] One author wondered how it was possible to talk about bargaining power in relation to door-to-door salesmen of encyclopedias. *See* F. Kessler, *Contract of Adhesion- Some Thoughts about Freedom of Contract*, 43 COLUMBIA LAW REVIEW 629 (1943).

This is due to two important factors; the first is the increase in labor productivity over the last two centuries and the second the fact that the negotiation and management of standard clauses are labor-intensive activities, i.e. require a considerable input of labor compared with other activities that have benefited from the increase in productivity due to technological innovation and the increase in capital.[332] The result has been that the relative prices of amendments to clauses have increased with respect to the prices of goods that have benefited from the increase in labor productivity and the accumulation of capital. As an illustration, one could consider a situation of negotiation over the amendment of a clause providing a benefit to a consumer of 100. Two centuries ago the time needed for a negotiation with a probably positive outcome would say have an economic value of 30, so that it was advantageous for the consumer to negotiate. Today the time needed would be an inflated value of 200 (owing to the increase in wages). Hence there is reduced incentive to negotiate. If one would rather not refer to labor costs, one could say that negotiations are time consuming for the consumer,[333] i.e. take time that could be used in other ways. It may also be disadvantageous to negotiate from the standpoint of utility of consumer time, consumer's deriving the greater utility from free time.[334]

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[332] The change in relative prices between labor- and capital-intensive activities was first examined by Baumol. As Baumol explains: "A half hour horn quintet calls for the expenditure of 2- man hours in its performance, and any attempt to increase productivity here is likely to be viewed with concern by critics and audience alike" - W. Baumol, *Macroeconomics and Unbalanced Growth: The Anatomy of Urban Crisis*, 17 AMERICAN ECONOMIC REVIEW 415, 416 (1967). Think also of theatrical performances in general: the scope for an increase in productivity is very small. It follows that the price of theatre tickets is bound to increase and, unless the state provides a subsidy, theatrical activity could even disappear. The same applies in large part to nursing services in hospitals.

[333] The concept of "time consuming" was introduced by Becker - *See* G. Becker, *A Theory of Allocation of Time*, 75 ECONOMIC JOURNAL 493 (1965).

[334] It may be found that a standard clause entails inefficiencies, but it nonetheless remains a second-best solution. By way of example of how this might play out, consider a situation wherein in the middle ages a feudal lord had the monopoly of the crossing of a river on a bridge. In view of the limited value of time, the monopolist and travelers could negotiate in order to arrive at the best price. The monopolist could charge different prices, according to his assessment of travelers' ability to pay, charging a low price to those with little money. In this way the typical deadweight loss due to monopolists' fixed prices would be partly eliminated and the exploitation of the bridge pushed until the marginal cost was reached. It is likely that many authors perceive that the fixed prices of standard contracts cause inefficiencies of this kind, but the solution of negotiations would be even more costly for companies.

But negotiations also involve a great deal of work for the drafter, i.e. they are labor intensive. Modern technology has not yet made it possible to negotiate automatically, so that persons must be involved in negotiations. In view of the relative increase in wages, this activity costs more than other activities of a capital-intensive nature, with a consequent large increase in the costs borne by consumers, to the extent that they are passed on to them.[335] The same problems apply to the management of a non-standard contract. It is a labor-intensive activity. Until new technologies allow non-standard contracts to be negotiated with a small labor input (early signs of this can be seen now[336]) the activity of negotiating and managing low-value contracts will be highly inefficient.

B. The second meaning

The term "standard clause" has a second meaning, probably used less frequently than the first but equally important. It is used, in fact, to indicate that the contracts adopted in a given industry contain a similar, if not identical, clause. There are various possible explanations for this. The one that appears most convincing is based on network effects, as discussed by US authors in the 1990s.[337] Imagine that a number of firms adopt a particular clause; firms that come after can decide to enjoy network effects by adopting the same clause. Network effects occur when an entity obtains a benefit by adopting the same products or the same "network",[338] in the strict sense of the term, as other entities. Thus, for example, a consumer

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[335] If the supply curve is perfectly elastic, the cost is passed on to consumers in full.

