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Exclusivity agreements in international business operations; Risks and best practices.

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Abstract

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Abstract: This thesis will address the question of exclusivity clauses in business operations at the international level, consequentially establish what the risks are, and determine the best practices for entering into an exclusive commercial agreement in an international context.
I will explore the international business environment and how companies interact with other undertakings in this environment. We will proceed by studying exclusivity in its different forms and aspects in a contractual context and dissecting exclusivity dealings exposing its features and effects, as well as looking at them through a dimensional prism. This will serve to understand and see how exclusivity terms affect the parties to an international business arrangement and the effects they have in the market they operate.
Using principles of legal theory such as freedom of contract, and using a theoretical approach, a study of the effects of exclusivity will be elaborated considering the factors and attributes inherent to the inclusion of exclusivity terms in a commercial contract. Classifying and studying the effects of exclusivity considering the effects as isolated items and how these shape the relationship between the parties and play a role in international business operations. We will examine how exclusivity clauses position the parties in respect to their contractual relationship.
Laws and regulations applicable to exclusivity agreements will be identified and considering these, the applicability and validity of exclusivity clauses and agreements will be scrutinised. Competition law and employment law will be the main fields of exploration to observe and study how these two fields of law regulate exclusivity terms in view of the horizontal and vertical direction of exclusivity agreements between the parties. We will use the examples of EU and UK regulations as they have a different angle in approaching the validity of exclusivity agreements.
Following the identification of the main elements of exclusivity agreements, based on Competition end employment regulations as well as business elements, I will classify and identify the risks that the use of exclusivity agreements has for international commercial agreements, from an operational and legal perspective.
Considering the risks and the features of exclusivity agreements, I will propose best practices to avert or remedy the risks and to achieve the best efficient use of exclusivity agreements.

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1. Introduction.

1.1. Overview and definition.

Companies, as a manifestation of human trade, have historically tended to grow, expand, and reach further than their starting point. Companies, especially the larger ones, have benefited from and to the advancement of technology and communication which, has paved the way for the different markets to make their way towards the global economy.[1]

The global market can be a field difficult to operate in for businesses unless their structure and strategy are aligned to deal with the challenges presented by carrying on business in different jurisdictions. Such challenges come in different forms, lack of knowledge of the specific jurisdiction, limited access to the market due to unacquaintance of local partners, suppliers, resellers, distributors, and similar.

An instrument used in the process of dealing with the challenges above will be in the form of a commercial contract. This would be something that will be adapted taking into consideration the risk posed by such challenges and will require the use of certain clauses that would preserve the interest of a particular business, whether is the undertaking doing business abroad, or a local partner and even more interesting, a combination of all. These instruments embody all the intricacies, details, and rigging of the commercial, or business relationship. Also, some contracts are influenced by predominant instruments, such the case of employment contracts as a part of the local business operations of an international conglomerate. The laws and regulations of local employment relationships cannot be ignored when designing or assessing the legal viability of an international business operation.

An exclusivity dealing implies something being excluded from something, and that could be understood as a restriction. However, exclusivity dealing can have different effects, some may not be as intuitive as others. Exclusivity can indeed enable a party, that is excluded from

[1] P Samantha Yoder, John K. Visich, Elzotbek Rustambekov, *Lessons learned from international expansion failures and successes* (2016) The Journal of the Kelley School of Business, Indiana University V. 59. Issue 2 pp. 233-243 P. 233, 234

performing, to increase the profitability of their overall operations. On the other hand, exclusivity can restrict a party in a way that may disable it from performing or operating in the market overall.

Exclusivity agreements, due to their complexity in terms of effects, and positioning of the parties in respect of each other and their surroundings, expose the parties and their business arrangement to certain risks. Some of these can be tackled at a contractual level and do not preclude the exclusive element of the dealing from being valid, other risks may compromise the validity of the agreement and the business arrangement as a whole. Therefore, when entering into an exclusivity agreement is fundamental to consider existing and potential risks, as well as forming the agreement in a way that all factors are considered, including the counterparties' interests, the international nature of a transnational commercial dealing, and the position of the exclusivity agreement inside an international business operation.

Some companies will proceed straight to operate in a foreign jurisdiction, alone or with the cooperation of a local company, some other businesses may see greater chances of success for their international operations if they approach other companies to join resources and interest,[2] as some local companies at a local level may conclude that they will be able to comply with the needs of a foreign entity if they join forces with another local entity. Any of those situations will end up in a contractual relationship, which will have a particular share and scope and will have effects on the parties and beyond them, as we will see further down this thesis.

Exclusivity agreements and exclusive relationships are regulated from different legal fields; competition law[3] rules over how the undertakings' actions and arrangements affect the market and prevents businesses from creating cartels[4] and in the case of employment law it prevents employers from having an unreasonable grip on the freedom of employees.[5]

[2] Maria Elo, *International Expansion through joint venture: Situations and strategies from a network perspective.* (2009) P.20

[3] The Sherman Act, Canadian Competition Act, and the TFEU all regulate undertakings activities in respect of the market. We will elaborate further below in a specific chapter.

[4] Art 101(1) TFEU

[5] Section 3 Chapter 3, Finnish employment contracts Act (55/2001)

It could be argued that the law is an instrument to moderate the free market in its most raw aspect, whereby the actors who are in a privileged position of power would force their interest over the less privileged actors.[6] It is important that regulating exclusive relationships does not cross beyond the threshold of establishing legal limits to maintain an overall level of fairness, whereby all actors in the market have the freedom to conclude how they want to dispose of their rights without being compelled by circumstances imposed by other actors.

1.2. Aim and Purpose.

This thesis will dissect exclusivity agreements into their basic elements and identify features and aspects that are relevant to the dynamics of an international commercial operation.

We will examine features of exclusivity agreements, considering the position and relationship of the parties as well as how they relate to a business arrangement that includes exclusivity terms, which will lead us to understand the different elements that come into play in exclusivity agreements.

Once the elements and effects of exclusivity agreements have been disclosed and elaborated upon, we will proceed to place these agreements in a legal framework and study legal systems from different jurisdictions to see how these affect exclusivity agreements. By approaching exclusivity agreements from an employment law and competition law this thesis will tackle exclusive agreements from those points of view which will serve to understand the legal aspects of these agreements in commercial relationships of those two main legal viewpoints under the scope of a commercial relationship.

After we have established what the components of exclusivity agreements are and how these are regulated, we will continue studying the risks that entering into exclusive dealings entails in order to reach recommend best practices to be applied to the use of these agreements.

[6] Shubham Krishan, *Roscoe Pound Theory Of Social Engineering.* *https://www.legalserviceindia.com/legal/article-10837-roscoe-pound-theory-of-social-engineering.html*

In this thesis we will study exclusivity agreements, in their different forms, exploring their legal and practical aspects and how they are regulated. The impact of exclusivity clauses in international business operations will be addressed, and the thesis will examine best practices when using such clauses.

The term exclusivity and its formulation as a clause will be explored to achieve a full view about what is the meaning and effect of adding an exclusive effect to an agreement as an instrument for a company to influence a specific transaction, their business strategy and in some respects, the market.

The application and implications of exclusivity clauses on different fields applicable in business operations such as employment, competition, and general contract law. This will be done using a comparative approach to different legal systems to conclude how those systems regulate exclusivity in those fields.

We will continue looking at commercial contracts where exclusivity terms are included from an international scope to see the effects that such clauses have both between the signatory parties and in the markets they operate. This will allow for an understanding of where these clauses are used, and how they affect the instrumental effectivity of commercial contracts for undertakings that choose to use exclusivity clauses. This will, in some cases, be beneficial for what the parties intend to achieve due to the versatility provided by exclusivity clauses, and in other present certain risks due to regulatory obstacles or due to vulnerabilities presented by the limitations, which are natural to such clauses.

This master thesis will explore best practices that, after identifying, analysing, and studying the uses and regulations of exclusivity agreements in an international context, would be beneficial when considering engaging in exclusivity commercial arrangements in an international context.

The goal is to understand what exclusivity agreements are by deepening into their composition that allows them to take different forms and play various roles depending on where their execution is aimed at. Consequently, this thesis will serve to unfold to the reader the blueprints of exclusivity agreements mapping how their different elements interconnect

and give shape to a contractual relationship vested with elements of exclusivity, which would have different uses, restrictions, risks, and benefits for an international business operation.

1.3. Limitations.

The limitations faced by the author in elaborating the present thesis are based on the limited literature specifically addressing exclusivity agreements from a fundamental point of view.

The study and elaboration of the elements, dimensions, and features of exclusivity agreements are limited to the author's understanding and observation of exclusivity agreements in various business scenarios such as business expansion strategies that include partnerships with other undertakings in different jurisdictions.

Case law and legal literature are mainly limited to competition and consumer law, which restrict the literature applied to the fundamental nature of exclusivity agreements with relevance to the parties, their contractual relationship, and the effects thereof, for them and beyond their contractual scope.

1.4. Method.

Part of the elaboration of this thesis will be based on the professional experience of the author. Contracts drafted by the author will serve as an inspiration and reference for some arguments and statements declared by the author in the thesis. Similarly, professional experience will serve as a base for the elements and features of exclusivity clauses. Negotiations that have taken place in the drafting of exclusivity agreements include.

This thesis will use various methodologies for its different chapters and topics, as each segment will explore exclusivity agreements in progressive layers. Each section will use a methodology suited to its nature.

Basic research will be used to study the use of exclusivity agreements in international business operations and to recognize the main elements and features of exclusivity agreements. These will be dissected and using basic methodology, this thesis will identify and explain their different aspects.

A Correlational approach will be taken to recognize how different features lead to different effects caused by exclusivity agreements. These effects will be studied using basic research to examine the characteristics of these agreements based on the source of the effects and how they affect the parties, the business arrangements, and the environment influenced by the exclusivity agreement.

