Transplanting Contractual Terms: The Influence of the Common Law in the Civil Law of Contracts, a view from the Periphery

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Taken from here to where it came from and taken to a place and used in such a manner that it can only remain as a representation of what it was where it came from

-Lawrence Weiner -
INTRODUCTION

It seems to be somewhat common place that young practitioners of private law in South America finishing their law studies enter the profession and encounter a whole new system of law not previously available or studied in their college years. Many of the new classes that start working for a law firm are immediately exposed to a set of contractual materials that are written in English language and/or follow a contractual model that was not the one they had had access to as civil law students. This experience is part of a broader and more encompassing phenomenon that represents a silent but meaningful transformation of the law of contracts in Colombia and South America.

In this paper I analyze to what extent and in what manner common law contracts have influenced the law of contracts in South America. I assert that the common law contractual model has been transplanted to Colombia and South America. I sustain that the transplant has been operated by prestigious local law firms, which act as a linkage between the places of production and the places of reception. As I explain, prestigious local law firms have positive incentives to operate these transplants. I sustain that, once the transplant has been operated, (I) the devices that have been transplanted are or may be misread (in a López-Bloomian sense) or, to appeal to another familiar concept, are subject to the transplant effect and that, (II) initially, the transplant

1 And, in fact to many and most of the developed countries around the globe. For example, Claire A. Hill and Cristopher King argue in a 2004 paper that Anglo-American firms have transplanted the Anglo-American transaction documentation style to Germany. See Claire A. Hill and Cristopher King, How do German Contracts do as Much with Fewer Words?, 79 Chicago-Kent L. Rev. 889 (2004).

2 Interestingly, law firms are themselves a transplant from the U.S. This raises several significant observations, including whether and how the practice of law will change as a consequence of such transplant. This paper deals with one aspect of such transformation, but the spectrum is, as it is starting to unveil, much broader.
process entails some degree of distortion and uncertainty, both in the drafting and the enforcement stage, which (III) I propose may be further mitigated by learning and network externalities.

The paper is divided in three sections. In the first section I set the theoretical framework for undertaking the study of this influence. I take aid from the work of the recent and prolific comparative literature for this purpose. In the second section I analyze in detail the process of transplant of contractual terms from the United States to Colombia and South America, identifying the role of prestigious local law firms in operating this transplant and the possibility of misreading. In the last section, I offer several examples to illustrate the transplant hypothesis, with particular emphasis in two contractual practices: best reasonable efforts and representations and warranties.

I believe this paper is merely a preliminary, halting step into a more comprehensive project. In particular, more detailed and objectively verifiable analysis is required in order to prove some of the hypothesis set forth herein. Many efforts will have to be pooled together to accomplish this: the recollection of data, mostly in the form of executed contracts and judicial decisions (the gathering of which, due to the lack of public filing requirements and well organized reporting systems in Colombia is, regrettably, cumbersome), the selection or construction of proxies to measure particular transplants and the uncertainty they may generate, the design of a method to measure whether and to what extent there is any correlation between legal transplants and development (in terms
of, for instance, GDP)\(^3\), etc. I do believe, however, that my findings suggest that it is worth continuing to work along this path. If, indeed, the common law contractual model has been transplanted, as I suggest, to Colombia and Latin America, the implications in connection with the education we must offer law students, how law is practiced by lawyers and the kind of disputes courts will have to deal with, would seem substantial. Furthermore, I believe this paper and further studies in this and other areas of private law are unveiling that the Latin American legal family is experiencing a change of paradigm whereby the United States has occupied or is starting to occupy the role formerly played by countries such as France, Spain, Germany and other jurisdictions from continental Europe.

I. CONTRACTUAL TRANSPLANTS

a. Legal Transplants and the core-periphery dialectic

The first author to use the term “legal transplants” in a systematic fashion was the Scottish scholar Alan Watson\(^4\). Thereafter, a large body of literature has used the term, tracked historical examples of concrete legal transplants and analyzed their patterns and characteristics. The common claim of this literature is dependent on the distinction

\(^3\) Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard suggest that the process of transplantation has a direct or indirect positive impact on GDP per capita, either immediately or through its impact in improving legality (which includes factors such as rule of law, low risk of contract repudiation, absence of corruption, etc.). See Daniel Berkowitz et al., Economic Development, Legality, and the Transplant Effect 1-29 (William Davidson, Working Paper No. 410, 2001).

\(^4\) “A successful legal transplant –like that of a human organ- will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection”. Alan Watson, Legal Transplants: an Approach to Comparative Law 27 (Charlottesville: University Press of Virginia, 1st ed. 1974).
between origin countries – places of production or the core- and transplant countries – places of reception or the periphery. The idea is simple, there are countries that have developed the law internally and there are countries that have transplanted the law of one of these other countries. The concept of legal transplants is implicitly embedded in the notion of legal families and is perhaps the prevailing, at least a competing, model for understanding the production and diffusion of law.

b. Misreading Legal Transplants

One of the most complete and detailed studies of legal transplants from the core to the periphery has been accomplished by Diego López (who, interestingly, writes from the periphery). In his work, López studies how legal theories have been transplanted from the core (e.g. Germany or the United States) to the periphery (i.e. Latin America).

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5 See Diego Eduardo López Medina, Teoría Impura del Derecho - La Transformación de la Cultura Jurídica Latinoamericana (Legis, 1st ed. 2004); The distinction is akin to the core-periphery dialectic as developed by Immanuel Wallerstein. See Immanuel Maurice Wallerstein, El Moderno sistema mundial (Siglo XXI de España, 1999).

6 “The distinction between origin and transplant countries assumes that in some countries the law has developed endogenously, i.e., without copying the laws of other countries. On the other hand, there are countries that have simply transplanted the law of one of these origin countries. This leads to different groups of countries denoting different legal families, such as English, French, and German legal origins.” Mathias M. Siems, Shareholder Protection Around the World (“Leximetric II”) 138 (Del. J. Corp. L., Working Paper No. 359, 2008); “In the core countries, law-making bureaucracies and interest groups are sophisticated and well-organized. Hence, even legislation in areas that require technical expertise and do not usually receive much political attention can be internally produced with frequent and informed input by various constituencies. Political theories, or any other internal determinants theory for that matter, can come into full play here. By contrast, in the periphery the necessary expertise for internally producing technical legislation is generally lacking. Moreover, interest groups are not well organized and in any event lack the expertise to intervene in technical legislation of general scope, such as corporate law. Hence, countries in the periphery resort to copying statutes from the core countries, and for reasons of easy availability the models chosen come from those core countries that belong to the same legal family.” Holger Spamman, Contemporary Legal Transplants: Legal Families and the Diffusion of Corporate Law 2 (September 15, 2006).

7 For a summary of concrete examples of transplants of law along legal families, see Spamman, supra note 6, at 10; see also Berkowitz, supra note 3, at 1-5.

8 Duncan Kennedy has suggested that López has offered the new paradigm under which to explore the relationship between places of production and places of reception. See López, supra note 5, at Prologue.
According to him, the idiosyncrasy of the Latin American legal system has been configured through the reception of different legal theories along its history. However, the legal theories that have been transplanted have not remained unchanged, but instead have been *misread*. The result is not simply a *mimesis* of original and superior legal products, but the production of local and particular products that contain themselves some kind of originality. When a legal institution is transplanted, in effect, it becomes part of local extra-textual networks of practices, relations, intentions, beliefs, etc., all elements that constitute the material of what López calls a pop theory of law.

Essential to the legal transplant is the process of *misreading*. López takes the concept from the literary critic Harold Bloom (after all, the basic elements of both law and literature are words). Bloom suggests that all new poets suffer from some kind of imprisonment by previous poets, and that in order to achieve their own *voice* the new poets necessarily misread the master. Bloom considers that there are strong poets and week poets. Strong poets misread the work of their precursor, but the process is not a mistake or an error; it is not a bad reading of the previous canon. On the contrary, it is the mechanism by which the new poet adopts the tradition as her own and projects it with originality.

Misreading is made through different modes of transformation that Bloom calls *revisionary ratio*. Saving much of the detail, I will briefly refer to two of such revisionary ratio, which are useful both to understand how the misreading is made and to my analysis of how contract models may be or have been misread in the local context of Latin America.

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9 *Id.* Page 37.
America. The first one is called *tessera*, which is the Latin word to designate each of the little pieces of glass or stone with which a mosaic is made. According to Bloom, and afterwards to López in the sphere of law, the strong poet (the strong legal theorist or the strong lawyer) reads the work of her precursor in a disordered manner, taking just one of her works (a *tessera*) instead of the totality of the canon; being then forced to rearm the mosaic with whatever she has at hand. The resulting mosaic may be different from the original one. Another powerful effect of the *tessera* is that whoever holds one of these pieces is recognized as having access to the full mosaic, that is, is recognized by other actors as been already within the original literary (or legal) tradition of which the *tessera* makes part, thus as holding authority thereunder.

The second metaphor is *Kenosis*. *Kenosis* refers to the action of emptying one self. The young poet humiliates herself before her precursor. For a weak poet, the humiliation is the loss of self-esteem and of the ability to make comparisons with this precursor. For the strong poet, instead, the *kenosis* is a false humiliation and the recognition of her condition as an influenceable poet, upon which, however, she regains the possibility of comparison and creative critique.

López theory sets forth a model that explains satisfactorily how legal theory has been transplanted to Colombia. López proceeds to explain how the main works of legal theorists, (*e.g.* Kelsen and Hart, among others) have been transplanted from the place of origin to Colombia and Latin America. I do not intend to follow López in that venture
now. Instead, I will borrow his model and take a couple of lessons to understand the transplant and misreading of contracts and contractual terms.

I assert that both of the abovementioned metaphors are strictly relevant to the field of contract transplants. When a contractual provision, concept or practice is transplanted to another legal system, it abandons the network of decisions, rules\textsuperscript{10}, practices and opinions that constitute its hermeneutical context in the place of production and which provides substance and meaning to it. Such context does not exist, or is different, in the place of reception. In other words, the device is transplanted as a tessera. Further, the agents that operate the transplant (prestigious local law firms, as I will show in detail below) facilitate the transplant by making a concession to a foreign system which they may consider as more sophisticated, coherent or otherwise more suitable to the purposes pursued. This agent experiences a kenosis as a condition to enable the transplant. I will return to these metaphors and their explanatory power in connection with contract transplants later.

c. Misreading Contractual Transplants

The lessons that a comparative theory of contract transplants can derive from López legal comparative theory can be summarized as follows:

\textsuperscript{10} The reference to rules includes not only those rules that contribute to the construction or the interpretation of the legal transplant, but also, notably, the default rules that the contractual transplant intends to override. For example, Andrew Schwartz suggests that the material adverse change clause is a standard rule that has been used to override the frustration doctrine as set out by the common law in the United States. See Andrew A Schwartz, A “Standard Clause Analysis” of the Frustration Doctrine and the Material Adverse Change Clause, (U. Colo. L. Sch., Working Paper No. 09-15, 2009).
<table>
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<th>López’s Propositions about his legal comparative theory</th>
<th>Lessons for a comparative theory of contract innovation</th>
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<td>There are places of production and places of reception of legal theory. Places of production have a reach hermeneutical environment, while the opposite is true about places of reception.</td>
<td>There are, alike, places of production and places of reception of contract innovation. Similarly, places of production have a reach hermeneutical background, comprised by a network of practitioners, judicial opinions, precedents, templates, practices etc. This hermeneutical network doesn’t exist, or exists imperfectly, in places of reception. Paradigmatic examples of places of production are prestigious law firms in New York. Local law firms in Latin America are examples of places of reception.</td>
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Legal transplants from places of production to places of reception are *misread*. That explains why, for instance, Hart can be misread as an anti-formalist in Latin America, instead of a moderator of legal realism as he was understood in North America.