[336] The contracts offered by firms that operate on the Internet give consumers a range of options. The management of these contracts is completely automated. Although this cannot be considered real negotiation, consumer choice has been increased.

[337] *See in particular* M. Klausner, *Corporations, Corporate Law, and Networks of Contracts,* 81 VIRGINIA LAW REVIEW 757 (1995).

[338] The concept of network externalities risks being confused with that of learning externalities, which have some points in common. As we shall see, however, the difference is very important. The benefits of learning externalities stem from the use of a term in the past. Positive network externalities arise from the contemporaneous use of a given term by a number of firms. In this case there are no benefits arising from the past use of the term but benefits arising from its contemporaneous use. In other words a firm cannot take

who joins the telephone network has the network effect, or positive externality, of being able to contact all the persons who have already joined. Alternatively, when a number of consumers adopt the same product, they will have the positive externality of paying a lower price for complementary goods thanks to economies of scale.

Network effects are generally of a bilateral nature. Thus a firm that adopts a clause similar to that of other firms will benefit the latter because the legal disputes it will engage in will help to clarify the meaning of the clause. But at the same time the legal disputes of the other firms will benefit the first firm because they will clarify the content of the clause, i.e. the interpretation that judges intend to adopt. It needs to be made immediately clear that recourse will often be made to the network effects produced by judges' decisions when these serve to clarify the interpretation of a clause. In other words reference will be made to the network effects produced when a number of firms use the same clause.

Some authors make a clear distinction between learning externalities and network externalities. The former are the benefits a firm obtains from a clause (to remain in this field) that has already been used for some time by another firm or by a number of other firms, so that its content has been clarified in part. In this case the economic benefit of the clarification is already internalized in the value of the clause the new producer will adopt. This firm enjoys a benefit that is not accompanied by a network externality (usually of a reciprocal nature) benefiting the first firm(s) to use the clause. Network externalities, by contrast, are concerned only with the future; in other words the calculation of network externalities must be based on what will probably occur in the future and not on the benefits that it is already certain will be obtained from learning externalities.

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previously realized benefits from other firms. *See* M. Kahan and M. Klausner, *Standardization and Innovation in Corporate Contracting (Or 'The Economics of Boilerplate')*, 83 VIRGINIA LAW REVIEW 713, 725 (1997).

This is an assessment that requires the concept of expected value. The firm must imagine what it will gain if there are network externalities and decide, on the basis of this calculation, whether to adopt the clauses that other firms may or may not adopt. As we shall see, this distinction is very important because it helps us to understand the probable market failure that justifies intervention of a mandatory nature by the legislator in some situations. A firm that decides to use a clause that has already been applied must calculate what is the level of probability that other firms will use that clause and cannot merely copy a clause for which precedents have already been created. A calculation must be made based on expected value. As mentioned, it does not enjoy a sure benefit due to learning externalities.

At this point there arises of problem of some significance, even though it goes beyond what has been discussed here so far: when network externalities are reciprocal, i.e. when firm A benefits from the activity of firm B and vice versa, a firm that must decide whether to use a clause will not take account of the benefit the other firms will derive from its use of the clause.[339] There is a positive externality that is not internalized. Clauses could therefore be excessively diversified.[340]

As per the above discussion in all circumstances it may be concluded that as a consequence of network externalities, if a group of firms adopts a certain clause, there will be similar copied behavior by the others to enjoy the benefits derived from widespread use of the clause in question.

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[339] *Supra* note 8, at 734. They state that there are two possible reasons for a firm making a sub-optimal choice of clause: the first is that it may decide not to adopt a clause not knowing whether it will become a standard allowing the firm to benefit from network externalities; the second is that a firm that adopts a clause that is able to produce network effects does not take into account the benefits accruing to other firms and could over-customize its clause.

[340] Since the businessman does not take account of the benefits he produces for others, he might prefer a different clause that takes account only of his own benefits and therefore does not aim at standardization.

C. The third meaning

The third and last meaning of the term “standard clause” has been used mainly by economists and especially law and economics scholars, who have put forward the confrontation between rules and standards.[341] A rule has a well-defined and unambiguous meaning, so that judges have little room to exercise discretion. They are only required to apply the precept that is clearly indicated in the rule; they must apply what it specifically provides for. A standard instead is a rule that is formulated in a vague, partly indeterminate, manner, that can be interpreted in different ways and that contains more than one meaning, so that judges have ample room to exercise discretion and their decisions can vary considerably even with regard to similar cases.