Regulatory aspects of exclusivity agreements will be studied using a comparative approach for regulatory aspects of exclusivity agreements. We will study US law, EU Law, UK, and Canadian law mainly, due to their compatibility and similar approaches to exclusive business relationships, employment, and competition law-wise. Seeing the similarities of these legal systems will also allow discern the particular angle taken by these jurisdictions when approaching the legal values addressed by them.

By applying a descriptive method in exploring the risks involved in using exclusivity agreements this thesis will conclude by establishing a set of best practices that will be studied using an applied method. A basic approach will be taken to elaborate and conclude best practices comparing the risks and the benefits of exclusivity agreements.

1.5. Literature Review.

The literature related to exclusivity agreements consists mainly of legal theory, positive law, and case law. These three types of literature address exclusivity clauses by analysing the effects of exclusivity agreements and the elements affecting them, as well as how the legislator regulates exclusivity dealings and how the courts apply and interpret the law in courts of law.

The legal theory that applies to exclusivity agreements approaches the relationship formed between the parties to an exclusivity dealing, how their interests are balanced and the emergence of controlling situations that may or may not end up in a situation of unfairness.[7]

The effects of exclusivity agreements are synthetised from the nature of the relationship of the parties due to the exclusive nature of a commercial contract, anti-competitive, procompetitive levels relationships.[8] The effects that go beyond the parties are also considered, as authors consider the effects that they have in collectives such as consumers or entire commercial environments such as the market.[9]

Literature about Legal philosophy will be employed to address their liberty to shape their agreements under the principle of freedom of contract and to see what the limitations are, and why. The commercial limitations inherent to exclusivity dealings cannot always be seen as an exercise of freedom as the effects they could have would harm others which leads us to the second sentence in this paragraph.[10] This is critical as the philosophy behind the use of exclusivity terms between contracting parties needs to be considered to assess the feasibility of a fruitful commercial relationship. The parties should be allowed to act according to their interests as it is a mandate in business to protect business interests, otherwise a commercial arrangement born from parties that do not consider their business interest would be a fallacy, but those self-interests should not be the only factor to consider when building the motor of a business arrangement, as the aim to look after those interest cannot be the cause of harming the interests of the other parties.[11]

"Efficient breach" is an item of Contract Theory that needs to be considered when entering into exclusivity agreements, and legal literature addresses this by explaining how this theory comes into practice and how its elements come into play in the development of a contractual relationship. Literature addresses this topic by looking at the effects that efficient breach has

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[7] Sandra Marco Colino. *Vertical Agreements and Competition Law : A Comparative Study of the EU and US Regimes*. 2010 Hart Publishinge

[8] Richard M. Steuer,Exclusive Dealing in Distribution (1983) 69 Cornell L.Rev. 101-125.

[9] *The American Economic Review*, vol. 77, no. 5, 1987, pp. 1057–62. *JSTOR*, The Competitive Effects of Vertical Agreements: Comment Page 1057

[10] Jonathan Wolf, *The Legal and Moral Aspects of International Trade: Freedom and Trade (1998) Volume Three*, Taylor & Francis Group. *P. 84*

[11] John Stuart Mill" On Liberty" (first published 1859, Batoche Books 2001) Chapter II, Of Individuality, as One of the Elements of Well-Being. P. 52

when a contract as a promise, and exchanged expectations, is broken.[12] Literature on efficient breach explains that specific performance is an exceptional remedy, and expectation damages are the norm.[13] Efficient breach literature makes a point in the value of a transaction, mainly between buyer and seller. In the case of exclusivity agreements, this is only one factor to the exclusivity agreement, as there may be a seller and a buyer in the case of exclusive distribution agreements, but it is not always the case in certain horizontal relationships where the parties restrict themselves otherwise.

The risks that efficient breach poses to the parties in an exclusivity dealing are addressed in Contract Theory literature using remedies. Certainly, a pecuniary identification will be granted to the loss of the non-breaching party, but literature fails to estimate the lost position as itself due to the breach of exclusivity. However, legal literature also mentions the use of liquidated damages as a means for the parties to assess and measure their risks.[14] Theoretical conceptions such as costs conception and indifference conception provide a view of how the party who suffered the breach of an exclusivity clause would position itself when seeking remedies.[15]

The exclusive element in agreements such as employment contracts and exclusive service agreements between a principal and an individual acting as a contractor, is reviewed by literature in light of the vertical relationship between the parties. These types of agreements are covered mainly by legislation and case law.

Different Employment acts as well as positive laws related to vertical contractual relationships give a glimpse into how different jurisdictions understand restrictions for employees to take employment with other parties and how case law deals with contractors not being confirmed as employees but giving parallel rights. Using different laws and acts will serve to compare how exclusivity employment agreements address the exclusive nature of the vertical relationship internationally.

[12] Francesco Parisi, *The Oxford Handbook of LAW AND ECONOMICS*, Vol 2. Pag. 20
[13] Eisenberg, M. The Theory of Efficient Breach and the Theory of Efficient Termination. (2004). *UC Berkeley: Berkeley Program in Law and Economics*. P. 2
[14] Francesco Parisi, *The Oxford Handbook of LAW AND ECONOMICS*, Vol 2. Pag. 23
[15] Eisenberg, M. The Theory of Efficient Breach and the Theory of Efficient Termination. (2004). *UC Berkeley: Berkeley Program in Law and Economics*. P. 4

The Finnish employment contracts serve as an example of grounds for exclusivity to be an integral part of an employment relationship. It allows to identify two main elements, the sanctioning of exclusivity agreements between employer and employee, and the conditions for the validity of the exclusive element.

In the United Kingdom, the exclusivity element of the employment contract or the invalidity thereof is specified in the Regulation of 2022[16] and provides a different perspective on addressing the exclusivity element of exclusive employment contracts. Similarly, the United Kingdom's Employment Rights Act[17] addresses the exclusivity of zero-hour employment contracts.

The Zero-Hours law (Regulation 2022) is an interesting reaction to the situation that workers under a zero-hours contract experience.[18] When employees under such contract are subject to exclusivity terms an element of unfairness can be detected due to the unbalanced situation created by it.[19] This is, the element of unfairness in an exclusive zero-hour employment contract, is not due to the external circumstances of the employment relationship where the parties were indifferent when entering into it, but a situation whereby the employer is aware or could be aware of the situation of the necessity of the employee, thus taking unfair advantage of the situation for the exclusive benefit of the employer.[20]

The unfair advantage mentioned above is not always applied to all workers, zero-hour contracts are not generally applied to highly skilled workers.[21] This can be a sign that highly skilled workers are in a position whereby they do not have the necessity to accept such conditions and are the low-skilled workers who due to their circumstances are in need to take what they are offered.

[16] The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022
[17] Employment Rights Act 1996
[18] A zero hour contract, whilst being a legally binding documents, provides no certainty of expected working hour, or income, to the employee, setting such an employee in a predicament and relying on the uncertainty of incoming working hours. The employer would have full control over the employee's work and its availability.
[19] Rick Bigwood, Contracts by Unfair Advantage: From Exploitation to Transactional Neglect (2005), Oxford Journal of Legal Studies, Vol 25, N°1 P.66
[20] Rick Bigwood, Contracts by Unfair Advantage: From Exploitation to Transactional Neglect (2005), Oxford Journal of Legal Studies, Vol 25, N°1 P.91
[21] UK Office for National Statistics*, Labour market economic commentary: January 2020* P. 10. https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/labourmarketeconomiccommentary/january2020/pdf

The ban of exclusivity clauses in zero-hour contracts allows the employees to free themselves from their income being at will of the employer, by having the possibility to seek supplementary sources of income, thus shifting the advantage element towards a level of fairness.[22]

The Spanish worker's statute sanctions the *exclusive dedication* of a worker in certain conditions, this is comparable to the other pieces of legislation that address exclusive work agreements, that need to be contemplated within the scope of a business arrangement that may include the requirement of exclusive working conditions.[23]

Canada acknowledges the relationship of independent contractors as a working relationship separated from employment, but with characteristics that could be similar, this would be useful to see alternatives when using exclusive working agreements.[24]

European Union law is used due to its transnational nature as it affects different jurisdictions simultaneously. Specifically, the Directive applicable to Working Relations[25] is interesting as it provides insights into the angle that the European Union takes when dealing with exclusivity terms in working agreements, and this is interesting as literature that applies to the working element in international exclusivity agreements needs to consider international legal instruments such as EU Directives.[26]

The Commercial Agents directive[27] mentions the acceptance of territorial restrictions which are relevant to the territorial element of exclusivity agreements.

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[22] Justin Madders, an MP in the UK Parliament, during a debate on Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022, on Thursday 20 October 2022. Addressed several times that the banning would help to make the labour market fairer for low-income workers. https://hansard.parliament.uk/Commons/2022-10-20/debates/cb459dd0-c617-4637-9430-c8d3d900a37f/details

[23] Art. 21 R eal Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores. Art 21 https://www.boe.es/eli/es/rdlg/2015/10/23/2/con

[24] Labour Relations Act, 1995, SO 1995, c 1, Sch A, <https://canlii.ca/t/553r7> retrieved on 2023-08-18 (definitions)

[25] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union

[26] Ibid.

[27] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

For issues concerning "choice of law" that would lead to more favourable laws towards the use of exclusivity contracts, we will be using the Rome I European Union regulation.[28]

The Treaty on the Functioning of the European Union is a starting point and fundamental source for understanding the red lines set for commercial dealings.

Directive (EU) 2019/1 of the European Parliament and the Council of 11 December 2018 addresses the protection from distortion of the internal market. The Canadian Competition Act will be addressed to see how exclusivity agreements are regulated in Canada.[29]

The EU commission issued guidelines for compliance in horizontal cooperation agreements and vertical restraints which will be useful to see how exclusivity dealings can align with the principles of the EU.[30]

In the USA the Sherman Antitrust Act and the Clayton Act serves as the main tool for measuring compliance in exclusivity dealing with relevance in the market, we will use these acts to support the thesis.