Contractual transplants can also be misread. A contractual provision –such as the “best reasonable efforts” clause or the use of representations and warranties- may be transplanted identically in its formulation; but its effects and its *place* within the underlying system, beliefs and practices in action and in the minds of lawyers may produce unexpected and unintended results.

The process of misreading is, though dependent, not hierarchically inferior. Misreading results in originality. It suggests the possibility of a comparative theory made from the periphery.

Alike, due to the implications and the effects of legal transplants, as determined by its insertion into a new body of law, contractual terms that are standard in the place of production, may be considered as bringing original, innovative and unforeseen effects in places of reception. Contractual transplants are also subject to misreading. I suggest that the main effect of misreading in the realm of contracts is the production of some degree of uncertainty, which is further mitigated by network and learning externalities.
That legal transplants are subject to misreading is a common notion among comparativists. Berkowitz et al.\textsuperscript{11}, refer to the effects of misreading as the “transplant effect” and describe the tension that underlies the transplant process in words that call upon the metaphors of \textit{tessera} and \textit{kenosis}:

“Legal scholars have long observed that there is a gap between formal law on the books and law in action. While this gap exists in origins, we would expect to observe a larger gap between the books and law in action in transplants. The logic of this prediction follows from the idea that the law is primarily “a cognitive institution” (Means 1980). This is self-evident with respect to the informal legal order. Observance of this law requires knowledge of the customs and habits of a social group. The fact that formal legal orders have put the key elements of the legal order in writing tends to disguise the fact that the effectiveness of these rules also rests on knowledge and understanding of these rules and their underlying values by social actors. While most members of society will, and in fact need not, be familiar with the specifics of individual rules and regulations, they are familiar with the basic concepts of the legal order. Moreover, they can rely on professionals as intermediaries, who have a better knowledge of the formal legal order. But even for professionals to apply a special rule, they must not only grasp the wording of that rule, but also the concept behind it, the value judgments on which it rests, and its position within the overall legal order.

\textsuperscript{11} Note, however, that López analytical units are legal theories (Hart’s antiformalism, Kelsen’s pure theory of law, etc.) while Berkowitz et al.’s are legal rules or specific provisions thereof.
When a transplant country applies a rule that it has transplanted from an origin, it is effectively applying a rule to its own local circumstances that was developed in a foreign socioeconomic order. Thus, we would expect that the interpretation of a legal rule will differ more within a transplant than an origin. The context specificity law has important implications for legality in transplant countries. Where the meaning of specific legal rules or legal institutions is not apparent, they will either not be applied or applied in a way that may be inconsistent with the intention of the rule in the context in which it originated. This in turn has implications for the perception and trustworthiness of the institutions applying them, and thus for the future demand for these institutions.”

Similarly, according to Siems “[…] the idea of transplant countries can be criticized because countries often do not simply copy the law of a particular origin country. The claim of a mere copying disregards: (1) the ongoing influence of their pre-transplant law; (2) the mixtures and modifications at the moment when some copying of foreign law occurs; and (3) the post-transplanted period, in which the transplanted law may be altered (or at least applied differently from the origin country).”\(^\text{12}\)

Spamman has suggested that “there has been much debate in comparative law how deep transplantation runs, i.e., (1) whether the concept of transplantation has any explanatory power regarding the legislative process as opposed to the drafting process, so to speak,

\(^{12}\)Siems, supra note 6, at 139.
and (2) whether the transplanted law in the recipient country functions anything like the original in the origin country."

The comparative study of contracts, contract rules and contractual terms is neither new nor rare. But a research of how contract terms travel and get altered by effect of that journey and of who is operating the transplant is something that, to my knowledge, has just very recently raised the interest of legal scholars. Interesting studies in this field include the following:

(1) A paper by Heike Schweitzer, a German author, studying the transplant of U.S. private transactional concepts in Germany, including letters of intent, breakup fees and material adverse change clauses. Schweitzer argues that important differences in the underlying dealmaking environments in the U.S. and continental Europe give rise to important differences regarding the meaning and function of those provisions once they are transplanted.

(2) The unpublished work of Luc Thévenoz, Director of the Center of Banking and Financial Law from the University of Geneva and a Commissioner of the Swiss Federal Banking Commission. Thévenoz has studied for several decades how the common law institution of the trust has traveled from the Anglo system and has been transplanted to most of the countries of the world, from Liechtenstein and Swiss to Japan. According to Thévenoz, once the trust was transplanted to civil law countries, it had to

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13 Spamman, supra note 6, at 11.
adapt to a different system of property and was therefore altered (misread). The result of this is that a new global concept of trust has emerged, one that has been enriched by the specificities of local systems and that is somehow detached from its original formulation.

(3) Two articles by Spanish scholars analyzing the transplant of representations and warranties from U.S. to Spanish acquisition contracts\(^{15}\). As I will show in more detail in the last part of this paper, the authors examine how representations and warranties interact with the Spanish legal system and what function they perform thereunder.

(4) A paper by Ni Zhu, a Chinese author, on the possibility of transplanting the concept of efficient breach to China\(^{16}\) and a paper by Li-Wen Lin, another Chinese author, arguing that vendor codes in global supply chains have been transplanted through private contracting in the globalization age, rather than through government channels\(^{17}\).

(5) A paper by Phil McConnaughay\(^{18}\), from the University of Illinois, which seeks to explain the influence of western contracting styles and dispute resolution practices in Asian commercial relations and the friction that results from the contrast with eastern commercial ideas and behavior which subordinates law and contracts to evolving

\(^{15}\) See Ángel Carrasco Perera et al., Fusiones y Adquisiciones de Empresas (Cizur Menor, Navarra: Aranzadi, 2004); Fernando Gómez Pomar, El Incumplimiento Contractual en Derecho Español, 3 InDret. Revista Para el Análisis del Derecho (2007).


\(^{17}\) See Li-Wen-Lin, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, 57 No. 3 Am. J. Comp. L., 711 (2008).

circumstances and relational values. According to McConnaughay, the Asian ideas and beliefs regarding the role of law and contracts in governing commercial relationships is substantially different from those in the West. “Inflexible deal closing written contract terms in the West become seemingly elastic, “relationship beginning” predictions in the East.”

In the following section I will assess how contract models and terms have been transplanted from the United States into Colombia and South America. I will start by making a map of the Colombian contracts law and by showing some evidence of the transplant of contractual terms from the United States. Then I will show the impact and novelty of this transplant into the Colombian system. After that, I will analyze the process by which the transplant has been operated and will give count of the sources and the characteristics of the innovation. Finally, as we pass to the final section, I will consider if the transplants have been or may be misread.

II. THE TRANSPLANT OF THE COMMON LAW CONTRACTUAL MODEL INTO THE COLOMBIAN LEGAL SYSTEM

a. Mapping Colombian Contracts Law

Colombia has a civil law system rooted in the Roman-French family of law. Broadly speaking, six different influences or transplants can be said to form the Colombian tradition of contract law. The first transplant comes from Spain due to colonial linkage. It

19 Id. Page 24.
was imposed in the territories that constituted La Nueva Granada and arrived through several statutes, such as *La Nueva Recopilación* of 1567\(^\text{20}\); *Las Leyes de Indias*, edited by Carlos II of Spain in 1680\(^\text{21}\); and *La Novísima Recopilación* edited and promulgated by Carlos IV in 1806\(^\text{22}\). The second and perhaps most important transplant comes from France. In 1887, the democratically elected Congress of a new independent republic adopted a Civil Code. This Code was substantially similar to that drafted by a commission led by *Andrés Bello* for the Republic of Chile\(^\text{23}\). The main source of influence for this work was the French *Code Napoleon* from 1804, and the work of the French canonical authors, such as Gény, Josserand, Bonnecase, etc.\(^\text{24}\), as they had been, \\

\(^{20}\) See José Antonio Escudero, *Sobre la génesis de la Nueva Recopilación*, 73 Anuario de la Historia del Derecho Español 11-34 (2003); see also Ramón E. Madrnián de la Torre, Principios de Derecho Comercial (Temis, 1980).

\(^{21}\) See De las Audiencias y Chancillerías Reales de las Indias, (Jan. 7, 2015, 2:30 pm), [http://www.congreso.gob.pe/ntley/Imágenes/LeyIndia/0102015.pdf](http://www.congreso.gob.pe/ntley/Imágenes/LeyIndia/0102015.pdf).


\(^{24}\) The influence of French authors is evidenced in the following texts:


(ii) A series of classic French texts that have been brought and traduced amongst us, e.g. Mazeaud, Herni, León & Jean, Lecciones de Derecho Civil, (Buenos Aires: Ediciones Jurídicas Europa, 1969); Louis Josserand, Derecho Civil (Buenos Aires: Ediciones Jurídicas Europa-América, Bosch, 1952); Robert Joseph Pothier, Tratado de las Obligaciones (Heliasta, 2nd ed., 2007); Jean Domat, Las Leyes Civiles en su Orden Natural (Impr. de Jose Taulo, 2nd ed. 1841-1844); Marcel Planiol, Jean Boulanger & Georges Ripert, Tratado de Derecho Civil: según el tratado de Planiol (La Ley, 1963-1965); Georges Ripert & Felipe de Solá Cañizares, Tratado Elemental de Derecho Comercial (Librairie générale de droit et de jurisprudence, 1954); Julien Bonnecase, Elementos de Derecho Civil (José M. Cajica, 1945-1946);
again, misread by local scholars. The third wave of transplants hits Colombia from Germany. Specific transplants are due to the misreading of authors such as Von Ihering, Savigny, Detmold, Ludwig Enneccerus, Karl Larenz, Ludwig Ennecerus, Theodor Kipp, Martin Wolff, among others. In 1971, Colombia adopts a Commercial Code. Much of it is inspired in the Italian Code of 1942. Further influence is received through Italian authors such as Carnelutti, Galgano, Emilio Betti, Calamandrei, Giuseppe Chiovenda, etc.

Based on a historical common background, a shared cultural heritage and a geographical and commercial proximity, there has been a circulation of practices and ideas across South America. The region doesn’t only share common positive systems, but constitutes what, though loose, is a large network of texts, ideas, imaginaries, concerns, emotions, etc. Finally, I sustain that we are at the verge of a new and profound transplant, this time coming from the United States. My hypothesis, as I will explain in this section, is that this transplant is unique and has been accomplished in a completely different manner from the previous ones. I also suggest that this legal transplant is


Diego López, supra note 5.