To give a traditional example: the speed limit of 50 km an hour for driving in built-up areas is a rule, while the requirement to drive at a reasonable speed in built-up areas is a standard.[342] As can be seen, in the first case judges have very little room to exercise discretion, whereas in the second they have much more.[343]

III. TWO PROBLEMS OF FRAMING MANDATORY PROVISIONS IN ECONOMIC TERMS

Having defined the concepts of “standard” and “rule”, we can now tackle a problem that has been examined by a number of authors, with different results. It should be noted that we will

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[341] *See* L. Kaplow, *Rules versus Standards*, 42 DUKE LAW JOURNAL 557 (1992). This article describes all the differences between “rules” and “standards”.

[342] In traditional language the terms “rule” and “standard” indicate two types of provisions established by a legislator with different characteristics. In what follows here they will also be used to indicate conventional clauses having the same characteristics as the legislative provisions referred to above.

[343] On the criteria for formulating legal rules with a view to their efficient interpretation, an important article is that by Goetz C. & R. Scott, *The Limits of Expanded Choice: An Analysis of Interactions Between Express and Implied Contract Terms*, 74 CALIFORNIA LAW REVIEW 361 (1985).

consider two rather different fields of research, linked, however, by a single market failure justifying the intervention of the state.

The first case concerns the clauses governing relations between consumers and professionals and especially unlawful clauses, which are deemed to be null and void. The Italian Article 33 of the Consumer Protection Code states that "In a contract concluded between a consumer and a professional clauses are considered to be oppressive that result, even if in good faith, in a significant imbalance for the consumer in the rights and obligations deriving from the contract."[344] Article 26 of the same Code states that "Clauses considered to be oppressive pursuant to Articles 33 and 34 shall be null and void while the rest of the contract shall continue to be valid."[345] If the legislator introduced a mandatory provision, it must be considered, from the standpoint of an economic analysis of the law, that there was a market failure, i.e. that the market was not able to arrive at the optimal solution on its own.

Some scholars err on the side of caution and have attributed this failure to information asymmetry or, more exactly, in the rational apathy of consumers, who do not read all the clauses of a contract (because it is too costly to do so). Producers, taking advantage of this excessive cost for consumers, especially with regard to the clauses that are unlikely to be applied, introduce clauses that are oppressive (inefficient, i.e. entirely to their advantage) precisely as regards the matters consumers do not read about. They insert inefficient clauses, entailing a loss of wealth for the company.[346] It is especially ironical that all producers insert unlawful clauses with the result that there are inefficient contracts for a low consideration –

[344] Article 33, Consumer Protection Code.

[345] Article 26, Consumer Protection Code.

[346] Consider the instance wherein insurance against a certain event costs the producer 5 and the consumer 10. The efficient solution would be for the producer to insure himself and make the consumer pay 7 or 8. If the parties read the contract, the consumer would think that optimally, he would pay the producer seven or eight but the producer would be the one who would take out the insurance policy, so both benefit. If the consumer does not read the clause, the producer will not incur the cost of the insurance and the consumer will continue not to be covered by the insurance policy, which would have been efficient.

because the savings on the inefficient clauses are generally used to attract a larger number of consumers with a lower consideration.[347] By imposing efficient clauses, the legislator has eliminated the deadweight loss even if this may entail an increase in the consideration (although such an increase is generally smaller than consumers' willingness to pay for an efficient clause). Thus, even with a higher price, consumer welfare increases due to the more advantageous clause.

The problem at this point is to clarify what exactly the market failure is. If the mandatory provision is efficient, what exactly is the market failure that has been corrected? But is there really a market failure? Consider an initial hypothesis: that a businessman inserts in his contract exactly what is established by Articles 33 and 36 of the Consumer Protection Code. Would he not have solved the problem of inefficient clauses? The producer would have repeated the concept inherent in the mandatory provision and would have attracted new customers putting their trust in the protection clause.