The Spanish commercial code will be mentioned about the possibility of restricting forms of trade without infringing other legal principles such as freedom to work and protection of commercial interests.[31]

[28] REGULATION (EC) No593/2008 if the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
[29] Canadian Competition Act (1985)
[30] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance 2.2.3, and
Communication from the Commission COMMISSION NOTICE Guidelines on vertical restraints 2022/C 248/01 2.1.
[31] Código de Comercio Real Decreto de 22 Agosto 1885 LEG1885\21 Pag. 40,

2. Exclusivity relationships: features and dimensions.

In this chapter, we will dissect exclusivity clauses and classify their different elements and features. Exclusivity agreements are an expression of the parties' interests conjoined to the parties' expectations. We will take a dimensional approach to balance the interaction of these features. The element of exclusivity can play various roles and move its effects alongside the positioning of the parties as well as shifting its effects between the parties. The parties, their roles, and the object of exclusivity are points of source for analysing exclusivity agreements. These exclusivity agreements can take different forms and exclusivity can take a predominant role in a commercial contract or be relegated to a secondary part of the business arrangement.

2.1. Nature of exclusivity contracts and contracts with exclusivity clauses.

Whether we talk about contracts with exclusivity clauses or exclusivity contracts the role and effect of exclusivity will take place to a certain degree. However, although we could effectively refer to either one of them as exclusivity agreements, in general. The approach is however different, despite in conjoint to the effects and purpose that exclusivity may have in a commercial arrangement.

Sometimes for certain companies, the main goal of taking on business with other companies is their interaction concerning the market where they operate, so sometimes they may want to limit the activity of other undertakings, and this will be expressed in the exclusivity to be the main goal and governed body of an agreement, therefore the sole purpose will be contained in this agreement. The benefit of one company over the other company lies in the leverage achieved in the specific market. Now this can have regulatory implications in terms of restricting competition.[32] The nature of these specific commercial relationships lies in the

[32] Case C-680/20 ECJ. Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (2023) para. 7

fact that the main goal and focus of the relationship between the companies is granting their respective undertakings a position of operating they would have otherwise if they had not been granted such right. It is now important to notice that there is a difference between the scenario whereby one company was the only party having the possibility to perform an activity or operate in a specific market or field, than if it was not. That would be the case when a company is the exclusive owner of certain technology and therefore is the only party to commercialise it. That case would be the first one mentioned above, as it is the only party that has the right to commercialise such technology, and it is in the position to grant other parties the rights they have. The second case would be when a company is not the sole party with the right to use certain technology or operate in a given field, and it would agree with another or multiple parties, to exclude itself from operating in that field or using such technology. There we can see that such exclusivity is passively granted, as it does not come from a right given by its owner, but such exclusivity is acquired by a third party excluding itself from taking an action or performing an activity.

Now, in those situations where two or more undertakings intend to enter into a business relationship with more significance and scope than the restrictive effect that exclusivity has, the exclusivity would be a subsidiary part of their contractual relationship. This will manifest in that such exclusivity could serve as a compensatory element to balance the terms of the relationship between the parties. This could take form when a supplier would have otherwise more beneficial terms than the distributor, and the distributor would benefit from the granted distribution rights of the supplier's products.[33] In that case, we need to take into consideration that both parties have an established place in their respective markets and have a symbiotic relationship whereby fill their respective roles in the supply chain but do not depend on each other. However, when for either one of the parties it would be beneficial, but not necessary for its functioning, to have such exclusive right in respect of the other one, and they decide to apply exclusivity clauses in their contractual relationships, is when this would fall in this category of contracts with exclusivity clauses.

One major manifestation of the difference between contracts with exclusivity clauses and exclusivity contracts is the effect that removing the exclusive element would have on the

[33] Case C-680/20 ECJ. Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (2023) para. 7

relationship between the parties. This would display the weight that such an element has in the relationship between the parties and the role it plays in balancing their interest, the risks that would compromise their interests concerning how they interact and depend on each other will be shown by the extent that exclusivity is weighted, in any effect it may have between them, and towards thirds parties, or the market where they operate.

When both parties depend on each other due to their exclusive relationship and exclusivity is intrinsic to their business model we would be referring to the first example, and in that case, their relationship requires the other party, and no one else, to enable both to carry on their operations. The effect that exclusivity has is not disabling each other from conducting business or operating any other way but enabling themselves to conduct business. This is important to point out as their contractual exclusive terms do not arise due to a strategical choice, or for a business strategy, but it is out of necessity.[34]

The scenario disclosed above considers that both parties are exclusive to each other, this is, they are interacting together to conform to a goal and reach an objective, which as stated above enables them to operate.[35] However, there can be a situation when the necessity of excluding a party from performing is not translated into a symbiotic relationship with a mutual benefit towards their active input in the market, but to exclusive the other parties from operating altogether, this would not have an enabling effect to the extent that it has a disabling effect to other parties to operate. In this case, exclusivity is not an element of necessity due to reliance, but an element of dominance by discarding any other party from operating. This can have effects on certain legal values protected by law, such as free

[34] An example," The scope of these commitments goes beyond the European Economic Area. This is necessary in light of the economies of scale that are typical in the semiconductors industry: manufacturers need to produce large amounts of chipsets in order to be competitive. Broadcom's offer makes us comfortable that existing competitors and potential new entrants will have a sufficiently large portion of the market open to them to be credible players in these markets. Statement by Executive Vice-President Margrethe Vestager on the Commission decision to accept commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes Brussels, 7 October 2020, STATEMENT/20/1853

[35] Merz, Jessica Paige, "The effects of exclusive contracts on organizational competitiveness" (2012).Senior Honors Projects, P. 35

competition,[36] freedom of contract, and other social values applied to protect society from the imposition of unfair contract terms.[37]

On the other opposite of the spectrum of reliance on exclusivity, there is a situation when both parties do not rely on each other to conduct their business. In this case, the parties' starting point is regardless of any other party, and engaging with another undertaking contractually that would include a certain extent of exclusivity, whether as an actor in the market or a link in a supply chain, we could see that it would cause a restrictive effect on the party that is excluded from acting.

As revealed above, depending on what place the terms of exclusivity have in the contractual intentions of the parties it would have a prominent focus, and at the same time, the effect of such terms will also vary in degree between restrictive effects or disabling effects, whether in operations, competitions, production and other. The more disabling the effect is, the more vertical nature will the exclusivity term have between the parties. The disabling effect would have the counter effect of enabling the other party to operate in the position the other party would without such exclusivity terms being put in place.

Another point is that the element of exclusivity, regardless of the restrictive effect in nature, would have an enabling effect in these cases as it would enable one party, or the commercial operation formed by the parties possible.

In terms of balancing the degree of discretion the parties may have within their contractual framework there may be restrictive terms applied in the form of exclusivity clauses.[38] That would be the restrictive effect these will have, and in contrast with the disabling effects these have a balancing effect, which would lay down a horizontal nature of the profile of the interaction between the parties, as this will be elaborated further down.

[36] Competition in the internal market is mentioned in Article 101 of the Treaty on the Functioning of the European Union (TFEU)

[37] Rick Bigwood, Contracts by Unfair Advantage: From Exploitation to Transactional Neglect (2005), Oxford Journal of Legal Studies, Vol 25, N°1 P.74

[38] Exclusivity terms can be used as a bargaining chip when negotiation commercial contracts, as in incentive present to a counterparty for entering into a collaboration agreement, or as a prerequisite for a company to distribute the products of a manufacturer.

Due to the above, we could say that a vertical exclusivity relationship between the parties would tend to manifest disabling effects from their contractual relationship in the form of exclusivity agreements or contracts with exclusivity clauses, but the main feature would be the disabling effects of them, as the vertical interest would have a unilateral and vertical direction of interest, thus restrictive the sole interest of one party would have nonetheless a disabling effect on it as an objective or point of consideration.[39]

In cases where exclusivity takes the main role, the enabling effects would take effect instead of disabling or restricting effects, as the exclusivity terms would be implemented in the form of enabling aspects due to cooperation rather than disabling aspects as a result of one-sided interest. The enabling effect can also take place simultaneously to a restrictive effect as the balance of interests would include these restrictive effects for compensatory reasons between the parties, but in any case, the enabling effect would outweigh the restrictive effect and any restriction put in place by an exclusivity clause or agreement would not have such goal, as the outcome would not require any party to exclude themselves from the benefit or object of a given business activity.

From this point forward we would refer to exclusivity clauses in agreements and exclusivity contracts as exclusivity agreements when referring to both. The effects and different general characteristics of exclusivity agreements have been mentioned above. Now we can put those general characteristics forward and see how they are in practice and what sort of features they present. It is convenient to put the practical examples and concrete types and features in light with the effects and characteristics mentioned below in this thesis,[40] as it can help to extrapolate an intrinsic nature of such legal mechanisms as exclusivity agreements. From this point forward we would refer to exclusivity clauses in agreements and exclusivity contracts as exclusivity agreements when referring to both.

[39] Francine Lafontaine, StephenM.Ross, AnnArbor, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, (2005), P. 3
[40] Chapter 4: Effects of exclusivity

2.2. Vertical/horizontal exclusivity

Certain business relationships are characterised by their vertical or horizontal nature. Horizontal relationships could be defined as those where the parties are at similar power positions in the market as one would not depend on the other, and vertical relationships would be those whereby one party has more control or power over a certain market or supply chain.[41] Exclusivity clauses can have a balancing effect on those relationships in the way that the undertaking with less control over the market can attain further control by having exclusive access or operational control over a market that the other party may have had in the first place. In horizontal relationships, the parties have a similar position in their respective fields so exclusivity agreements between them would have a strategic focus and affect the market, as the impact of the exclusivity would be focused outwards, rather than inwards as it would be the case of the exclusivity agreements between parties in a vertical relationship.

However, that is not without its counterbalance, as such exclusive rights may as well carry certain exclusive obligations, and this is because if one party is willing to grant such exclusive rights, this might be in exchange for an expectation transferred to the other party.