Some late-XIX century Italian authors who influenced Commercial Codes, especially in regards to accounting, were, e.g., Francesco Villa, Elementi di amministrazione e contabilità, (Pavía, 5th ed. 1870); Francesco Marchi, Giuseppe Cerboni, Fabio Besta, amongst others. However, the extent to which these authors effectively influenced the drafters of the Colombian Commercial Code is not well documented.

The Latin American canon of contracts includes works that have been read for decades in law schools throughout the region. Some of the authors that are part of the canon are Mazeaud (France), Josserand (France), Luis Claro Solar (Chile), Arturo Alessandri (Chile), Manuel Somarriva (Chile) Fernando Hínestrosa (Colombia), César Gómez Estrada (Colombia), José Alejandro Bonivento, George Ripert (France), F. Von Savigny (Germany), Robert Pothier (France), Marcel Planiol (France), etc.

The canon also includes joint collections of Latin American authors, see, e.g., Hernán Corral Falciani & Guillermo Acuña Sboccia, Derecho de Los Contratos - Estudios sobre temas de actualidad, 6 U. de los Andes (2002); and law reviews circulating in several countries of the region, such as Foro de Derecho Mercantil.

There has already been some influence of the common law in Colombia in other areas, such as the areas of securities, corporations, criminal procedure and constitutional law. The influence in these areas has materialized through statutes.
breaking a paradigm according to which the civil law –especially contract law- is to a great extent impermeable to, and incommensurable with, the common law.

b. The Transplant of the Common Law Contractual Model to Colombia

By using the term common law contractual model (“CLCM”) I refer to a contractual structure that has originated in the United States and is used in places of reception (e.g. Colombia) as a model to be followed or imitated horizontally along many different relationships and with different functions. I am not referring to specific contracts, such as franchise agreements, loan agreements, trust agreements, underwriting agreements, etc.; but to the transversal structure and specific techniques, provisions and tools thereunder used by lawyers in drafting these agreements. The innovation that I am interested in is the transplant and spread not of a contractual function, but of the drafting architecture model and specific provisions thereof that can be redeployed horizontally in many different types of transactions, until in due course it is standardized.

There is sufficient evidence that the CLCM has been transplanted to Colombia and, furthermore, Latin America. I have also interviewed with colleagues from the most important local law firms who have all confirmed that CLCMs are used in Colombia. Through my colleagues in Harvard Law School and in several law firms in New York and throughout Latin America I have received insight that a very similar process has taken place in virtually all the countries of the region.
The CLCM is different from the civil law contractual model in several ways. Examples of particular modules\(^{29}\) of the CLCM are (1) the concept of *consideration*, completely foreign to the civil law; (2) the use of *representation and warranties*; (3) the signing-closing structure typical in most of acquisition and financing contracts; (4) *material adverse effect clauses*; (5) *indemnity clauses*; (6) *best reasonable efforts* covenants; and (7) non-compete provisions, among many others. In the third section I will study in detail some of these features.

It is possible (but I am afraid hardly verifiable) to formulate the hypothesis that the process of the transplant developed along the following lines: The transplants started in cross-border deals involving U.S. parties in the areas of M&A, private equity, structured finance, project finance, capital markets and the like. In such type of deals, U.S. parties and their counsel, arguably with more bargaining power, would have imposed –from the core to the periphery- the CLCM. Similar models may have been used over and over again. Learning and networks externalities developed between U.S. Law Firms and prestigious local law firms. Eventually, the CLCM standardized and spread to (at least the most sophisticated) contractual relationships with no foreign component\(^{30}\).

Depending on the degree of penetration of the transplant process, three different types of transplanted CLCM can result. The first type includes contracts entered into by one


\(^{30}\) Since there is no registration requirement for most of these transactions, there is very little public data available to empirically verify the transplant process. Most of these conclusions can only be verified through similar experience of lawyers handling this type of transactions and the gathering of non-public samples from the same sources. A more systematic empirical study is wanted and hopefully will follow this paper.
Colombian party and one U.S. party, and governed and construed according to the law of a state of the U.S., typically New York\textsuperscript{31} and less commonly Delaware, Florida, etc. The second type includes contracts entered into one Colombian party and one foreign non-U.S. party (or more rarely two Colombian parties), but governed and construed according to the common law, again, typically, the law of New York. The third type is the most perfect manifestation of the transplant: both parties are Colombian persons and the contracts are governed by Colombian law. It is clear that the latter provides the most interesting field for understanding the extent of the transplant and its innovative power. In particular, this is the type of transplanted CLCM that will give rise to eventual litigation, thus challenging its place within the Colombian system. This doesn’t mean, however, that the other two types of transplanted CLCM are unessential to the process. Three reasons support this: (1) the third type of transplanted CLCM is chronologically dependent on the first two; (2) the first and second type of CLCM inflict strong influence in the minds of lawyers and legal operators, shaping the form of contract law \textit{in action}; and (3), regardless of an express contractual choice of law, the first two types of CLCM may still be challenged in local courts, and it is unclear to what extent local judges will uphold the choice of law provisions. In consequence, these CLCM may still face potential litigation in the place of reception.

\textsuperscript{31} There are several reasons that explain why the law of New York has become the preferred choice of law in cross-border transactions: The law of New York is perceived as highly sophisticated and pro-business; the New York judiciary is extremely efficient; and drafters may have incentives to choose New York law. The legislature of the State of New York has welcomed this practice since 1984. §5-1401 of New York General Obligations Law states that a New York choice of law in a contract for more than US$250,000 will be enforced regardless whether the transaction bears a reasonable relationship to the State of New York. §5-1401 of the same statute states that a New York choice of forum shall be honored if the dispute involves more than US$1,000,000 and the transaction designates New York law. This statute preempts the choice of law rules and the doctrine of \textit{forum non conveniens} of the common law.
The process is still unfinished for it remains to determine how the fully transplanted CLCM will be read (misread) by the courts and to what extent the transplant will (or will not) produce unexpected results in the country of reception. In the rest of the paper I will analyze the salient details of the process.

An argument against my description of the transplant process is that the peculiar provisions of the CLCM may have developed originally and spontaneously in Colombia, without any influence from the United States. This thesis would advocate for a political theory of self-determination and internal choice\textsuperscript{32}. According to this competing theory, provisions such as representations and warranties, best reasonable efforts and material adverse change, etc. would have evolved from the natural development of the civil law of contracts in Latin America. Such coincidence would not be necessarily surprising; Thévenoz, for example, recognizes that the Islamic institution of the Waqf, amazingly similar to the American trust, evolved independently from its pair at the common law.

However, the evidence flows in the opposite direction to prove that the CLCM and the provisions that derive from it have been transplanted from the United States and have not been developed independently by Colombian lawyers and/or legal operators. A first set of evidence is intra-textual and deals with the language employed in the innovation: (1) Some CLCM are drafted in English. (2) Even when the CLCM or some of its provisions appear in Spanish, it is clear that they are the result of an almost literal translation of the original in English. Thus, for instance, the term “indemnity clause” has been translated as “cláusula de indemnidad”; the term “material adverse effect” has been translated as

\textsuperscript{32} Spamman, supra note 6.
“efecto material adverso”; the term “representation and warranties” has been translated as “representaciones y garantías” and the term “best reasonable efforts” has been translated as “mejores esfuerzos razonables”. If all these terms had been produced locally, it could be expected to find terms somewhat more familiar to the language used in the local statutes and legal literature. For example, article 868 of the Colombian Commercial Code sets forth the “teoría de la imprevisión”. It would be reasonable to believe that a term using the word “imprevisión” as part of its formulation would be more likely to appear than one referring to “efecto material adverso” which borrows terms that are nowhere mentioned in Colombian statutes or scholar works. Similarly, the expression “reasonable efforts” doesn’t make part of the Colombian classical contract tradition. That is not to say that the Colombian system has not created an objective standard of conduct applicable to certain obligations, it just means that such standard is usually expressed with different terms, such as “prudent man” or “diligent man” (associated to the french homme prudent et avisé and le bon père de famille de l’Article 1137 du Code Civil). Therefore, though it may have had a similar conceptual meaning, if the provision had been produced in Colombia it would have probably been expressed with different terms more tuned with its tradition.

A second set of evidence is related to the extrinsic circumstances that surrounded and triggered the innovation: (3) The United States is the main commercial partner of Colombia and the main source of foreign investment. The intensification of business coupled with unequal bargaining power militates in favor of this legal transplant. (4) A majority of Colombian lawyers that have conducted studies abroad have received legal
education in the United States and the UK\textsuperscript{33}. These students return to their countries in South America to work in prestigious law firms with the tools and abilities required to receive the transplants coming from the common law (linkage).

The fact that an important number of the partners and an increasing number of the associates in prestigious law firms in Latin America have received legal training in the United States, whether in law school or as foreign associates in U.S. law firms, is also relevant.

(5) Finally, if the innovation had flourished spontaneously, the scholar community would have kept track of that. Not surprisingly, quite on the opposite end of the spectrum, scholars, practitioners and the courts recognize that such innovation is due to the influence of the common law in Colombia.

It seems clear, then, that the CLCM has been transplanted from the United States to Colombia. This begs, at least, the question as to who has operated this transplant. As I show below, the transplanted innovation has been operated by prestigious law firms in Colombia which have served as the linkage between the two systems.

c. Law Firms as Linkage Providers

\textsuperscript{33} According to the UNESCO, most of the Colombian persons studying abroad (28.5\%) have chosen U.S. as its destination, followed by Spain and France. More specifically, in 2014, 36.5\% of law students awarded scholarships by one of Colombia’s major sponsor attended law schools in the U.S. and 28.8\% attended law schools in the UK, as compared to 10.9\% who chose France and 2.6\% who chose Spain.
Colombian prestigious law firms (PLFs) have served as the linkage between U.S. lawyers and their clients, and Colombian clients and the Colombian legal system. I take the term “linkage” from the theory of dependence as it has been used by Barbara Stallings\textsuperscript{34}. According to the linkage theory, the countries in the periphery are bound to the countries in the core by some social classes that perceive certain benefits from that linkage and share the paradigms of the core. Regarding these classes, Stallings says that “the education impact of their experience is not simply a general acquaintance with an international lifestyle but specific knowledge relevant to their profession provided within the paradigms in the industrial countries.”

The role of PLFs and the value of the linkage they provide are twofold: (1) as part of a privileged class and as rational agents, the individuals within the PLFs seek to internalize the benefits of the transplant, while some of its costs is externalized. However, (2) the linkage (i) serves as a reputational intermediation and (ii) creates learning and network externalities. The net outcome is positive. Let’s look at this process in more detail:

(1) PLFs have strong incentives (and in fact undergoes substantial investments) to make the transplant, because unlike its costs, some of the benefits of the transplant are internalized by PLFs. First, the law firm secures its position as a linkage provider, thus strengthening the relationship with law firms in the place of production. Second, PLFs increase their reputation in the place of reception. In effect, the possession and use of the CLCM (in terms of Bloom’s revitionary ratio, the tessera) is regarded by

clients and other law firms as a sign of authority and recognition; and the use of the legal terms that flow from the CLCM are considered to have more *perlocutionary* power\(^{35}\) than its parochial equivalents\(^{36}\). The benefit for the PLFs comes in the form of increased positioning and the ability to improve, expand and enhance its practice.