Several problems arise at this point: in the first place how to make the clause known to consumers. This problem could be solved, however, by specifying that the clause in question is to be the first in the contract and printed in large letters. Consumers' attention should therefore be drawn to this clause.

IV. A POSSIBLE SOLUTION TO THE PROBLEM IN TERMS OF MARKET FAILURE

But there is a much more serious problem that must be highlighted: the clause prepared by the producer is a "standard" according to the third definition given of this word. In fact it is not clear which clauses are the inefficient clauses, except for some abnormal cases, and

[347] For a more complete analysis of the phenomenon, with reference also to the United States, the reader is invited to consult E. Baffi, *I limiti all'autonomia contrattuale nel pensiero economico e filosofico moderno*, in RIVISTA CRITICA DEL DIRITTO PRIVATO Year XXII, 4, at 660 et seq.

judges would therefore have a great deal of discretion. They would be able to decide similar cases in different ways. This discretion would entail the possibility of decisions unfavourable to entrepreneurs, with consequences for their reputations and legal costs. Entrepreneurs would then bear all the costs of the disputes, which would serve to make the clause clearer and more precise (especially in the legal systems based on the principle of binding precedent, although there is also a tendency in the Italian system to adhere to the decisions of the Court of Cassation) the Italian court that decide on the legitimacy of rules interpretation.

Learning externalities enter the picture here.[348] The other entrepreneurs could wait for judicial experimentation to clarify the clause and only then insert it into their contracts. Thus the first entrepreneur would bear all the costs of producing, leading such a clause to be called, in economic language, a "public good" (the clause passes from being a "standard" to become a "rule") and the others would behave as free riders (i.e. would enjoy the benefits produced by the first entrepreneur without paying anything). Since the first producer cannot exclude the others from the benefits obtained through experimentation with the clause, they will appropriate the better results without having to pay anything.

It is therefore the failure of the "public good" market[349] that prevents the production of an efficient clause. The first producer would have to bear all the costs, but at this point gives up.

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[348] The most obvious benefit of using an existing clause is that it is not necessary to spend resources to prepare a new one. Among the costs involved in preparing a clause, those that give the greatest savings when recourse is made to previously prepared formulas are the costs arising due to drafting errors. In contrast, a new term or a term that has not been widely used may often entail very high drafting costs. On this point, *see* M. Kahan and M. Klausner, *supra* note 8, at 720. But as regards learning externalities, we shall see that the main benefit lies in the fact that the clause imitated has already been tested by the courts and has a clearer and more precise meaning. In short learning externalities bring the following advantages: a) efficiency in drafting clauses; b) reduced uncertainty as to the meaning and validity of clauses as a result of judges' earlier decisions; and c) the familiarity with the terms of lawyers, other professionals and investors. *See* M. Kahan and M. Klausner, *supra* note 8, at 720-21.

[349] This aspect had already been noted by J. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLORADO LAW REVIEW 1549, 1567 (1989). Gordon was also in favour of a mandatory provision that would impose the

The private cost would normally be higher than the private benefit, even though the production would be socially useful. Thus a clause that would probably be efficient does not emerge. This is why American scholars distinguish between learning externalities and network externalities.[350] For the former nothing is paid and they discourage the achievement of an efficient clause. For the latter it is the future that counts not what has already been obtained free of charge; free riding cannot exist.

V. A SECOND CASE

Another case in which doubts arise about the exact failure of the market that can justify an intervention of a mandatory nature by the legislator is that of abuse of economic dependence. Such abuse is forbidden and punished by Italian Law 192/1998, which governs sub-contracting in productive activities. The ban, drafted with reference to subcontracting, affects all the unjustifiably onerous conditions applying to a firm (whether customer or supplier) that is economically dependent on a contracting firm that imposes conditions excessively biased in its favor.

The concept of abuse of economic dependence follows, according to the best court decisions, from the fact that a firm makes specific investments to the benefit of another firm, specific investments that have a much lower value if used for another purpose. Knowing this, after the contract has been signed the dominant firm can ask, perhaps arguing that its costs have changed (in order to mask the violation of a contractual obligation), for a reduction in the price of the goods produced by the economically dependent firm.

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adoption of the same clause by all firms. In this way the cost of creating the public good, definable as a "clarified and precise rule", was borne by everybody.