It is important to note, that granted exclusive rights, exclude other parties from exercising them, including that party granting such rights. Therefore, if the parties are willing to have a business relationship based on balance, consideration must be expected. This has different dimensions, as in the relationship supplier-distributor, exclusivity can lie on either one of them, or both, whereby the distributor would be the exclusive holder of distributing rights for the supplier's goods and services in a certain jurisdiction, or all the way around. There is also the dimension of both supplier-distributor holding concurring exclusive rights in their respective roles.[42]

[41] In the authors' professional experience, businesses that are negotiating exclusivity agreements understand their exclusive relationship considering their interdependence. Horizontal relationships are understood by some businesses as dealing *inter pares,* whereby vertical exclusive relationships are expressed in exclusive cooperation agreements when a party has control over a business aspect around which exclusivity is negotiated. The author has drafted cooperation agreement between parent companies and its subsidiaries/daughter companies where exclusivity has been expressed vertically and horizontally.

[42] Two undertakings in a vertical operational chain, can have both vertical and horizontal relationships. As is the example of a supplier and a distributor when both the distributor and supplier exclude each other from dealing with third parties.

Exclusivity relationships are present in most legal fields; from the most general category of business law to a specific one such as employment law. The use and motivation of these kinds of relationships vary, as in employment law it would appear obvious that an employer would expect its employees not to work for its competitors, in a supply and purchase contract the parties start from a different position as their respective obligations are not pre-established in such a way that limiting the freedom of one of the parties would be expected for the relationship to work as intended.

A horizontal relationship can also be developed from a vertical relationship. This would be the case when parties to an international business operation establish exclusivity terms amongst themselves, but they would have a restrictive effect on other parties out of the scope of their dealings. An example of this would be when one major supplier of First Necessity products enters into an exclusive purchase contract with a major chain of low-cost grocery stores, this would affect other local First Necessity product suppliers. That can have several other socioeconomic effects.

Depending on the type of contract and the extent to which the exclusive rights are granted, the transfer of rights will have different effects. Sometimes the parties wish to limit the scope of their exclusive agreements within a territory and sometimes they would limit the exclusivity to other factors such as the stage in the supply chain, whether for instance, as distribution or manufacturing.

2.3. The interaction of actor and action

The source for exclusivity, as the motor or motivator behind an exclusivity agreement can be looked at from the parties' perspective or the perspective of their activities.[43] Actor exclusivity is the type of exclusivity that indicates that the parties involved are incentivised to be in a business relationship regardless of their performance,[44] whereas action exclusivity

[43] This is the case when "who they are" and "who are they" is the driving factor.
[44] Is important to point out that despite the performance of the parties not being a point of focus it is not completely irrelevant as the identity of a party can be affected by its performance.

would point to the performance of the parties rather than their identity or goodwill. There can be situations when these two types can interact during the commercial relationship.

- **Actor exclusivity.**

This is the type of exclusivity that would focus on the parties who are dealing with each other and not on the point or goal of performance, the objective is to restrict who the parties are engaging with.[45] This would be the case of exclusivity clauses in some employment contracts, whereby an employer requires the employee not to take up employment with any other employer. In this case, the restriction lies in the employee not being able to be employed by any other party and the specific employment tasks are not relevant but the employment itself is.[46] Similarly, we would take the example of two companies, one with a reputation that has been damaged for ecological reasons, and the other that has a substantial positive reputation in ecological sustainability. The first company happens to share such a negative reputation with its competitors and would benefit from a reputational facelift. However, it would be optimal to stand out by being more reputable than its competitors and decide to engage the second company and seek an agreement. The first company does not need to consider the activities of the second company, but only its reputation, so it could approach it with an exclusive sponsorship agreement, whereby it could not associate itself with any of its competitors. One remark that deserves attention, is the case of demanding exclusivity from contractors, as in exclusive service contracts. This could see its place in a situation where a business following its strategy decides to retain the services with individual professionals, due to their expertise, whether in executing the strategical goals of an international operation or in performing the specific task in a jurisdiction, there could be legal implications in such cases.[47]

- **Action exclusivity.**

Here, the subject of exclusivity is not who the actors contractually engaged are, but the actions they are engaged in. In this case, contrary to "Actor exclusivity", as discussed in the

[45] The author has drafted agreement between a company and its local representatives abroad, where the brand had a primary role on their agreement, performance has been secondary, if not irrelevant.
[46] Let's have the example of renown scientists or celebrities, where the employer is incentivized by the status of the employee.
[47] It is important to ensure that exclusivity terms in employment contracts are compliant with specific jurisdictions where the employment is based or governed by.

previous paragraph, the parties are focusing on a specific action or set of actions, looking into what the activities of the parties are. Following the examples above, an employee may not be prevented from being the employee of other employers, but certain tasks or jobs could be restricted by a non-compete clause,[48] whereas this would not constitute exclusive employment it may exclude the employee from performing specific activities for, in the instance, the employer's competitors. In the case of companies, sticking to the example of a company and its competitors, these may decide to strengthen their position and agree to exclude themselves from performing certain activities, this could be for different reasons, restricting competition, or securing the provision of services or delivery of specific products.[49] This naturally will have consequences, for the parties involved and the public, as the restrictive effect of competition, may create a situation of unbalance that may or may not be against legal values protected by Law.[50]

Considering the actor and the actions involved, there will be a degree that for these two, will be relevant when forming an exclusivity agreement, depending on what field of operations they interact. This is because none of these elements of actor or action can be understood separately as the party in question would be relevant to other parties for their respective interests due to the actions or lack thereof of the other party. However, as it would be in the example of the impact of concepts such as branding, they tend to have an effect arising from the identity of the undertaking in question rather than due to the specific activities carried out by such entity. In this scenario, the point of exclusivity will have more weight towards the parties involved rather than their specific actions. The opposite situation would be where the identity of a party in question would be irrelevant to the object of the contract and the effect of the exclusivity agreement. This can be seen in the light of the effect sought by excluding a party from acting, the focus of excluding the effects of an actor whereby the

[48] Non-compete clauses restrict the employees from engaging in employment with competitors of the employer. Although they may not prevent them from being employed by a third party, these non-compete terms could serve to limit the risk of competitors benefiting from the employees particular skills or knowledge.

[49] This would be the case of exclusive distribution agreements where the retailer is restricted to sell only one brand of certain type of product.

[50] For some years, in Ireland, Van den Bergh Foods Ltd (HB) provided to its suppliers with cabinets to store such products, years later, Master Foods Ltd (Mars) entered the Irish market as a competitor of Van den Bergh Foods Ltd. and suppliers of HB started storing Mars products. HB wanted to enforce its exclusivity agreements, in the exclusion of other competitors from storing their products in the cabinets mentioned. In the judgment of 2003 of The Court of First Instance of the European Communities in the case T65/98 the court founded that HB could not enforce the exclusivity agreement in protection of the market from been distorted by restriction of competition.

corresponding parties would benefit from the void produced by excluding such in contrast with restricting the actions and leveraging the restriction thereof in benefit of the non-excluded party, or other cases the benefit provided by the exclusion action altogether of the parties involved.

2.4. Mutual vs. unilateral exclusivity.

The horizontal and vertical nature explained above will come into place. As mutual exclusivity would mean that the parties are in equilibrium with the effects that exclusivity would have between themselves, we can see that it would evidence a horizontal relationship between them, whereby the control over the contractual relationship is shared by the corresponding effect of the exclusivity agreement.[51] This observation can be extrapolated to the effects of the mutual terms in the effects with third parties or their respective markets where such mutual terms may have unequal effects out of the scope of the contract and the restrictive effect of the exclusivity terms.

On the other hand, unilateral exclusivity can vertically express itself as one party is granting exclusive rights to the other, creating an unbalanced or vertical effect due to the single direction the granting of rights is taking. However, this seemingly unbalance remains limited to the extent of the use of the exclusivity agreement, but the effects can vary and achieve a balance defining a horizontal relationship between the parties, by using such exclusivity terms on one side to counterbalance other aspects in the contractual construct intended by the parties. This is because unilateral actions can have mutual effects, and vice versa.

Let us consider that one party has access to certain raw materials and intends to manufacture a product that can only be produced using such raw materials.[52] Then, a second party possesses manufacturing capabilities that are required for producing the products that the first party intends to manufacture. We can see that both parties can benefit from the interaction with the other one, and we could see that by that symbiotic starting point, no

[51] In the XIX century, Winchester repeating arms company and Colt firearms manufacturers mutually excluded from manufacturing the products the other was famous for. Although no exclusivity agreement is to be known, their *de facto* non-competition had a mutual exclusion effect. Herbert G. Houze *Winchester Repeating Arms Company*,Herbert (1994)

[52] Note that this also applies in cases of patented products and material subject to copyright.

party relies upon the necessity of the interaction with the other party, we can then see a relationship horizontal. Now let us add, as a variable, the element of mutual exclusivity. This would change the relationship as they both would depend on each other, and they would exclude any other party from interacting with either one. This would have been inherent in the situation where the first party would be the only one to have access to such raw materials to fabricate the product, and the second party would be the only one with the technical capabilities for manufacturing such a product.

The importance of the nature of mutual exclusivity takes form in the parties' willingness to put themselves in a situation of mutual dependence that they would not have been in otherwise. In this case, such mutual exclusivity granted to each other is at the same time restrictive to each other. Furthermore, such an exclusivity agreement would have effects outside the scope of the contract between the parties involved, as not only the parties are depending on each other to produce such a product, but no other party would be able to do so.

The position of the parties above is not equal in respect to each other, as only one party depends on the other, therefore such dependence is not mutual. In principle, one party would have all the chances to benefit deposited in the willingness of the other party. Let us say that both parties are aware of each other positions and are willing to find a balance by compromise, this is by using an exclusivity agreement that would entitle the second party to be the exclusive manufacturer of the products.