However, PLFs may be inclined to also foster their own interest. This has been identified by Kahan and Klausner, who point out that although lawyers “presumably attempt to draft contracts that promote the interests of their clients, the interests of the draftsman may diverge from those of the client firm”\(^{37}\). Furthermore, in the context of transplants from one system to another, the interest of the draftsman may diverge from the interest of the system as a whole. In that sense, there may be an *agency problem* between the PLFs, and their clients, on the one hand; and, more important, between the PLFs and the legal system (that is, other lawyers, other clients, the judiciary system, law students, etc.), on the other\(^{38}\). As a result, the PLFs that operate the transplant impose some costs on the legal system\(^{39}\). When the PLFs adopt the CLCM imposed by the North-American law

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\(^{39}\) In a 2003 paper, Garoupa and Ogus annalize this issue in the context of game theory. According to them, the cost of adjusting legal rules include “(i) direct cost from acquiring information, importing (e.g., drafting a new law) and learning foreign legal rules and practices; (ii) rent-seeking costs from those who plausibly lose from changing legal rules and are willing to waste resources to avoid those changes; (iii) indirect costs due to the potential loss of legal coherence and potential contradictions within the emergent law given that some areas of the law will be more changed than others.” Garoupa and Ogus do not assess the question of who bears these costs and, therefore, do not take into account any considerations of agency problems in
firm, they resign to their own legal background. So, for instance, when a PLF includes a MAC in a contract, it is renouncing to use similar local terms or concepts that could serve a similar purpose (e.g. teoría de la imprevisión). In Bloom’s terms, the PLF makes a kenosis before the foreign law.

Likewise, when the PLF decides to include a foreign provision, it does so without including also in the contract the network of practices, customs and judicial decisions in which the term is embedded. The term is transplanted, but the underlying framework is not. That is to say, the PLF has just taken a tessera, while the mosaic has been left behind.

The cost associated with this misreading of the transplant is some amount of legal uncertainty, primarily raising enforceability and fidelity concerns. As such, the cost is externalized to clients and the legal system. If a controversy arises in that regard that leads to litigation, the fact that the term is alien to the system increases litigation costs. Additionally, it is not clear if judges will give the term the same meaning that it had in the place of production, if they will give them a different meaning, or if they will not enforce the term altogether. This uncertainty is a cost. In the words of Garoupa and Ogus, it is the cost of “the potential loss of legal coherence and potential contradictions within the emergent law.”40 The cost is borne, at least partially, by the legal system.

40 Id. Page 10.
(2) But the role of the PLFs is not perverse. The payoff that a country gets from its willingness to adjust its legal rules to those of another country is \(1 - L\), where \(1\) is the payoff of the transplant (normalized to 1) and \(L\) is the total cost of adjusting\(^{41}\). In any event that \(L\) is less than 1, a country will have incentives to adjust its rules. There are significant reasons to believe that the payoff of the transplant of the CLCM exceeds the cost of adjusting the local set of relevant rules, some of which I explain below:

(i) First, the PLFs act as reputational intermediaries. That lawyers add value by renting the reputation they have acquired as repeat players is the most agreed upon theory of the transactional value of lawyers\(^{42}\). This role is more valuable when one of the parties involved in the transaction is not a repeat player and, more importantly, is located in a country from the periphery. As asserted by Schwarcz, the value of this intermediation is proportionally higher as the need for trustworthiness and credibility increases\(^{43}\). Consider the following example. Suppose that a North-American private equity fund is willing to acquire an interest in a Colombian energy company. The foreign party is most likely not aware (or at least not fully aware) of the Colombian legal system, the systemic risks of the country or the reliability of the local company. In these circumstances, by engaging a PLF as local counsel, the Colombian energy company is able to rent the reputation of the PLF, which offers the skills to operate the transplant of the CLCM. This generates a \textit{signal} to the acquirer that the local system complies with the standards of the core, and that the local party has the desired level of sophistication. Without such

\(^{41}\) \textit{Id.} Page 12.  
\(^{43}\) \textit{Id.} Page 22.
reputational intermediation, the North-American private equity fund would factor in the uncertainty and could demand more insurance (in the form of representation and warranties, indemnification provisions, escrows, etc.) or offer a lower purchase price. More dramatically, it could even refrain from consummating the transaction.

Likewise, (ii) PLFs play a significant role in the generation of network and learning externalities. The lateral market between law firms and the circulation of ideas and forms foster the diffusion of transplanted contractual terms. Thanks to the spread of the transplant along the network comprised by PLFs, clients and other law firms, the latter learn from and receive the benefits of the transplant with lower costs. The CLCM and its terms tend therefore to be standardized and become more uniformly applied. Over time, network externalities can provide negative feedback, reducing any uncertainty that may initially be produced regarding the applicability of the CLCM in the system of reception.

Finally, (iii) PLFs have incentives to preserve their own reputation. No serious law firm wants to see the contracts it has drafted found unenforceable by local judges. Whether due to a higher commitment to legal consistency and purity or to a long-term economic concern, law firms have powerful incentives to make sure that the transplants they help operate are upheld in their local system and that, otherwise, their clients are fully advised with respect to any problems that may arise from such confrontation.
Summarizing, the result of the process is a transplanted CLCM operated by PLFs, who provide the *linkage* between places of production and places of reception. The PLFs benefit from performing this role because it secures their position as the *linkage* with the core. This increases its ability to improve, expand and enhance its practice. The system also benefits from this role because the PLFs act as reputational intermediaries that allow the two systems to inter-communicate with lower costs, and allows the innovation to spread. Likewise, PLFs make an important contribution in generating network and learning externalities. As indicated above, there is a positive correlation between the transplant of legal devices and economic development. However, though mitigated, the transplant injects some amount of uncertainty in the legal system of the place of reception. This is due to the fact that, circling back to our initial metaphors, the PLFs have made a *kenosis* and a *tessera* in regard to the transplant.

At this point, the question is whether the transplant is subject to a process of misreading and to what extent the body of reception, continuing with the metaphor, will not reject the transplant.

d. The Law-Making Role of Law Firms, the Role of the Judiciary and the Misreading of Contractual Transplants

As mentioned above, Colombia has received several transplants along its history. Most of the previous transplants have been operated in the form of legislation and further expanded by the work of scholars that were part of or (to certain extent) acquainted with
the legal family of the place of production. That was how, for instance, the French *Code Civil* was adopted. These transplants and many others operated in modern times follow the conventional *top-down* view of production of law and legal knowledge.\textsuperscript{44}

The transplant of the CLCM is very different. It has been operated by lawyers and has spread from the *bottom-up* to other levels of the legal system. Such type of production of law corresponds to what Powell refers to as the law-making role of lawyers and McBarnet as “creative legal engineering”\textsuperscript{45}. Contrary to the lessons of the traditional theory of law according to which the sources of law with higher *pedigree* are statutes (in the civil law) and judicial opinions (in the common law), the modern law of contracts is being shaped, under the spirit of freedom of contract, by a highly sophisticated professional class of lawyers that create innovative legal devices as a response to business circumstances and their clients’ needs. Law firms are modern factories of law and innovative contractual provisions are legal technology.\textsuperscript{46}

Essential to this kind of private law making is its adoption by the legal system. Since legal products so created are the result of a bottom-up process and have not been made by the legislature or the courts, it is up to the courts to determine if they are consistent with the legal system and therefore enforceable. Powell has said about these private innovations that “if challenged and upheld by the courts they become institutionalized in


\textsuperscript{45} Id. Page 427.

\textsuperscript{46} Spamman, *supra* note 6, at 34.
the common law.”47. One of the most salient examples of this kind of bottom-up innovation is the shareholders rights plan or poison pill, the modern paradigm of private law innovation.48. The poison pill was designed by Martin Lipton and was initially adopted by very few corporations since 1980. Most of the firms remained reluctant to adopt such a bold innovation. In 1985, in Moran v Household International, Inc., one of its most famous decisions, the Delaware Court of Chancery49 upheld the device, thereby institutionalizing it in the common law. From then on, the vast majority of corporations in the United States adopted a poison pill.50. Once a legal institution has been institutionalized, scholars keep track and make sense of the process and are able to provide consistency to the story of the innovation.

To a certain extent, the transplant process of the CLCM can be compared to the positioning process of the poison pill. That is, the particular provisions of the transplanted CLCM have been significantly diffused but have been only occasionally challenged as a result of which they have not completely institutionalized in the civil law. How the courts have or will read (misread) the CLCM and whether the transplant has avoided or will avoid rejection are questions that are addressed in this paper.

The role of the courts is cumbersome for, at least, the following reasons: (1) the provisions of the CLCM are alien to the civil law (e.g. the Colombian system);

47 Id. Page 429.
48 For a brief description of the positioning strategy behind the poison pill, see George Triantis, supra note 29, at 8 – 9.
50 This pattern may have shifted in recent years due to shareholder activism and other developments in modern corporate law.
furthermore, they may be drafted in, or translated from, the English language, with which judges are not necessarily familiar; (2) the courts may be biased, and under the obligation, to translate the provisions of the CLCM into what they may consider to be their local legal equivalents; (3) the provisions of the CLCM will appear to the judges as a *tessera*, i.e. there are no previous decisions that may guide the lower judges in their initial assessment of the provisions of the CLCM. Furthermore, the level, the type and the sources of the arguments that attorneys may offer to defend the CLCM will come from a background that is not necessarily familiar to the reviewing judges.

The judicial review is determinant in completing the process of transplant of the CLCM. There is some uncertainty regarding how the courts will read the CLCM and the effects they will attach to its terms. Uncertainty translates into costs.

In the following section I will refer to two particular examples that show how the CLCM may be subject to misreading and how the main effect of this misreading is the production of *uncertainty* with respect to the meaning and the effects of the transplant. I also suggest that any uncertainty that the transplant of the CLCM may generate is likely to be mitigated over time as it spreads due to the generation of network and learning externalities.

III. TWO EXAMPLES: BEST REASONABLE EFFORTS AND REPRESENTATIONS AND WARRANTIES
a. Best Reasonable Efforts

Provisions incorporating *Best reasonable efforts* (“BRE”)\(^{51}\) are widely used in the common law. They are used to indicate the standard of commitment of a promisor in many different contexts, such as provisions in which one party agrees to use BRE to keep confidential information, to obtain consent of third parties, to commercialize a product; to satisfy certain conditions precedent to close the envisioned transaction, to collect receivables; etc. In some cases, this standard is used in combination with hard proxies, as when a party agrees to use BRE to increase business and, in any case, to run it safely and in an orderly manner, providing first class services\(^{52}\).

BRE have been transplanted to Colombia and South America. But, how will judges read (or misread) these transplants and what is the threshold that they will use to measure whether BRE provisions have been satisfied? As asserted above, there are different reasons why judges may misread the transplant of BRE. Leaving aside the idiomatic differences, civil law judges are likely to misread the BRE for two reasons: (1) they will try to find the local equivalent, and (2) they will not be able or willing, to take into account the network of legal decisions that underlies and accompanies the concept of BRE.

\(^{51}\) As shown by Adams, there are many different variations of the term. We can assume that the courts will not interpret these variations to mean different things. See Kenneth A. Adams, *Understanding “Best Efforts” and its Variants*, Prac. Law., 11 (2004).