[350] On the concept of network externalities, see M. Klausner, *Corporations, Contract Law, and Networks of Contracts*, 81 VIRGINIA LAW REVIEW 757 (1995).

Since the latter cannot put its plant to any other use, it may ultimately be prepared to accept a reduction in price down to the variable cost of the goods produced or at any rate down to the point where it could produce for another firm at a slightly higher price. In this way it will not recover its fixed costs (the "specific investments") and will make a loss. The difference between the price agreed and the lower price requested, which the economically dependent firm would accept is called "quasi-rent".[351]

More precisely, under Article 9 of the above-mentioned Italian law on sub-contracting, Law 192/1998, economic dependence refers to the situation in which a firm is able to bring about an excessive imbalance between rights and obligations in its business dealings with another firm. Dependence is assessed with account also taken of the real ability of the party that has suffered the abuse to find satisfactory alternatives on the market. Similar rules are present in other European countries, as France.

The reference to the real ability of the party that has suffered the abuse to find sufficient alternatives on the market should be noted. In this case there would not be specific investments, or at least they would be minimal. As can be seen from the formulation of the mandatory provision; this is also formulated in the manner of "standards". Here, what should be noted is that an entrepreneur could introduce a clause absolutely identical to Article 9 of the Italian law on sub-contracting. This should tranquilize sub-contractors, who would not risk being expropriated. Similar rules can be derived from the doctrine of unconscionability and relating rules.[352] Also in France a discipline is present that introduce mandatory rules for the situation of abuse of economic defence.[353]

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[351] See the fundamental text on this subject – B. Klein , R. Crawford and A. Alchian, *Vertical Integration , Appropriable Rents, and the Competitive Contracting Process*, 21 JOURNAL OF LAW AND ECONOMICS 297, 298 (1978).

[352] R. Craswell, *Property Rules and liability Rules in Unconscionability and Related Doctrines*, 60 UNIVERISTY OF CHICAGO LAW REVIEW 1 (1993).

[353] INTRODUCTION TO FRENCH LAW, (George Bermann and Etienne Picard eds., 2008) .

The problem is that for this clause it is not possible to formulate a “rule”, only a “standard” (in terms of their opposite meanings as referred to at the beginning of this paper), in view of the difficulty of identifying all the cases in which it can be applied. It is up to judges with their precedents to establish the precise cases. The clause would be vague, there would not be precise indications, it could be open to various interpretations so a great deal of clarification in the courts would be needed to turn this standard into a “rule”.[354] Judges would have considerable discretion. But the first firm to adopt the clause identical to Article 9 of the law on sub-contracting would incur all the legal and reputational costs, without being able to make the other firms pay anything because such benefits cannot be excluded from consumption. The other firms would enjoy the learning externalities and once the provision had been made clear and precise (turned into a rule), they could introduce it into their forms. The clarification of the norm is a public good in the economic sense[355] and it is not in a single entrepreneur’s interest to incur all the costs necessary to produce such a good even if that were socially (but not privately) desirable. Thus, an efficient norm is not produced owing to the failure of the market for the “public good”.

VI. SOME OBSERVATIONS

The problem of public goods in the economic sense of new clauses that appear as “standards” seem to already be known to commercial operators. It is not by chance that producers’ associations propose the insertion of certain standard clauses. If a number of firms insert the same clause, the other firms will have an interest in doing the same in order to enjoy the resulting network externalities and not be late in adjusting their forms (if a firm waits for an

[354] It should be noted that the term “rule” is not to be taken here as a “norm established by the legislator” but as a contractual clause that has a very high degree of precision.

[355] A public good in the economic sense is marked, in the first place, by its not being excludable from consumption. In other words it is not possible for other persons to be excluded from enjoying it even without their having paid. The typical example in economics is the lighthouse: ships that do not pay anything for its services can still use its light to steer by.

excessive production of learning externalities, it could be late in offering its contract to consumers). What needs to be stressed is that the assessment of network externalities applies to the future: firms must understand how much they will gain by coming into line with the other firms and enjoying the future benefits the network externalities are expected to bring. When a firm relies only on learning externalities, in reality their value is certain and not expected or probable like that of network externalities. Producers must try to calculate what they will gain by inserting clauses used contemporaneously by other firms. It follows that the more firms adopt a clause, the greater will be the benefits expected from doing the same. Unfortunately, firms do not take account of the tendency for network externalities to be of a reciprocal nature and do not consider the benefits they produce for others.