Exclusivity in the example above would not have a purpose if it were to be mutual, as only the second party can provide such a product and nobody else, but the second party is not the only actor that can provide such a service to the respective party.

2.5. Exclusive performance vs. exclusive relationship.

Some business transactions may include several parties, as the exclusivity may be directed to a specific part of such transaction. This would be the case whereby one of the parties is

intended to perform according to an agreement, excluding others from performing.[53] This dimension applies in those cases when the agreements include several obligations for the parties and specific performance is identified and vested in a sole party or parties. An example of this would be when several parties agree to undertake a business operation in a given country, and only a portion of the parties involved are able or trusted to perform in such specific territory. The use of exclusivity in performance becomes crucial in certain international situations when the performing party has knowledge and experience in operating within its territory, which leads to the next dimension.

Performance as mentioned above, is not the only item exclusivity may be directed to, as there are other elements that parties could be interested in when reaching an agreement where exclusivity takes place. In some cases, the parties' operations are directed into presenting themselves as doing business together.[54] Not only when performance is required but the mere relationship between the parties is the focus. An example of this would be when the parties involved seek a reputational gain, and the parties agree to be in business with each other, whether this involves business operations or simply presenting themselves under the same brand. This exclusive relationship dimension is separated from the others as the objective of the parties would not necessarily include any other actions or performances. Non-compete clauses may also fall into this exclusivity dimension as they could be used to the extent that the real contractual relationship between the parties is exclusivity.

2.6. Exclusive vs. sole rights: Hard singularity and soft singularity.

Exclusive rights have the effect that it would exclude any party, other than the one who is been granted such rights, from exercising them. This means that the grantor of such rights would give away the possibility of exercising them itself. We can call the grant of exclusive

[53] Example of exclusive relationship clause: *Appointment and exclusive contract. HQ hereby appoints CO, and CO hereby accepts the appointment, as the preferred service provider, marketer, re-seller and primary delivery point of the Services in the Territory, as " –brand name---confidential--- (name) _____, Only CO may be referred to as cooperating, working with, and /or associated with HQ under the brand " ----------"[53] HQ agrees not to permit any third person to, market, promote, sell or provide the Services in the Territory under the same terms of this contract (except as requested and/or agreed on by CO, which cannot be unreasonably withheld). Should a third party interfere in a way that may violate the territorial rights mentioned herein, CO may start legal actions against the 3rd party within the Territory, and HQ s*

[54] Companies seeking being associated with brands with a better reputation. "Benefit by association".

right from the grantor a hard singularity situation, as it would mean that the grantor would have, in principle, a full restriction from performing or exercising under the terms of exclusivity. This would be applied in most cases as in principle any party may agree to exclude itself from performing a certain action for the benefit of the other. The granting party does not need to have any proprietary rights that only it can grant. An example of this would be a service contract issued by a construction conglomerate, appointing a local construction company to build an apartment block.

A lesser degree of restriction for the party granting exclusivity would be the approach of appointing the other party as the recipient of sole rights.[55] This would exclude any third party from performing or exercising the rights granted. Therefore, the grantor would not be restricted by granting such rights. This applies only in those cases whereby the grantor has certain proprietary rights or a position where it is the only one that would otherwise perform. An example of this would be a reselling contract issued by a manufacturer of a certain product, as the manufacturer is the only one manufacturing the specific product and would have control over who is buying from them.

2.7. Territoriality.

This constitutes a remarkable dimension for exclusivity in international agreements, as it embodies the principle behind an international commercial contract, as it would be transnational or trans-territorial, and the term "territory" will play a fundamental role in defining the goal and scope of an international commercial agreement.[56] Territoriality not only could define the scope of a contract,[57] but it would also serve as a mitigating risk in other cases. However, territorial exclusivity cannot always prevent ulterior effects that the particular scope is trying to be limited to. This is, the fact that an international conglomerate

[55] An exclusive cooperation agreement between two companies, may have exclusive appointment but grant sole rights for the delivery of services in a specific jurisdiction. The author has drafted exclusivity cooperation agreements using these terms to limit the restriction suffered by the grantor.

[56] Territorial exclusivity due to its generic nature is a simple type of exclusivity as its scope does not require structural changes to the general operations of a company.

[57] Example of territoriality in an exclusivity clause: *During the term of this Agreement, Distributor shall have an exclusive right to sell the Products purchased under this Agreement to customers established within the Territory. Meaning that during the term of this Agreement, the Company shall only sell the Products and/or support the users of the Products established within the Territory through and via Distributor. The Company shall also not appoint another distributor within the Territory and shall not sell and deliver Products by herself.*

decides to have the terms governed by a given jurisdiction does not prevent the effect of such business arrangement to have an effect in a different jurisdiction, thus being affected by the laws and regulations of a territory different from the scope of the exclusivity agreement.

3. Exclusivity agreements and their regulations.

The parties to a contract are free to construct it and agree on the terms included in it. That would be an agreeable statement as the parties are one of the elements of a contract and freedom of contract is a well-established legal principle as it is included in several international bodies as will be mentioned below.[58]

Certain business operations may include the necessity to include exclusivity clauses, this being for reasons of securing secrecy or full-time dedication from those involved in the execution of the specific work, or for logistical optimisation reasons. In any case, the inclusion of contractual terms such as exclusivity clauses needs to be considered carefully so as not to limit the legal risk of not complying with laws and regulations, but to first identify the existence of such risks. It is important to look at exclusivity clauses not only for what they are in the way are spelt out but also for the effects they have, as we will see below. Some approaches to regulate them may well address them for what they are as such, but others will focus on their effects. This is, exclusivity clauses will not always be directly regulated but in some instances, only some of their effects will be singled out and banned.

We have addressed the effects and the compromises that including exclusivity clauses may entail, not only between the signatory parties, but also with third parties, and even with greater elements such as the market, or society. It would be natural to believe, and perhaps even take for granted, that everyone is fit to do as they please as long as it does not harm others.

[58] Hans-W. Micklitz, *On the Intellectual History of Freedom of Contract and Regulation* (2015) Penn State Journal of Law & International Affairs Penn State Journal of Law & International Affairs Volume 4 Issue 1, pp. 13-16

Despite the principle of freedom of contract being one of the pillars of Western contract law, as with the freedom of exercising certain rights in a particular manner or degree, it may end up compromising other rights or principles embodying the values of a system supported by such pillars as freedom of contract. UNIDROIT (International Institute for The Unification of Private Law) article 1.1, establishes that *"The parties are free to enter into a contract and to determine its content*"[59] Such an article is rather succinct, and it could come across as a blunt statement of freedom of contract being and absolute right or principle. However, UNIDROIT provides comments on this article on their website. These comments address that despite the principle of freedom of contract being of fundamental importance for the principles of international trade, it cannot be taken as an absolute as it cannot be used to deviate from mandatory law.[60] Article 1.4 states, *"Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law."* Acknowledging not only that applicable mandatory rules may be applicable, but it also states that the principles mentioned in the document are not applicable in the avoidance of such mandatory rules. Making the principle of freedom of contract subsidiary and conditioned under such rules.

The principle of freedom of contract and the limitation of such principle are condensed in the text of the PECL (Principles of European Contract Law) in article 1:102:1 Freedom of contract *"Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles."*

The following points will address how certain fields of the Law view and regulate the use and effects of exclusivity clauses. Different jurisdictions will look at and engage with exclusivity clauses from different angles. There are legal systems that will engage exclusivity clauses directly by law, as mostly is the case in civil law systems. On the other hand, in the Common Law system, regulations would be directed not to the presence of exclusivity clauses by themselves, but to the effects they may have in some cases.

[59] UNIDROIT Principles of International Contract Law 2016 C.1
[60] UNIDROIT Principles of International Contract Law 2016 C.1

There may seem to be a dichotomy between the libertarian reading of freedom of trade and the protection of the trade with respect to protecting commercial actors from competitive acts. These anticompetition regulations could be seen as against free competition. However, free competition being contingent on freedom can be an oxymoron, as freedom seen as an absolute value may lead to the harm of competition itself, by the more powerful actors pushing other operators in the market out of it, by means that would deprive the competitors of their freedom.[61] This freedom could apply to the use of exclusivity clauses, as the use of these in commerce can lead to harm to the legitimate interest of other businesses.

The first two segments of law that we will analyse below regulate the legal values mentioned, and these first two fields of the law are directly applied to vertical relationships in the case of employment law and horizontal relationships in Competition law.

3.1. Employment regulations.

International business operations cannot be regarded without their execution, which necessarily is performed under a specific jurisdiction, and by natural persons. It is not unthinkable that the specific tasks reflected in a greater business operation are carried out by individuals employed, whether in the local jurisdiction, or a second jurisdiction. This leads us to consider employment law as a point of attention and a key to unlocking one of the many items that can conform to international business operations.

The nature of employment relationships generally implies the requirement of the employer that the employee is suitably available for the employee to perform their duties.[62] Having that as a reference, an employer may find it beneficial for the company to ascertain the employee's availability by including an exclusivity clause in the employment contract.

[61] Parry, G, Parry, GB, Qureshi, A, & Steiner, H (eds) *The Legal and Moral Aspects of International Trade (*1998) ,p. 84

[62] Richard R. Carlson Employment by Design: Employees, Independent Contractors and Employment by Design: Employees, Independent Contractors and the Theory of the Firm, (2018) Carlson Arkansas Law Review, Volume 71 Number 1 Article 3 (127-214) P. 158 P. 66

However, exclusive working dedication to one employer is not an inherent element of an employment relationship as the employee's freedom to be employed by more than one employer does not, in principle, preclude the employee from fulfilling their obligations as an employee. It is also to be noted that when we refer to exclusivity terms in employment, these are as vertical as they are unilateral. This is, the exclusivity would be a restriction contractually imposed to the employee only, and this could be understood as a compromise by the employee, whether it is balanced in terms of compensation or other subjective terms of value regarded by the employee.