At the center of the civil law is the concept of *obligation*, that is, a bond between two persons whereby one of them, the creditor, is entitled to demand from the other, the debtor, performance. One of the many classifications of obligations -owed to the French author René Demogue- is that between obligations of ends (*obligaciones de resultado* or, pursuant to the French expression, *obligations de résultat*) and obligations of means (*obligaciones de medio* or *obligations de moyens*)53. If the debtor has committed to achieve a specific result, the obligation will be considered one of ends (*e.g.* the obligation of a carrier to deliver goods at certain place). If the debtor has only committed to employ all her energy and diligence to achieve that result, but has not guaranteed the result, it will be an obligation of means (*e.g.* the obligation of the doctor to cure its patient, except of course if she has promised a specific result). The main difference between the two types of obligation is the standard of liability. Generally, an obligation of ends is deemed to have been breached if the creditor satisfies the burden of proving that the result has not been achieved. In such circumstances, the debtor can only be exonerated if she proves *force majeure*. On the contrary, a plaintiff needs more than just proving that the result has not been achieved to successfully claim that an obligation of means has been breached. Such plaintiff needs to prove, in addition, that the debtor has acted with *culpa*, *i.e.* negligently. The notion of *culpa* is idiosyncratic to the civil law. In those cases, it is the creditor who has the burden of proving the debtor’s negligence.

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53 The classification was adopted by the Colombian Supreme Court in 1938. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, 31 mayo 1938, “Escallón, Liborio”, actividades peligrosas, Gaceta Judicial [G.J.] t. XLVI, p. 571-572 (Colom.).
My suggestion is that the civil law judge will be tempted to misread the BRE as an obligation of means\textsuperscript{54}. She will do so because (1) as a judge she is expected to apply her own system of law; and (2) as an individual her knowledge and skills are likely to be bounded by the precepts of her own local system. Making this kind of equivalence is not frictionless. On one hand, the notion of \textit{culpa} is alien to the common law. For that reason, while the content of BRE may be determined by some notions of good faith or negligence in the common law, in the civil law it will be mandated by the notion of a prudent man or \textit{le bon père de famille}. On the other hand and perhaps more important from a practical perspective, in the civil law, as shown above, the creditor (plaintiff) has the burden of proving that the debtor has acted with fault and, thus, has breached an obligation of means. To the contrary, it has been sustained in the common law that the burden of proving that BRE were undertaken lies on the defendant\textsuperscript{55}.

Another reason to misread BRE is the fact that the transplant doesn’t drag along the background in which it is rooted in the place of production. That is, it is just the formulation of the terms that is been transplanted; but the realm of underlying judicial decisions and scholar works are left behind.

The content and meaning of BRE is not clear in the common law. As shown by Scott and Triantis, BRE have been read to mean different things by different courts. “Some courts

\textsuperscript{54} Acevedo has, as noted, assimilated BRE to obligation of means. Another possible alternative is misreading best reasonable efforts as akin to a general duty of good faith.

\textsuperscript{55} “Plaintiff was not obliged to show just what steps Falstaff could reasonably have taken to maintain a high volume for Ballantine products. (...) The burden shifted to Falstaff to prove there was nothing significant it could have done to promote Ballantine sales that would not have been financially disastrous.” Bloor v. Falstaff Brewing Corp., 601 F.2d 609 (2d. Cir. 1979).
interpret “best efforts” as the equivalent of “good faith”, others impose a higher standard of reasonable diligence, and some even require the level of effort that would be exerted by a similarly situated integrated firm"56. Notwithstanding the tension that may exist among these decisions, it is clear that BRE have had some companion from the courts and the scholars. Since it is a vague standard, BRE will always carry some kind of uncertainty, but that is something that transactional lawyers can take into account, calculate, administer and use to their advantage to determine the probability of judicial choice. Whether she calls the term BRE or an obligation of means, this background is not available for the civil law judge or to the anticipating lawyer. The BRE clause appears to her as a tessera, while she has no access to the rest of the mosaic from which it was taken.

The following example may illustrate my point. Suppose that a brewing company is planning to buy the distribution network and related assets of another company. Part of the purchase price will consist of royalty payments of certain amount of dollars per barrel of beer. The seller’s lawyer—who, let’s assume, is trained in the common law—considering whether to agree to such payment mechanism and to include a provision in the contract requiring the buyer to use BRE to promote and maintain a high volume of sales. The seller’s attorney will cheaply realize that this case presents the same fact pattern as the casebook favorite57 Bloor v. Falstaff Brewing Corp. Thus, she may predict that the courts may likely apply the “integrated firm” test to determine if BRE have been used. That will allow her to measure the post-sale restrictions on the buyer’s exploitation

56 Scott & Triantis, supra note 51, at 836.
of the assets, thus permitting her client to increase the price accordingly to those restrictions. It will also give her information to valuate the trade-off of choosing a vague standard rather than a hard proxy\textsuperscript{58}.

But this prediction may fail if, all other things equal, BRE are transplanted to another system. If BRE get litigated in the place of reception, the civil law judge will not have cheap access to \textit{Bloor v. Falstaff}, nor, for what it counts, any other judicial decision or scholar works originated in the place of production. Information costs in this context may be prohibitive. Additionally, the level, the type and the sources of the arguments that lawyers may offer to explain the rationale of BRE will come from a background that may be unfamiliar to the reviewing judge. Therefore, the predictions made when the contract was drafted may be totally misaligned with the possible outcomes in case of litigation.

In real life things are never as simple as in the previous example, and lawyers will always have to deal with some kind of uncertainty when using BRE in their contracts. But, the examples serves to prove that, no matter what is the initial uncertainty involved, when BRE are transplanted from the United States to Colombia or South America, an \textit{extra amount of uncertainty} comes into play. Uncertainty may be so severe that it may completely hinder visibility regarding judicial choice. To prevent this, practitioners may

\textsuperscript{58} The question here is not whether Falstaff was correctly decided. “How, for example, should one deal with a complaint that Falstaff had failed to meet its best efforts obligation to maintain as its own employees Ballantine’s sales, marketing, clerical and administrative personnel? Ironically, while the problem is generally difficult or intractible, in the one case that has filtered down to the casebook level, the problem turns out to be an easy one. The context—a one-shot sale of assets—delimits the feasible meanings of “best efforts” and all of the meanings lead to the same conclusion: the courts got it wrong”. Goldberg, \textit{ supra} note 56.

The question is whether the lawyer can rely on its authority to calculate the probability of the judicial choice.
therefore (and do in fact) engage in lengthy negotiations to incorporate hard proxies, carve-outs or explicit definitions of BRE.

Scott and Triantis have studied the benefits and costs of uncertainty in the enforcement of standards. According to them, the parties to a contract can decide to express their obligations through vague terms—such as BRE— or through precise rules. In the first case, parties save front-end costs but delegate to the back-end the task of selecting proxies to measure performance, thus translating the costs to the litigation stage. They conclude that “when the efficient proxies are highly state-contingent and less dependent on private information of the parties, the parties will be more inclined to use standards to delegate proxy choice to the courts, particularly if uncertainty is expected to resolve itself by the time the relevant performance is due.\(^{59}\)

To the position held by some scholars that uncertainty and the risk of judicial error justify the choice of precise terms over vague standards, Scott and Triantis correctly respond by showing that uncertainty produces positive performance incentives on the parties. In effect, uncertainty creates incentives for undertaking multidimensional efforts, and for focusing on performance rather than on the wasteful production of evidence that a specific proxy has been satisfied. Moreover, according to them, the negative effects of uncertainty are ambiguous, that is, they can be in favor or against either party. In that circumstance, “the important question is not whether vague terms are perfect, but whether there are conditions under which they are superior to a contract with a corresponding precise obligation or even no obligation at all. […] Given the court’s superior

\(^{59}\) Scott & Triantis, supra note 51, at 842-843.
information, the parties can expect that one or both of the proxies will be less noisy under the circumstances than the one that the parties would pick ex ante. Therefore, even when discounted by the relevant probabilities of judicial choice, either alternative would improve performance incentives over certain, but inferior, specific contract proxy.\(^{60}\)

In this manner, Scott and Triantis manage to prove that uncertainty does not necessarily militate against the choice of vague standards such as BRE. One could think, then, that whatever additional uncertainty is created by transplanting BRE to countries such as Colombia, the same would be incorporated into this model. If this is true, my assertion that BRE are misread when transplanted, would be interesting and maybe even true from a theoretical perspective, but irrelevant from a practical one. However, I believe that at least in the early stages of the transplant the uncertainty created by the misreading of the transplant is relevant and may trump or limit the efficiency associated to the use of a vague term over a hard proxy to induce performance.

Note that Scott and Triantis imply that, \emph{ex ante}, lawyers are able to make a comparison between three terms. The value of the performance incentives of a specific proxy \((x)\), the value of a vague standard discounted by the probability of judicial success \((y_s)\) and the value of the same vague standard discounted by the probability of judicial failure \((y_f)\).

According to the authors, “even when discounted by the relevant probabilities of judicial choice, either alternative \([y_s \text{ or } y_f]\) would improve performance incentives over certain, but inferior, specific contract proxy \([x]\)”.

\(^{60}\) \emph{Id.} Page 845.
Suppose that in fact the transactional lawyers have built a probability function (based on previous decisions, works of scholars, etc.) and have agreed to a BRE vague standard, which they consider to be superior to what they perceive as an inferior specific proxy. This choice is efficient. The situation may be different upon the transplant of BRE since the lawyers may have a hard time trying to anticipate how a BRE provision will be interpreted by the courts. In this context, the uncertainty generated by the transplant of BRE may be of such magnitude that rational lawyers may be unable to anticipate the probable outcome of litigation and, thus, may prefer to choose hard rules instead of vague terms. This, in turn, is expensive in terms of transaction costs and delays at the negotiation stage.

In addition to that, when a vague standard such as BRE is transplanted to a country in the periphery, anxious foreign clients may want to cut down uncertainty. In such circumstances, “under standards, promisors may invest in predicting how a future court will interpret their vague obligation”\(^{61}\). This factor, which Scott and Triantis have consciously excluded from their analysis, may well prove to be inevitable in situations of transplant and may generate higher transaction costs.