A second point that can be made with regard to the reasoning put forward so far is that the general conditions often contain clauses that are standard in the second meaning attributed to the term. This is so because they are rules and therefore do not need a judicial specification.

In the field of corporate law it is possible to find, with specific reference to bond issues, clauses that are very similar, if not identical. This can be explained by considering that underwriters prefer to use identical clauses in order to exploit economies of scale. In addition, the correction of a bond covenant applies to all of them, so it is less costly for underwriters to make the change. It appears less likely that a series of lawyers will adopt the same standard clause, except in the case of a law firm with a large share of the market.

VII. CONCLUSION

As the analysis presented here shows, in the case of clauses to which consumers are a party it is not information asymmetry that causes market failure, nor, as in the case of sub-contracting, is it the dominant position that causes the inefficiency (this justification appears

rather fallacious because an entrepreneur who finds himself in a position of economic dependency is completely free, before signing the contract, to do so or not and can choose other solutions and invest in other sources of income). Firms could insert clauses identical to those mandated by the laws in question, but there is the problem of the costs incurred by the first mover, since they are standard rules. In fact the first mover bears all the costs but does not reap all the benefits. He does not internalize the benefits of his activity and it is no longer advantageous. There are free riders who, by definition, can enjoy something produced by others without having to pay a price.

One possible solution would consist in copyrighting new standard clauses. In this way those who want to use them have to pay a royalty to the inventor. But our legislator has preferred to proceed in a different way. Italian law provides for all such clauses to be obligatory, in the sense that it is not possible to derogate from them. This has fostered efficiency according to the Kaldor-Hicks criterion: some entrepreneurs will suffer net losses but society's overall wealth will be increased. It is not to be imagined that acting in this way there can be very serious distortions: it appears difficult to suppose that an entrepreneur will withdraw from the market for fear of the new rules. If this were to be the case, however, there would indeed be a distortion.

We can conclude with a general observation: two different phenomena, such as abusive clauses in consumer contracts and abuse of economic dependence, marked by mandatory regulation, appear to be linked to the same economic justification, i.e. that the market can produce standards but not rules. If entrepreneurs could write their clauses in the form of rules, the problem of market failure would be considerably attenuated. In fact there would be no learning externalities to be copied and the first entrepreneur to introduce a rule (in the third definition of the concept of standard) would appropriate all the advantages. But in the

two fields examined in this paper producing precise rules is very costly, if not impossible. An excessively precise rule would require the consumer or producer it is aimed at to make an enormous effort to read it, which would trigger rational apathy and thus give rise in the system to the vicious circle examined here.

It should be noted that in many fields the spontaneous formulation of rules is highly complicated, so that recourse has to be made to standards. Consequently, an intervention by the legislator, making it obligatory for all to use the standard (rule) and distributing the legal and reputational costs among them, may be a solution with an important future.

In the analysis made here no account has been taken of the strong-weak contracting party antithesis, because for this author it does not appear to have a strong explanatory force and the microeconomic fundamentals do not appear clear (it is worth recalling door-to-door salesmen of encyclopedias).[356]

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[356] Roppo stresses the strong-weak contracting party antithesis in Contratto di diritto comune , contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppi di un nuovo paradigma, in Il contratto del duemila, in Roppo, Turin 2002. This idea is not accepted by Pardolesi, Conclusioni, in Il terzo contratto, Milan 2008 and by D'amico, La formazione del contratto,in "Il terzo contratto. L'abuso di potere contrattuale nei rapporti fra imprese", Bologna 2008 . Gitti g. e G. Vila editors, Bologna (2008). A classic work on information asymmetries is the study by Pardolesi and Pacces, *Clausole Vessatorie E Analisi Economica Del Diritto : Note In Margine Alle Ragioni (E Alle Incongruenze) Della Nuova Disciplina*, DIRITTO PRIVATO Vol. II, 1996 at 377.