As mentioned, the unilateral nature of the exclusivity in an employment contract may lead to unbalanced and even unfair situations, including such as when the employee accepts the exclusivity terms compelled by the vertically powered relationship whereby the employee has no other option but to accept such terms, in a "take it or leave it" situation.[63] In that example, the employee may consider themselves locked in a predicament whereby the purpose of maintaining employment is rendered unavailing. A practical example of this would be when a person seeking employment finds an opportunity that may not be sufficient to maintain a standard quality of life in a given country but is compelled by its need to enter into the employment agreement, regardless of the unfavourable terms in the employment contracts, including the exclusive dedication clause.[64]

The issue above has been addressed with a regulation applied to cases whereby an employee is in a particular situation that would prevent exclusivity terms from being valid.[65] The regulation acknowledges the use of exclusivity clauses and identifies them in its Part 2,[66] and it exemplifies the effort to mitigate the negative impact of such situations where a lack of balance of interests arises. Those are when the employee's interest is negatively affected by the exclusivity terms of the employment contract. Due to the particularity of the zero-hour employment contracts, the exclusivity clauses could fall into the category of unfair contract terms, and this is because the employee would be locked into a situation whereby it would receive no remuneration for the employee's availability, and no option to seek alternative remuneration.

[63] Rick Bigwood, Contracts by Unfair Advantage: From Exploitation to Transactional Neglect (2005), Oxford Journal of Legal Studies, Vol 25, N°1 P. 74
[64] Ibid.
[65] The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022
[66] The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022, Part 2 s.3.

The Directive 2019/1152 of the European Union and Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, in its preamble prevents the employer from restricting an employee from taking up employment with other employers which, effectively limits the validity of exclusivity terms in employment contracts, as the employee is, in principle, free to seek employment as it wishes.[67] However, such bans to apply exclusivity clauses are subject to exceptions, which are intended to safeguard legitimate reasons for exclusivity clauses to be put in place. These are deemed objective reasons that would justify the need to include exclusivity terms, which would protect legitimate interests, such as health and safety, or business confidentiality.

The statement of the preamble mentioned above is embodied in Article 9 of the same document, titled "Parallel Employment" granting in its first paragraph, the liberty to the employee to take up other jobs, as the main principle of point 29 in the preamble. As for the exceptions referred to in the preamble, the second paragraph of article 9 reads *"Member States may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests".*[68] The article refers to *"incompatibility restrictions"* which could also be read as "restrictions due to incompatibility". Furthermore, we could identify "restrictions" with exclusivity terms, and "due to incompatibility" with objective reasons. That gives us a glimpse of what the EU institutions might be trying to achieve which is to make the compelling nature of objective reasons inherent to the applicability of restrictions such as exclusivity.

There is, however, a different depth that the paragraphs in Article 9 are reaching in relation to the effects of exclusivity, which will be dissected later.

From the above instances, we can deduct that the Law acknowledges and accepts the use of exclusivity terms in employment contracts, but it also addresses the need to provide a counterweight to balance the unfair results of that indiscriminate use of severe restrictive

[67] DIRECTIVE (EU) 2019/1152 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on transparent and predictable working conditions in the European Union (29)
[68] DIRECTIVE (EU) 2019/1152 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on transparent and predictable working conditions in the European Union (29)

terms such as exclusive employment may entail, especially given the compelling circumstances that may be involved in the bargaining power balance for the employee in accepting such terms, as a condition for the employment relationship to take place.

Comparing the EU's and the United Kingdom's approaches to the applications of restrictions to exclusivity clauses in an employment contract we can see that both tackle the point of unfair contract terms but from different angles. The UK does not forbid exclusivity clauses in employment contracts but, since 2023, applies the exception to their validity in the case of zero-hours contracts.[69] On the other hand, the EU in its directive,[70]establishes a principal ban on such terms in employment contracts, and the exception is applied to their prohibition, instead of their validity.

The restrictive effect mentioned above may, in some cases, have negative implications for the employee, as its compromise of not taking up employment with a third party is not necessarily corresponded with work, which is the particular case of zero-hour contracts, and the UK has hit the nail right on the head with the latest revision. It is a case of a specific solution for a specific problem. If we go back again to the EU's case, the restrictive effect is entirely wiped out with the banning of employers prohibiting workers from being employed by other employers. In this case, exclusivity as such is not directly spelt out, but the effect or mechanism of exclusivity is directly laid out. Furthermore, the exception to the effect of exclusivity is finely presented not as the possibility of the effect of exclusivity being applied in some cases, but certain incompatibility restrictions can be placed.

Now, we can see that in the comparison above we have two approaches: a ban on exclusive employment clauses and a ban on an effect of exclusivity clauses. The first approach implies that exclusivity clauses are always and altogether undesirable, and the second only regulates their applicability in a specific case, thus we can deduct that if the application of exclusivity clauses is undesirable in a specific case, it does not make such clauses undesirable generally.

In other jurisdictions, especially those where unfair contract terms are generally regarded as challengeable in court, there may not be a specific ban or regulation on using exclusivity

[69] Employment Rights Act (1996) UK
[70] Ibid, P. 32 above.

clauses in employment contracts, however, there could be instances whereby the inclusion of such clauses and the enforceability of them would lead to an unfair outcome. This will not be too far from the unfairness challenged by the European Union, or the United Kingdom as their Laws and regulations approach is to tackle an unfair outcome whether for the nature of exclusivity clauses or the consequential unfairness of their inclusion in a given situation. This can be due to an unforeseen situation which, arose after the parties agreed to specific terms that would make their validity unfair, or because the mere construction of the employment relationship including exclusive employment would in its merit be unfair.

Now, there is a situation that does not fall fully into an employment relationship, but into a work relationship, and these again need to be looked at in the light of the specific jurisdiction that would apply. This is the case of using independent contractors to perform a specific job. There is a financial incentive in using contractors instead of employees, as normally they would not fall under the protection of local employment law and would not entail the costs of employment such as pensions, insurance and others that may be applicable, putting the party that is buying the services in a beneficial position. This would for example provide the main contracting party with flexibility in increasing or decreasing operations costs, or the possibility of shifting the workforce between jurisdictions freely.

There are situations whereby the relationship between two businesses may be categorised by the element of exclusivity, as this would be pivotal for the relationship between the businesses being that of employment or not.[71]

At this point, we would focus on independent contractors as natural persons providing their services as legal persons. Furthermore, the result and outcome of their services would be the same as if they would work under an employment contract. For the reasons stated above, an undertaking may choose to have a service relationship other than employment, as the contractor itself may also choose to perform as an independent contractor for its reasons.

Once the situation above is presented, is when exclusivity in the provision of the services plays a role, in some cases more fundamental than others, as not only exclusivity will be the

[71] Henry Denny & Sons Ltd., trading as Kerry Foods v. The Minister for Social Welfare ([1998], 1 IR 34)

sole element to take into consideration, when establishing the validity of such choice, or the real legal relationship behind it.

Different legal systems contemplate a range of business or working relationships, and in the study performed in this master thesis, we will pay attention to the element of exclusivity. Therefore, we would exclude situations whereby the working relationship is vested with independence between the parties. That means that we will focus on those relationships where exclusivity plays a role, and the restrictive effect creates a situation of dependence.

In the case of Canada, the Canadian Labour Relations Act of 1995 as a definition for "Dependent contractor" separately from the term "Employee", and it is defined as a person working for another person under such economic terms that it would put the first in a position of economic dependence, albeit interestingly enough "dependent contractor" is included in the definition of "employee".[72]

A Canadian court ruled in a case containing what was just mentioned in the paragraph above. The Court of Appeal of Ontario, in a case about whether the plaintiff was an employee, or a dependent contractor stated that exclusivity is a factor for determining the employment status of a contractor, and as exclusivity would lead to a situation of dependency, exclusivity can be regarded as a "*hallmark"* in establishing the relationship in favour of employment.[73]

Whether the status of the worker is dependent contractor or employee may not have fundamental differences beyond inherent rights and obligations that an employee may have under its employment as well as the rights and obligations that a contractor may have in virtue of its service contract. Now, it is to be considered that the exclusive unilateral and vertical relationship between the principal and the contractor, will have an impact in certain cases the dependent contractor might be entitled to compensation in case of dismissal, as not only the specific terms of the contracts will be taken into account, but also other relevant circumstances such the duration of the business relationship and other factors that may justify compensation for the termination of the contract.

[72] Labour Relations Act, 1995, SO 1995, c 1, Sch A.
[73] McKee v. Reid's Heritage Homes Ltd., 2009 ONCA 916 (CanLII), at para 34,

The United Kingdom applies limitations in the restriction of trade for independent commercial agents. An independent agent, as a contractor for a principal company can have his ability to trade restricted by contract as long as the restriction is applied to a territory or a group of customers and goods.[74] This regulation serves to protect the independent agent from having an unproportioned restriction of its activities, as without any limitations it would restrain his ability to work without falling into a complete situation of dependency.

3.2. Competition regulations.

A business operation that includes the cross-border interaction between two or more undertakings is not an uncommon practice for companies to expand or operate their business which otherwise they would not be capable of.[75] Joint ventures and other forms of cooperation between companies are used for that purpose. Some companies have certain resources that could be beneficial for others, and those in seek of synergy could decide to approach other businesses, including their competitors.

Undertakings can venture into territories out of their jurisdiction for several reasons: these can include an attempt to expand their operations for their sole benefit under their own risk, or this can also take place with the cooperation of a second undertaking or several others. In the case the company decide to operate on its own, this, depending on the jurisdiction, may come with certain legal requirements, such as the requisite of having to incorporate itself in the jurisdictions it is willing to operate. Such instances can evolve into other situations such as the establishment of a subsidiary or relying on a local entity to operate on their behalf, and this latter eventuality can be expected to generally be embodied in the form of a contract.

Contractual relationships can take many forms and can include clauses that may affect not only the terms but also the nature of the commercial relationship. These agreements in some cases may have an impact and be directed to affect those directly involved in the operation.

[74] The Commercial Agents (Council Directive) Regulations 1993 Part IV sec. 20.