So, does this mean that the transplant of BRE is necessarily inefficient? If it is, does it mean that the BRE will be finally rejected and may be replaced by more parochial terms? I answer, in sum, no to both questions. I believe the transplant will continue to spread and perfect at a rhythm that will largely depend on the level of cross-border transactions. PLFs, who have positive incentives to do so, will continue to operate the transplant. The

\(^{61}\) Scott & Triantis, *supra* note 51, at 847.
transplant will continue to diffuse along a network between PLFs, law firms and clients. This network will contain elements taken from the place of production and materials originally created in the place of reception. Eventually, BRE may be litigated, and the judicial decisions will enrich the network providing more guidance to the prediction of judicial choice in regard to BRE. Therefore, even if the efficiency of the transplant may be curtailed at an early stage, when the transplant achieves a major degree of penetration, information will be available for lawyers to overcome uncertainty and to avoid wasteful investments to predict how future courts will interpret the term, thus creating learning and network externalities, benefiting not only future users of BRE provisions, but adding value to previous uses of BRE provisions.

b. Representations and Warranties

Representations and warranties (“R&W”) are used in a broad range of agreements in the common law, including in particular acquisition agreements. Generally speaking, R&W are promises regarding past, present or future facts or states of the world, directly or indirectly related to the promisor or the target company. For instance, a promisor may represent and warrant that it has title to the shares or assets sold, that the target company has no labor, tax, environmental or other type of liabilities, that no authorizations are required to consummate the transaction contemplated by the relevant agreement, etc. R&W are used together with indemnification obligations of the promisor, whereby the promisor assumes the obligation to indemnify and keep the promisee harmless from any damages that may result from any breach or inaccuracy of the R&W.
Used in this manner, R&W are the most common contractual tool to allocate risk. By making a R&W, the promisor is assuming the risk that the facts or the state of the world depicted by the R&W are not, or turn out not to be, true. For instance, a seller in an M&A transaction that represents and warrants that the company she is selling has no labor liabilities, may be liable if it turns out that, after the consummation of the acquisition, labor liabilities based on facts that occurred prior to closing surface resulting in a loss for the promisee.

R&W have been transplanted to most of the jurisdictions in Latin America. As further explained below, R&W have also been widely transplanted to Spain. My intuition is that the use of R&W has become a common feature in most of the modern regions of the world.

The transplant of R&W has raised significant unease among legal practitioners in the places of reception. There is no doubt that while they are a powerful and useful device to efficiently allocate risk through contract design, they are also an important innovation in many of the legal systems into which they have been transplanted. This innovative character has demanded significant investments from legal practitioners in order to unveil the place of R&W in their respective local legal systems.

In the following pages I will briefly refer to the Spanish and the Colombian experience in connection with the transplant of R&W into their legal systems. This will serve as
another example to show that, consistently with my general hypothesis, R&W have been transplanted from the U.S. to such jurisdictions, the transplant has resulted in an important amount of uncertainty, scholars and the courts have gone through a somewhat long and expensive process in order to construe the effects of R&Ws as introduced in their local practices, and, further along the process, learning and network externalities have started to develop that mitigate the initial uncertainty.

(1) The transplant of R&W in Spain

It seems to be uncontested that R&W have been transplanted to Spain from the U.S. and the U.K. and that Spanish law did not otherwise regulate them from inception\(^\text{62}\). It is also clear that there is no express rule of law setting forth the remedies available in the event of breach of R&W\(^\text{63}\). However, the use of R&W has spread in the Spanish system and since the year 2000 a number of decisions of the Spanish Supreme Court have had to deal with the meaning and effects of R&W under Spanish law. As suggested by Ángel Carrasco Perera, several competing doctrines could be contemplated, and have in fact been contemplated by Spanish courts, to determine the place of R&W under Spanish law and, more importantly, the extent of remedies available to the beneficiary of such R&W. Below is a brief summary of these doctrines:

(i) Eviction: Pursuant to this doctrine, a remedy would kick in only to the extent that the purchaser was deprived from title to the assets or shares specifically sold

\(^{62}\) Fernando Gómez Pomar, *supra* note 15, at 32.

(this is, the direct subject of the sale, or objeto). There are several inconveniences to this doctrine. The principal inconveniences are that, on one hand, no remedy would be available unless the direct subject of the sale has been evicted. So, for example, a purchaser of shares would not have a remedy if the assets of the company suffer an adverse effect, since such assets are not the direct subject of the sale (i.e. the shares). In addition, absent bad faith, the purchaser can only claim restitution, but it will not be able to seek damages.

(ii) Hidden defects: According to Carrasco, the most appropriate sede materiae for R&W under Spanish law would be the regulations regarding hidden defects. Pursuant to these regulations, falsehood or inaccuracy of a R&W would be equivalent to a hidden defect affecting the quality (whether corresponding by nature or under an express promise) of the sold asset. The promisee in this case will have the ability to demand resolution or a reduction in the purchase price (the so called quanti minoris remedy). Despite offering what can theoretically be conceived as the most appropriate receptacle, the doctrine of hidden defects has two major inconveniences: on one hand, the respective statute of limitations is extremely short, and, on the other, dolo of the seller is a condition for damages. Carrasco considers that, for those reasons, it is unlikely that Spanish courts channel any claim of breach of R&W under this doctrine since it would be detrimental to the purchaser’s bargained for interest.

(iii) Breach: The general rules governing breach of contract could apply to the extent the R&W can be construed as a promise or when they are so substantial that any
breach thereof would be tantamount to delivering an asset different to that purchased (under the *aliud pro alio* doctrine). Under Spanish law, upon breach, the non-breaching party can claim either specific performance or resolution, in both cases with appropriate damages. Carrasco considers that there are several objections to this doctrine as the appropriate measure of R&W, such as the difficulty to assert that a breach of R&W arises to the level of a substantial breach of contract that gives lieu to resolution, and the hardship in proving that falsehood of R&W leads to measurable damages.

(iv) *Dolo:* There is *dolo* when a party uses fraudulent or misleading words or constructions to induce the other party into contract. Generally speaking, two remedies are available as a result of *dolo:* resolution and damages. According to Carrasco, pursuant to this view, falsehood or inaccuracy of R&W constitutes pre-contractual *dolo.* Only rarely could a breach of R&W lead to resolution under this doctrine because it would need to be of such magnitude as to trump consent. In any case, the consequence of *dolo,* resolution, would most likely not be in the interest of the purchaser. More interesting, says Carrasco, is the ability of the purchaser to seek damages under this doctrine, who would not need to prove that such breach has been substantial to the contract as a whole and would most likely achieve the expected result. According to Carrasco, a similar approach has generalized in Germany, where the doctrine of *culpa in contrahendo* has been used as the most appropriate grounds to claim damages in connection with the sale of companies.
The discussion regarding the nature of R&W has been picked up by Spanish courts. In several occasions Spanish courts have had to assess how R&W should be interpreted in the Spanish legal system. What is more interesting in this regard is that part of the uncertainty described above has been replicated at the court level. The Spanish Tribunal Supremo has applied the aliud pro alio doctrine in certain decisions (Sentencia del Tribunal Supremo, Sala 1ª, June 30, 2000 (RJ 2000\6747, and Sentencia del Tribunal Supremo, Sala 1ª, de January 19, 2001 (RJ 2001\1320)) and the hidden defects doctrine in others (Sentencia del Tribunal Supremo, Sala 1ª, de November 20 2008 (RJ 2009\283)).

(2) The transplant of R&W in Colombia

R&W have also been transplanted to the Colombian legal system. The process is strikingly similar to the Spanish transplant. R&Ws have been transplanted by prestigious local law firms documenting acquisition and financing transactions. The dramatic increase of M&A and financing transactions in the last decade in Colombia has offered the perfect breeding ground for the transplant to spread.

Though there are no written works in this respect, legal practitioners lively debate around the place of R&W in the Colombian system. As in Spain, there are several competing doctrines in this regard. Being part of the same family of law, it is not surprising that the doctrines used in the Colombian context are similar to those that have been used in Spain. It has been speculated that R&W can be explained under the realm of hidden defects,

64 Id. Page 7-15.
dolo and breach. There have also been considerations that they could be construed under the concept of causa, this is, the motives that underlie the meeting of the minds. Another approach argues that R&Ws rest upon the doctrine of good faith (buena fe).

As in Spain, it was just a matter of time until the meaning and effects of the R&Ws were challenged before the courts (in fact, mostly arbitration tribunals). Below is a schematic summary of the main arbitral awards dealing with this issue, including the relevant citations. As you will note, different doctrines have been reproduced:


The following are the main elements of this award:

- The R&Ws have been transplanted from the U.S. legal system\textsuperscript{65}.
- The normative content of the R&Ws is that of a promise regarding the truth of a statement of fact\textsuperscript{66}.
- Three remedies are associated to the breach of R&Ws: resolution, specific performance and damages\textsuperscript{67}.

\textsuperscript{65} “Estas disposiciones corresponden en el contrato anglosajón a las denominadas cláusulas de “representations and warranties”, de particular importancia en el contrato escrito americano ya que en tales casos se aplica la regla de “Parol Evidence Rule” […] Entre nosotros la cláusula de Representations and Warranties es extraña a la regulación normativa de nuestros códigos de derecho privado y por ende no tiene contemplada en el derecho obligacional un efecto explícito.” Corporación Financiera Colombiana S.A. v. Invercolsa S.A. y otras, Tribunal Arbitral 40-43 (2005). Translated in “These provisions correspond in the Anglo-Saxon contract to the so-called “representations and warranties”, particularly important in the written American contract because in such cases the parole evidence rule applies. […] Among us, the representations and warranties clause is alien to the regulation set forth in our codes of private law and therefore no explicit effect has been contemplated in the law of obligations.”

\textsuperscript{66} “[…] Cuando una representación o afirmación de un supuesto de hecho se encuentra incorporada en el contrato, esta implica una promesa o “warranty” por parte del representado, de que los hechos son o serán verdaderos.” Id. Page 42. Translated in “[…] When a representation or statement regarding a state of fact is incorporated in a contract, the same implies a promise or “warranty” of the promisor that the facts or will be true.”
There is a logical relation between R&Ws and the indemnification provisions in the relevant agreement, in such manner that in absence of the former, a breach of R&Ws shall not result in any remedy for the promisee.\(^{68}\)


The following are the main elements of this award:

- There is no explicit or implicit reference to Corfinsura vs. Invercolsa.
- The validity of the R&Ws is based on freedom of contract. The tribunal held that R&Ws, together with the indemnity package set forth in the purchase agreement, constitute a private modification of the general rules regarding damages for

\(^{67}\)“Por lo que de su masiva incorporación al contrato comercial doméstico, a la luz de la reciente copia de las minutas norteamericanas, deben seguirse los efectos propios de toda estipulación contractual según la legislación nacional; es decir, su incumplimiento puede dar lugar a la resolución del negocio o a la ejecutoriedad del acuerdo con indemnización de perjuicios. […] Teniendo en cuenta, que la cláusula sobre las representaciones implica un efecto legal de garantía, o mejor, de promesa, es necesario poner de presente que el incumplimiento de las representaciones por uno de los contratantes da lugar a que la otra parte tenga derecho a reclamar perjuicios, sin perjuicio de la facultad de solicitar la terminación del contrato, cuando la representación es sustancial para el negocio. En tal caso, si el afectado decide terminar el contrato podrá pedir perjuicios, a diferencia de la rescisión que tiene por propósito privar de todo efecto el contrato con efectos retroactivos, por lo cual lo procedente es simplemente colocar a la partes en la posición en que se encontraban antes de su celebración.” \textit{Id.} Page 43. \textit{Translated in} “Due to the massive incorporation of these provisions in domestic commercial agreements, in light of the increasing copy of North American minutes, the typical effects of all contract provisions under national law shall attach to them, this is, any breach thereof shall result in resolution or specific performance, with indemnification of damages. […] Taking into account that the clause on representations and warranties implies a guarantee, or even better, a promise, it must be noted that the breach of the representations by one of the parties gives the other party the right to claim damages, without prejudice of its ability to request the termination of the agreement, when the representation is substantial to the business. In such case, if the affected party decides to terminate the agreement, it will be able to request damages, as opposed to “rescisión” which sole purpose is to annul any effect of the contract retroactively, placing the parties in the position they were in before execution thereof.”

\(^{68}\)“Ante la falta de regulación expresa de esta figura contractual en el derecho latino y en especial en el derecho contractual colombiano, la estipulación de la cláusula de “Representations and Warranties” es seguida de ordinario de la previsión de un efecto propio en la cláusula de garantía, también denominada de “indemnidad”. \textit{Id.} Page 64, at 44. \textit{Translated in} “In light of the absence of an express regulation of this device under “latin” law and especially in Colombian contract law, the representations and warranties clause is typically followed by a provision setting forth its particular effects in the guarantee clause, also referred to as indemnity clause.”.
breach of contract, as permitted under Article 1604 of the Colombian Civil Code.

- According to the tribunal, the parties have broad discretion to regulate the effects thereof. Under this same token, the tribunal held that the survival period and the procedure agreed upon to assert claims were valid and binding between the parties.

- The tribunal also held that the responsibility arising out of a breach of R&Ws is “objective”, this is, it is irrelevant whether the breach is the result of *culpa* of the promissor or not.

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69 “No cabe duda, entonces, del perfil eminentemente convencional del régimen de “declaraciones y garantías. Es sabido que el artículo 1604 del Código Civil, en su inciso final, autoriza a los contratantes para modificar el régimen general de responsabilidad previsto para la respectiva entidad negocial, por supuesto que dentro de parámetros que la misma ley se encarga de señalar.” Bancolombia v. Jaime Gilinsky, Tribunal de arbitramento (2006). *Translated in* “There is no doubt, thus, as to the eminent conventional nature of the representations and warranties. It is known that article 1604 of the Civil Code, final paragraph, authorizes the contracting parties to modify the general responsibility regime set forth with respect to the relevant negotiating entity, of course within the parameters set forth by applicable law.”

70 “Conforme a la ley contractual, tal como se ha reseñado, la aparición, a juicio del comprador – hoy Bancolombia, demandante en el proceso—, de incumplimientos de los vendedores –entre ellos el demandado Jaime Gilinsky Bacal— respecto de las “declaraciones y garantías” de que trata la cláusula octava del contrato de promesa que precedió a la compraventa perfeccionada, originaba la necesidad, en aras de obtener su efectividad, de observar los parámetros convenidos en el mismo contrato acerca del modo de hacer el correspondiente reclamo, de su oportunidad o momento idóneo en el tiempo para realizarlo, y de la atención de ciertos deberes o cargas de información, en función de la naturaleza del particular requerimiento, todos aspectos vinculantes para las partes, en la órbita eminentemente convencional de lo estipulado.” Bancolombia v. Jaime Gilinsky, *supra* note 67. *Translated in* “According to contract law, as indicated, the existence, according to the buyer’s view –Bancolombia as plaintiff– of breaches by the sellers –among them the defendant, Jaime Bilinsky Bacal– with respect to the “representations and warranties” set forth in Section eight of the promise contract that preceeding the perfection of the sale, resulted in the need, in order to obtain its effectiveness, of observing the parameters agreed to in such contract regarding the method to present the relevant claim, the opportunity or proper time to make it, and the observance of certain information duties, in function of the nature of the particular claim, all of which are binding for the parties within the conventional orbit of the agreement.”

71 “Con lo dicho hasta aquí, en opinión del tribunal puede señalarse que el convenio de responsabilidad a cargo de los promitentes vendedores, conforme a lo plasmado en las cláusulas octava y novena del contrato de promesa y en el otrosí de octubre 30, presenta un perfil objetivo en cuanto a que su estructuración o se desestimará en función del acaecimiento o no de los supuestos tipificados en las mencionadas convenciones, con independencia de la existencia o no de culpa de los potenciales deudores, o de buena o mala fe en su conducta, e incluso de su conocimiento o no de los hechos que eventualmente la configurarán.” Bancolombia v. Jaime Gilinsky, *supra* note 67. *Translated in* “Based on what has been said so far, in the opinion of the Tribunal it can be asserted that the agreement on the responsibility of the sellers, as set forth in sections eight and nine of the promise agreement and in the amendment dated October
• The tribunal sustained that the only remedy available as a result of a breach of R&W is damages (as opposed to resolution and specific performance, which is in fact the general rule for breach under Colombian law and was adopted in Corfinsura vs. Invercolsa) and that the R&Ws do not preempt the application of the principle of good faith.

• The tribunal held that the indemnification obligation resulting from the inaccuracy of R&Ws is correlated to the purchase price.

• The tribunal explicitly departs from the doctrine of hidden defects.
The tribunal addressed the issue of how the knowledge acquired by a promisee pursuant to a due diligence process may affect the indemnity rights for breach of R&Ws. The tribunal assumed a middle-point position, indicating that such knowledge by itself does not trump the R&Ws, but indicated also that the purchaser must act in good faith to preserve its remedies. Interestingly, the tribunal was addressing an issue that has been well identified and tracked in the U.S. and is commonly addressed through so-called anti- or pro-sandbagging provisions, this is, express contractual provisions regulating whether knowledge trumps or not the R&Ws.

(iii) Balclin et al vs. Gutierrez Robayo (2011)

from the legal regime of hidden defects, with its known remedies that permit the buyer to resolve the contract or to seek an adjustment to the purchase price (through the *quanti minoris* cause of action).”

75 “De nuevo, frente a la inquietud que se suscita acerca del papel del “due diligence” […] (i) La realización del “due diligence”, y el conocimiento directo que como resultado del mismo tuvo el promitente comprador sobre la situación del Banco de Colombia […], no tiene virtualidad para exonerar de responsabilidad, per se a los promitentes vendedores, ante eventuales incumplimientos en cuanto a las “declaraciones y garantías” emitidas, con las consecuencias indemnizatorias reseñadas […] (ii) Pero tampoco puede concluirse que el “due diligence” es, de salida y en términos absolutos, intrascendente en la evaluación de las reclamaciones incoadas, pues en un escenario en el que el principio de la buena fe tiene vigencia, con el alcance ya señalado, siempre existirá la posibilidad de injerencia en el análisis de las controversias contractuales, lo que en el caso presente habrá de examinarse teniendo como referencia ineludible, de un lado, la naturaleza y contenido de cada una de las 18 reclamaciones de la demanda arbitral, y del otro, lo que con relación a cada una de ellas pueda sugerir la revisión de si fue o no un punto tratado y considerado en ese momento, el contenido específico que tuvo su tratamiento cuando así haya ocurrido, la conducta de las partes —primordialmente del promitente comprador— con ocasión de su realización, etc. […]” Bancolombia v. Jaime Gilinsky, supra note 67. Translated in “Again, with respect to the concern of the role of the due diligence […] (i) undertaking a due diligence and the direct knowledge acquired by the purchaser as a result thereof regarding the condition of Banco de Colombia […] does not exonerate, *per se*, the sellers from their liability for potential breach of the representations and warranties, with the respective indemnification consequences […] (ii) but it cannot be concluded either that the due diligence is, in absolute terms, irrelevant in the assessment of the claims asserted, since it is a scenario where the principle of good faith is fully valid, with the scope already mentioned, it will always influence the analysis of contractual controversies, which in the present case shall be examined taking into account, on one hand, the nature and content of each of the 18 claims of the arbitral lawsuit and, on the other, whatever regarding each of them may result from the review of whether it was an item treated and considered at such moment, the specific content of such treatment when it occurred, the conduct of the parties—mainly of the purchaser—when done, etc. […]”
The following are the main elements of this award:

- The award expressly adopts Bancolombia vs. Gilinsky.

- However, it adds that the R&Ws are linked to the cause (causa) or motivations underlying the meeting of the minds. Therefore, the inaccuracy of the R&Ws can result in a vice undermining the meeting of the minds (*vicio del consentimiento*). Under this doctrine, the remedy is resolution\(^76\).

(iv) Cadena vs. Invertlc (2012)

The following are the main elements of this award:

- There is no explicit or implicit reference to any previous award in this respect.

- It is based on the assumption that the R&Ws are rooted in the doctrine of hidden defects\(^77\). Even though the award does not make any express reference thereto, the

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\(^{76}\) “En tanto son fundamento de las obligaciones principales del contrato, su incumplimiento puede entenderse como (i) un incumplimiento del mismo y (ii) un desconocimiento de las causas que dieron origen a la celebración del contrato”. […] De lo anterior, se puede inferir que las declaraciones y garantías pueden llegar a ser un elemento fundamental para el consentimiento. Por ello, la falsedad o inexactitud de una declaración puede conllevar a un vicio en el consentimiento, pues la manifestación de la voluntad no sería consciente y libre, sino que estaría afectada por irregularidades. Estas irregularidades pueden ser (i) la fuerza o violencia, (ii) el dolo o (iii) el error.” Balclin et al. v. Gutiérrez Robayo, Tribunal de arbitramento (2011). *Translated in* “To the extent they are fundamental to the main obligations under the agreement, a breach thereof must be construed as (i) a breach of the agreement itself and (ii) a repudiation of the causes that lead to the execution of the agreement. […] On the basis of the foregoing, it can be inferred that the representations and warranties can be a fundamental element of the meeting of the minds. Therefore, the falsehood or inaccuracy of a representation may result in a vice of the meeting of the minds, since it would not be conscious and free, but instead would be affected by irregularities. These irregularities can be (i) duress, (ii) dolo, or (iii) mistake.”

\(^{77}\) En efecto, “Cuando el objeto de la compraventa son acciones y no activos materiales, la función de las Representaciones y Garantías es extender el ámbito de responsabilidad del vendedor, haciéndole responsable de determinadas contingencias, daños o riesgos, que de otro modo ocurrirían a riesgos del comprador. Al establecerse una lista de hechos y contingencias que han de ser manifestadas como ciertas por el vendedor, éste asume la responsabilidad de que tales manifestaciones sean ciertas, y responde de ello. Con el régimen de responsabilidad propio de la compraventa, el vendedor no respondería de cualidades o contingencias que resultan ser externas y ajenas a la cosa vendida.” Balclin et al. v. Gutiérrez Robayo, *supra* note 74. *Translated in* “In effect, when the purpose of the sale are shares and not material assets, the function of the representations and warranties is to expand the scope of the seller’s liability,
remedies under this doctrine are resolution or price adjustment (\textit{quanti minoris}).

The statute of limitations is one of the shortest set forth in Colombian law, i.e. six months.

- Regarding the due diligence, it appears to set forth a duty to disclose on the seller and a limited burden to review on the buyer\textsuperscript{78}.

\textit{(v) Supreme Court decision dated December 16, 2013}

The following are the main elements of this decision:

- There is no explicit or implicit reference to any previous awards in this respect.