[75] P Samantha Yoder, John K. Visich, Elzotbek Rustambekov, *Lessons learned from international expansion failures and successes* (2016) The Journal of the Kelley School of Business, Indiana University V. 59. Issue 2 Pp. 241-242

However, others may be directed at affecting third parties, as a means to benefit the parties involved in the specific business arrangement.[76]

In the case that a given commercial deal's reach remains within the parties directly involved, compromises can be assumed by the parties involved. As it is natural in any business negotiation, occasionally some interests must be sacrificed for the gain of the others. This can seem as a legitimate dealing as the parties are risking or sacrificing their interests, as the ideal exercise of freedom of contract could be said, as the freedom to compete should not entitle one to harm the competition, that liberty is limited as liberty does not entail the liberty of harm others.[77]

How a commercial arrangement between two or more undertakings affects those third parties can be positive or negative. It could be beneficial for consumers to have access to cheaper first-need products as it could be detrimental for them to have access to the same product affected by the price-raising process. This would be an immediate effect or direct effect, as it would be a direct consequence of the dealings between the companies to the consumer. However, that would be only one aspect, and the detrimental or beneficial effect would be relative considering what would be subjected to the positive or negative effect of the commercial arrangement in question.

Let's consider that the commercial relationship between a group of companies involves one or more of the parties performing an action part of the commercial operation, and the remaining parties abstain from it. This could be for reasons of financial gain or could be for reasons of cost avoidance, which are not interchangeable elements because a financial gain can happen albeit costs have been accrued, and cost avoidance does not always translate into financial gain.[78] This arrangement of some parties excluding themselves from performing could be part of an exclusivity agreement integral to the contract between the undertakings involved.

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[76] John Baguley, Chris Cornforth, and Geoff Mallory, *What drives Non-Governmental Organizations (NGOs) to internationalise?* Pp. 6-9

[77] John Stuart Mill" On Liberty" (first published 1859, Batoche Books 2001) Chapter II, Of Individuality, as One of the Elements of Well-Being. P. 52

[78] A. Douglas Melamed *"Exclusive dealing agreements and other exclusionary conduct—are there unify ing principles?"* (2006) P. 403

Exclusivity terms between businesses are regulated differently under the light of Competition Law than under labour law. Labour law is essential for international business arrangements between companies, where labour is paramount for the execution of a specific project, and especially when it comes to retaining expertise and skilled individuals to safeguard critical business secrets, whether it is as individual employees or contractors as explained above, exclusivity terms are a factor to be considered, Competition law is of no less importance.

Labour law regulations are mainly focused on the effect of exclusivity terms vertically, between employer and employee. On the other hand, Competition law protects and regulates competition between undertakings, and this may seem that it oversees the horizontality of their relationship and in the way of allowing equal access to the market and the ability to take part in it in equal or fair terms. However, competition law takes into consideration the vertical and horizontal relationships of the market operators and looks closely into the effect these relationships have in that market. Therefore, regulating the effect that exclusivity terms have beyond the parties to an agreement that would include these terms would benefit and protect those affected by the dealing of the undertaking, for instance, protecting consumer welfare.[79] Competition Law addresses and protects competition between actors in the economic arena. This is the company interacting with the market and thereby affecting it. When exclusivity clauses are used between businesses operating in the market, such contractual terms may affect the market, by restricting competition. Nonetheless, exclusivity terms do not always have a regulated effect on the market, as explained previously if these are used in a manner that would not compromise any legal value protected by law, such as free competition.

When speaking about legal values, it is important to consider the specific jurisdiction we are dealing with, as different legal traditions are linked to the political system, with different, if not opposite legal values. There are politico-legal systems, with the legal value of "Free trade" that allow the market to run and remain unregulated. This can also theoretically reach the extent that the state prevents it from self-regulating, which could indeed fall into a paradoxical situation whereby a legal system would regulate the market for it to remain

[79] A. Douglas Melamed *"Exclusive dealing agreements and other exclusionary conduct—are there unify ing principles?"* (2006) P. 402

unregulated. On the opposite, we may find systems whereby state intervention is a staple principle in such a system. There we may find that "Free trade" is not the protected "legal value" it could be "fair trade" or "equality of opportunities to trade". This is theoretically possible, despite the state regulating and sanctioning every single aspect of trade.

There is an intermediary formula that "freedom of trade" would not always mean unregulated trade. Unlike in the case of the paradox mentioned previously, the state would promote and protect trade without intervening, and act as an arbitrator. The undertakings conducting trade would not have any state or legal restrictions to do so, as they would have absolute freedom to operate. However, that absolute right would be protected yet restricted to behaviour that would promote that every actor in the market is in a naturally equal position to conduct trade, and the state would intervene in those cases when undertakings behave in a manner that would compromise the freedom of trade of others. This would be the case of the state acting as an arbitrator.

The principle of "Freedom of trade" does not always translate into free trade, as businesses conducting trade may engage in certain deals that may end up restricting such freedom of trade for other businesses. Below we will study how different legal systems regulate or address the dealing between different undertakings when conducting business, and specifically how their dealing including exclusivity agreements is affected by such regulations of intervention, in whatever manner.

Regulating exclusivity agreements can be done by focusing on the *behaviour* of the parties or the effect of such behaviour. Different jurisdictions take different approaches, but the difficulty would lie in categorising what behaviours or conducts fall into a specific regulation.[80]

In the case of the EU, the internal market is protected from distortion by EU law. In effect, excluding the competitors from operating in the internal market would distort the competition. Such distortion is intended to be prevented to protect the rights of third parties, such as consumers and other undertakings operating in the internal market of the European

[80] A. Douglas Melamed "EXCLUSIVE DEALING AGREEMENTS AND OTHER EXCLUSIONARY CONDUCT—ARE THERE UNIFY ING PRINCIPLES?" (2006) P. 384

Union.[81] Furthermore, the first point of the preamble of the Directive 2019/1 of the EU mentions that the Treaty on the Functioning of the European Union (TFEU) establishes a mandate to ensure fair and competitive functioning on the internal market and grants merit and freedom of operating basis to obstruct any *"*company-erected barriers to market entry, enabling them to generate wealth and create jobs*"*.

In the United States legal terminology, the term "exclusive dealing" is extensively mentioned when using exclusivity terms or agreements, and often referred to the cases of vertical relationships.[82] This comprehends behaviours where certain restrictions are applied in the course of trade. The restrictions apply to how parties to an exclusive dealing are to conduct or not to engage in business with third parties.

The Bureau of Competition of the Federal Trade Commission enforces the United States' antitrust laws. Relevant to the topic of this thesis we will investigate the Sherman Antitrust Act and the Clayton Antitrust Act, as well as their impact on the validity of exclusivity agreements.

The Sherman Antitrust Act dates back to 1890 and Section 3 specifically declares illegal those contracts that restrain trade or commerce, even between parties in the United States and abroad.[83] As has been disclosed before, exclusivity clauses have a restrictive effect, and this can affect trade to the degree that they can effectively restrain trade and commerce, contravening what is stipulated in the Sherman Antitrust Act. If we break down the elemental parts of the Sherman Antitrust Act as *"Every contract", "in restraint of trade or commerce", and "is hereby declared illegal",* we can deduct that the protected value is trade and commerce and is protected from contracts that would cause restrain to it. This is shared with the European Union in the sense that restriction to competition is a legal good that is protected. The Clayton Antitrust Act supplements the Sherman Antitrust Act as it deepens its regulation and prohibitions of more specific anticompetitive behaviours.

[81] Council Directive (EU) 2019/1 of the European parliament and the Council of 11 December 2018 Chapter 1, Article 1, Para 1.
[82] Richard M. Steuer,Exclusive Dealing in Distribution (1983) 69 Cornell L.Rev. 101-125. P.102
[83] Act of July 2, 1890(Sherman Anti-Trust Act), July 2, 1890; Sec. 3

The Clayton Antitrust Act prohibits those commercial agreements that would lessen competition or create a monopoly in the context of commerce.[84] This means that the Clayton Act is directed to the modernisation of trade and the way such modernisation has allowed the parties to circumvent or adapt to the prohibitions set in the Sherman Act.

The Federal Trade Commission provides guidelines for compliance with Antitrust Laws. As an example, and interestingly to the topic of this thesis, on the 6th of April of 1995, the U.S. Department of Justice, jointly with the Federal Trade Commission issued a Document Titled "Antitrust Guidelines for the Licensing of Intellectual Property".[85] The Antitrust Guidelines in their section 4.1.2 spell out "Exclusivity" in two different ways; *"Exclusive licenses" and "Exclusive dealing".* The first form of exclusivity is seen as a restriction with a vertical effect,[86] and may not be affected by antitrust regulations as long as it does not have a horizontal effect.[87] *The* second form of exclusivity establishes a mandate between a licensor and a licensee, whereby the licensee is prevented from dealing with competitors of the licensor. This can create a horizontal effect to the restrictive effects of the exclusivity agreement, thus raising concerns about Antitrust laws due to the anticompetitive effects it may have.

From the above we can deduce that, in the United States exclusivity agreements are not always seen as anticompetitive, even in the cases that they may have a severe restrictive effect between the parties, as long as it does not hinder their ability to compete with each other. It is important to note that the severity of the restriction created by an exclusive dealing is not a factor in determining a breach of antitrust laws, but the factor of such a relationship creating an anti-competitive situation between the parties is key.[88]

As mentioned above, not all exclusive dealings have a restricting effect on competition. The pioneer federal piece of legislation, the Clayton Act, does not prohibit exclusive dealings, or any sort of exclusivity agreements for that matter, it does prohibit those that influence trade

[84] Clayton Act, Sect. 3
[85] US Department of Justice and the Federal Trade, Antitrust Guidelines for the Licensing of Intellectual Property Commission.
[86] See Chapter 3
[87] US Department of Justice and the Federal Trade, Antitrust Guidelines for the Licensing of Intellectual Property Commission. Page 19 Aug. 23
[88] Francine Lafontaine, StephenM.Ross, AnnArbor, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, (2005) Pp. 11-12

and commerce. We have elaborated previously on the effects of exclusivity terms. Our attention is now focused on the effects that exclusive dealings may have on competition and, thus free trade.