\textsuperscript{78}“Al no haberse informado en forma suficiente a la Convocante acerca de la situación real de la contabilidad de la empresa, no se observó la obligación de “revelación plena” consagrada en el artículo 15 del Decreto 2649 de 1993, que dispone que el ente económico debe informar en forma completa “todo aquello que sea necesario para comprender y evaluar correctamente su situación financiera, los cambios que esta hubiere experimentado”, entre otras circunstancias.” La compradora en este caso no estaba obligada a un escrutinio distinto del que surge del contrato y del que resulta de la confianza que tenía, de manera legítima, en que su contraparte contractual cumplía los deberes de los comerciantes y que la información que le suministraba la entregaba bajo los cánones de la más exquisita buena fe. En consecuencia, no es de recibo pretender que la compradora debía emprender una labor investigativa, mucho menos derrumbar la presunción de autenticidad y veracidad de lo que se le suministraba, y en el plenario se explicó de manera clara y suficiente cómo esto último habría constituido otro tipo de trabajo, diferente de una Debida Diligencia.” Balclin et al. v. Gutiérrez Robayo, \textit{supra} note 74. \textit{Translated in} “By failing to sufficiently inform the plaintiff of the real condition of the accounting records of the company, it failed to observe the duty of “full disclosure” set forth in article 15 of Decree 2649 of 1993, that sets forth that the economic entity shall inform in a complete manner “all that is necessary to correctly understand and assess its financial condition, the changes it may have experienced, among other circumstances. The buyer had no obligation to make a scrutiny different from the one arising out from the agreement and from the legitimate trust it had that its counterparty was in compliance with the duties of the merchants and that the information that was been provided was furnished under the most exquisite standards of good faith. As a consequence, it is not valid to pretend that the buyer had to undertake an investigation labor, or overcome the presumption of authenticity and correctness of what was being furnished, and in the process it was clearly and sufficiently explained that this would have consisted of another type of work, different from a due diligence review.”
- It is based on the assumption that the R&Ws are rooted in the doctrine of hidden defects. However, it clarifies that the parties are free to expand the scope and duration of the coverage thereunder.79

The following table summarizes the different doctrines that have been adopted by Colombian courts with respect to the effects and remedies associated to the R&Ws. As it can be noted, even though there seems to be an implicit agreement that R&Ws are valid and enforceable under Colombian law, different views with respect to the scope and duration of the remedies thereunder have been reproduced. This table is a perfect example of the transplant effect in action:

<table>
<thead>
<tr>
<th>DECISION</th>
<th>Breach of Contract</th>
<th>Freedom of contract</th>
<th>Vicio del consentimiento</th>
<th>Hidden defects</th>
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<td>Remedy</td>
<td>Resolution or specific performance, and damages</td>
<td>Damages</td>
<td>Resolution (and under certain circumstances damages)</td>
<td>Resolution or price adjustment</td>
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<td>Statute of limitations</td>
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<td>ten years</td>
<td>two years</td>
<td>six months</td>
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<td>Balclin et al vs. Gutierrez Robayo (2011)</td>
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<td>SCJ (2013)</td>
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</table>

79 “Es posible que las garantías de orden legal sean ampliadas por la voluntad concertada de los contratantes, y en ese sentido nada obsta para que el vendedor se comprometa a sanear los eventuales defectos de la cosa vendida como a bien lo tenga y por el tiempo que estime suficiente.” Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, 16 Diciembre 2013, “Salazar Ramírez, Ariel”, Ref. 11001-3103-023-1997-04959-01 (Colom.). Translated in “It is possible that the guarantees set forth by applicable law be expanded by the meeting of the minds of the contracting parties, and in that sense nothing forbids that the seller commits to cure any potential defects of the asset being sold as it deems fit and for the time it considers sufficient.”
The foregoing example suits adequately the bottom-up transplant model depicted in this paper. In doing so, it provides case-to-model confirmatory feedback. In sum, R&Ws were transplanted from the Anglo-Saxon system to Spain and Colombia. It seems to be uncontested that in each case the transplant was orchestrated by Spanish and Colombian law firms. Such transplant has raised a significant debate regarding the place of R&Ws in the Spanish and Colombian systems, to which they are alien. As shown, the effects of R&Ws vary depending on how they are construed (misread) under the local rules of each jurisdiction. Depending on where one stands in that regard, a breach of R&Ws can be asserted as the basis for resolution or specific performance (which are, interestingly, not remedies that would be generally available as a result of a breach of R&W in the common law) or the basis for damages. It will also determine the applicable statute of limitations. This situation has created a significant amount of uncertainty in this respect, which I speculate may have increased transaction and information costs in the context of acquisition agreements. Upon the passage of time, Spanish and Colombian courts were handled the mission to determine the correct meaning and effects of R&Ws, and in this

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80 My research has shown that this model, with minor variations, is consistent and also explains how law has been transplanted to other countries of reception, such as China. Author Li-Wen Lin has shown that the transplant of global distribution agreements into China follows a strikingly similar pattern. His words are remarkably consistent with my thesis: the thesis in this Article is that multinational companies, backed by their strong bargaining power, have transmitted a new legal order to developing countries through contracting with local suppliers and that such transmission may be interpreted as a form of legal transplantation. This kind of legal transplantation is different from the usual type in several aspects. First, it is multinational companies (non-state actors) rather than states playing a key role in the transplant process. Multinational companies' strong bargaining power as the source of authority and non-legal institutions as contract enforcement mechanisms make the transplants possible. Second, the vendor codes themselves are not government-mandated laws. Yet, they have an effect of approximately reflecting international law or multinational companies' home-country law or even the already transplanted but poorly enforced law in receiving countries. Third, this kind of transplantation is a response primarily to market demands rather than to political considerations. Economic and social pressures in the multinational companies' home countries are the ultimate forces behind this type of legal transplantation. When a law is transplanted from one state to another, the viability of the law in the new environment depends on numerous factors external to the quality of the transplanted law itself. Basically, the outcome of a legal transplant can be mutation, withering, or, albeit rarely, unscathed survival”. Li-Wen Lin, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, 57 No. 3 Am. J. Comp. L. 716 (2009).
endeavor have which to a major extent have reproduced the uncertainty. Legal scholars have assumed the task of putting together a consistent story of the transplant which eases the initial uncertainty. Though the transplant does not seem to have been perfectly assimilated yet since there is still some degree of uncertainty remaining, network and learning externalities are forming as a result of this process benefiting past and future uses of R&Ws by legal practitioners.

(vi) Other legal transplants

The foregoing are but two examples of contractual legal transplants. I sustain in this paper that there is a large number of similar contractual devices that have been transplanted from the U.S. to Colombia and other jurisdictions. In my opinion, such transplants can be explained, with occasional variations, by resorting to the theoretical framework I have described in the previous pages. More importantly, the dust is still to settle in connection with such devices and their place in the local legal context into which they have been transplanted is still to be conclusively determined.

I can think of several contractual devices of the CLCM that adjust to this model. The following are other examples of legal transplants that, in my opinion, offer a promising field for a research program which I believe is unavoidable in order to accomplish a well-founded comparative analysis of contract law:

- Material adverse effect
• Non-compete agreements
• Enforceability of shareholders agreements
• Break-up fees
• Drag along and tag along rights
• Put and call options

IV. CONCLUSIONS

This paper suggests a model of contractual innovation that takes into account the bottom-up transplant of legal devices from the core to the periphery. This model properly weighs the tension and differences between places of production and places of reception and the process of misreading that goes along with the transplant. It serves to explain the innovation that has been produced as a result of the influence of common law contracts in Colombia and South America. Evidence shows that this model can be generally applied to the process of transplantation in many jurisdictions around the world. The main conclusions are summarized as follows:

a. The common law contractual model has been transplanted to Colombia and South America.

b. The transplant has been primarily operated by PLFs, which have acted as the linkage between the place of production and the places of reception.

c. The role of PLFs as linkage providers is twofold. For one side, PLFs have incentives to operate the transplant since to some extent they internalize the
benefits, while the transplant process externalizes certain costs to the legal system. On the other hand, they act as reputational intermediaries and generate network and learning externalities. The transplant of law is positively correlated with economic development. The net outcome of this process is positive.

d. The devices that have been transplanted have been or may be misread (in a Lopez-Bloomian sense) and, for this reason, in its first stage, the process of transplant entails some degree of distortion and uncertainty. Uncertainty is a cost widely spread. This is also referred to as the transplant effect.

e. So far the descriptive part. Going forward, I sustain that the initial uncertainty may be mitigated by learning and network externalities. This network consists of practices, ideas, beliefs, judicial decisions and the work of scholars, all produced or issued in the place of reception to put together a consistent story of the transplant.

f. The transplant of best reasonable efforts and representations and warranties adjusts to this model. These devices have been transplanted from the common law, they have been widely used in Colombia and other jurisdictions and have generated a considerable amount of uncertainty. I believe these devices are being and will continue to be incorporated into a network that will grant them a new local-specific meaning. Upon this understanding, they cease to be mere mimesis of exogenous legal products and the process of transplantation/transformation is completed.
The bottom-up transplant model explains other transplants that have become a major element of contract law in Colombia. As such, it can be a powerful tool to approach a comparative study of contract law from the periphery.

References


Ángel Carrasco Perera et al., Fusiones y Adquisiciones de Empresas (Cizur Menor, Navarra: Aranzadi, 2004).


Bloor v. Falstaff Brewing Corp., 601 F.2d 609 (2d. Cir. 1979).


Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, 16 Diciembre 2013, “Salazar Ramírez, Ariel”, Ref. 11001-3103-023-1997-04959-01 (Colom.).


*De las Audiencias y Chancillerías Reales de las Indias*, (Jan.7, 2015, 2:30 pm), [http://www.congreso.gob.pe/ntley/Imagenes/LeyIndia/0102015.pdf](http://www.congreso.gob.pe/ntley/Imagenes/LeyIndia/0102015.pdf).


Edmond Champeau & Antonio José Uribe, *Tratado de derecho civil colombiano* 1 de las personas 5 (París Larose, 1899).
Eric A. Ponser, Agency Models in Law and Economics (The University of Chicago, 2000).


Guillermo Ospina Fernández, Régimen General de las Obligaciones (Editorial Temis, 8th ed. 2008).


Holger Spamman, *Contemporary Legal Transplants: Legal Families and the Diffusion of Corporate Law* 2 (September 15, 2006).

Immanuel Maurice Wallerstein, El Moderno sistema mundial (Siglo XXI de España, 1999).


Jean Domat, Las Leyes Civiles en su Orden Natural (Impr. de Jose Taulo, 2nd ed. 1841-1844).


Jorge Arango Mejía, El Código Civil y la Constitución de 1991 6-7 (Temis, 2000)


José Alejandro Bonivento Fernandez, Los Principales Contratos Civiles y su paralelo con los comerciales (Ediciones Librería del Profesional, 18th ed. 2012).


Julien Bonnecase, Elementos de Derecho Civil (José M. Cajica, 1945-1946)


Laureano Gómez Serrano, Guía de cátedra y sinópticos de Derecho Civil – Parte General 130 (Universidad Autónoma de Bucaramanga, 1987).
Li-Wen-Lin, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 No. 3 Am. J. Comp. L., 711 (2008).


Marcel Planiol, Jean Boulanger & Georges Ripert, Tratado de Derecho Civil: según el tratamiento de Planiol (La Ley, 1963-1965).


Ramón E. Madriñán de la Torre, Principios de Derecho Comercial (Temis, 1980).


http://www.colfuturo.org/seleccionados/

http://www.uis.unesco.org/EDUCATION/Pages/international-student-flow-viz.aspx