When referring to the effects of exclusive dealings, we are going to focus now on the effect on competitiveness. Exclusivity agreements can have competitive and anticompetitive effects. The case that competitors are excluded from a particular dealing between one or more companies does not necessarily mean that such an agreement restricts competition.

The anticompetitive effect can be measured in the degree to which competition in the market is restricted for all involved. This can be factored against foreclosing competitors, as this would be an element that would cause anti-competitiveness.[89]

Canada applies specific attention to exclusive dealings by defining them in their competition laws[90] and specifically prohibits exclusive dealings that restrict competition on the market.[91] This leads us to the identification of the legal value protected here, free competition.

3.3. General commercial law.

In the first two subsections, we have dealt specifically with Employment and Competition law. These two, individually, address and regulate the relationship between the parties in a business aspect, as combined they compose a vertical and horizontal approach to matters that would be involved in international business dealings.

Exclusivity arrangements and their regulation internationally are subject to various treaties, national and supranational legislations. As in the cases of employment and competition law elaborated above, other legal fields are also protecting a legal value.

[89] Richard M. Steuer,Exclusive Dealing in Distribution (1983) 69 Cornell L.Rev. 101-125.p. 116
[90] Competition Act (Canada), PART VIII Art. 77 (1)
[91] Competition Act (Canada), PART VIII Art. 77 (2)

The legal values shared between Competition law and Employment law can be seen in the light of the principle of *"fairness"*. This principle is applied to vertical relationships in the case of employment law and horizontal relationships in Competition law.

The Spanish Commercial Code in its preamble regarding "mediating commercial agents" mentions that the legislator cannot authorise any restrictions or monopolies without infringing the principle of "freedom to work" as an exercise of "commercial interests".[92] It also mentions that the "commercial interests" are harmed by prohibitions and restrictions opposing "freedom of contract".[93]

The Spanish commercial code alludes to legal values that are protected under the commercial codes, freedom of contract and commercial interests. We can interlink those two values into commercial interests being evolved from the principle of freedom of contract. As contracts are a legal instrument embodying an agreement, and these are used in the course of trade, it would not be unreasonable to deduce that the freedom of contract along with commercial interest could be translated into freedom of trade. That is because freedom of trade is something that is generally accepted as a value. In the case of Spain. The legislator is put as a guardian protecting such value.

In other jurisdictions, such as Finland, contractual terms that may be deemed unfair can become applicable.[94] This alludes to the principle of *"fairness"* as a legal value to be protected. Exclusivity terms that may not fall under the scope of employment or competition law, are subject to scrutiny when put under a test of fairness. Exclusive dealings can be freely and truly agreed on, but if the terms of it are or become unfair, these may be challenged to protect the fairness of the contractual terms.

[92] Código de Comercio Real Decreto de 22 Agosto 1885 LEG1885\21 Pag. 40, https://www.boe.es/eli/es/rd/1885/08/22/(1)/con
[93] Código de Comercio Real Decreto de 22 Agosto 1885 LEG1885\21 Pag. 77, https://www.boe.es/eli/es/rd/1885/08/22/(1)/con
[94] Contracts Act (228/1929; amendments up to 449/1999 included) Section 63 (1)

4. Effects of Exclusivity.

The inclusion of exclusivity clauses in a contract may have a different goal than the effect it provides. Therefore, it is imperative to analyse and become aware of the consequences of applying exclusivity clauses in commercial arrangements. The validity of the exclusivity agreements may hinge effects may hinge over the effects that these have.

4.1. Restrictive effect.

Exclusivity agreements imply an element of compromise whereby one of the parties is prevented from performing a commercial act or being a trading actor due to the repercussions that exclusivity has for the parties and their abilities to conduct business. We will refer to this as the restrictive effect.

The restrictive effect can be seen when a party is excluded from performing, for the benefit of the excluding party. The restrictive effect is increased the more the parties agree to exclude the counterparts to perform. The restriction applied to a party under an exclusivity agreement needs to be seen under a different lens applied to the scope of the exclusivity agreement.

The extent and consequences of the restrictive effect are not always uniform in all commercial arrangements when exclusive agreements are used. In an exclusivity contract where the goal is to exclude one party from performing, the restrictive effect would be at its highest degree and would evolve in subsequent effects, and in cases where exclusivity clauses are a marginal element to a business arrangement, the restrictive effects may not lead to any subsequent effects, as we will see below.

This restrictive effect is naturally prominent in the case of vertical relationships, where the restriction is unilaterally sourced by one of the parties. This would be the cases of employment, exclusive service agreements, and vertically the supply chain.[95]

[95] Francine Lafontaine, StephenM.Ross, AnnArbor, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, (2005) P.3

This effect is not always secluded within the contractual sphere of the parties to an exclusive arrangement, as it can be applied to other parties indirectly involved in the commercial dealing. Especially in cases of international business arrangements, this effect can be revealed in different jurisdictions, as due to the particularities of different territories and their local regulations, these effects can take place, not by the nature of the exclusive arrangement, but by its execution or application in a given territory.[96]

The parties do not always need to have an element of restriction in their exclusive dealing for this effect to be shown to other parties. The restrictive effect of commercial dealings can be applied to other items such as competition, freedom of trade, fairness in contractual terms, and similar legal values and principles.

Is important to have this effect in consideration as it is in some cases fundamental for establishing the validity or legality of exclusivity dealing in international business operations. The exclusive nature of the dealing may not be the key to their prohibition but the extent and nature of the restrictive effect.

The theoretical implications of the restrictive effect are set apart from the practical implications, as the restriction applied to a party excluded by an exclusivity dealing does not always translate into a restrictive effect applied to third parties. This is by understanding this effect as defined in this subsection. Other consequential restriction effects will be dealt with separately.

4.2. Disabling and enabling effects.

Exclusivity business arrangements can be defined by one side of the dealing being excluded by the other side excluding it, and we could deduce that being excluded from performing equates to being disabled from performing, and the excluding party will be enabled by the agreement.[97] This will not always be the case with an exclusivity arrangement, as exclusivity

[96] In Competition law, the effects of exclusive dealing are scrutinized for their effect in the market and free competition.

[97] Francine Lafontaine, StephenM.Ross, AnnArbor, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, (2005) P. 3

can cause different effects depending on all the factors involved in the equation considering the parties' operational, business, and legal capabilities.[98]

Starting with the enabling effect, a party who is excluded from performing may see its capabilities to perform disabled. However, if this party were in a situation whereby relying on the exclusive performance of the other party would strengthen its operational abilities, the enabling effect would take place. This could be the example of a company in one territory being unable to perform in another territory, and it would require some other business to carry on its activities in such territory. Now, this second company happens to have unique expertise to carry out the business intended by the first party, and the local business cannot rely on its operations on the sole potential deal with the first party. An exclusive deal whereby the first party is excluded from performing would enable the first party to carry on with its business deal under the exclusive arrangement.

The second party in the example above, could enable it to focus and take the risk of investing in resources to expand its business under the exclusivity dealing. The enabling effect can be applied mutually or unilaterally.

On the other hand, when an exclusivity dealing leads for one or all parties, to limit their ability to operate in a general scope of their business or a part of it, we would refer to this as a disabling effect.[99]

A disabling effect can take place as an intended part of the exclusivity dealing or unanticipatedly. An exclusive business arrangement that would include the need for the excluded parties to reach certain business goals, may find itself in the predicament of having not enough of its resources allocated for the completion of such targets and may have to relocate resources which would compromise other commercial operations. This would mean that the excluding party may end up suffering the disabled effect as its ability to conduct business would be impaired.[100]

[98] As in the case of two companies that commercialize the same product, the exclusion of one does not mean that the excluding party was unable to commercialize otherwise.
[99] The disabling effect, as a consequence of the restrictions placed by exclusivity agreements, will be of importance when discussing the legality of exclusivity agreements.
[100] Ruth Atkins, *Worth the wait?* Property Law Journal, 5 December 2011. P.11.
https://www.forsters.co.uk/sites/default/files/RDM_PLJ_Lockout%20Agreements_051211.pdf

A party that is excluded from performing, especially when territoriality is the main factor of the exclusivity equation, would suffer a disabling effect when the opportunities to operate in a certain territory are impeded under an exclusivity agreement, and this presents a disabling effect when the activities excluded would be commercial activities that the excluded party would have able to undertake otherwise.

4.3. Dependency effect.

This dependency effect is not by definition a manifestation of the restrictive effect, as the dependency effect can arise directly by the exclusive dealings without the restrictive effect as elaborated in subsection 3.1 being applied by either party.

Exclusivity dealings may create dependency due to the exclusion of the rights to act or omit, that would allow for a party to an exclusive dealing to operate dependently or independently from the exclusive dealings, and to what degree the commercial arrangement is affecting its operations, generally and within the scope of the exclusive dealing. The dependency effect can naturally occur in vertical relationships where exclusivity is not mutual.[101] In such cases, the dependency effect can also be measured parallel to the restrictive effect. In cases of exclusive work clauses for contractors, we can see how the dependency effect takes place, as the reliance on the contract for the contract is absolute as it is the restriction to contract with third parties.

In other situations, such as mutual exclusivity where the restriction effect is applied to the maximum degree, we could talk about the situation of interdependence. Such a situation, as seen before in this thesis, could create an economic actor acting as a single unity that would be regulated by competition law.[102]

[101] Let's take the case of exclusive services agreements and employment contracts.

[102] In the case" C-680/20 ECJ. Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (2023)", Unilever was found to be in violation of EU Competition Laws, even though the anti-competitive actions were performed by its distributors, however the court established that they acted as a single unity controlled by Unilever.

We can also break down dependency into types, direct dependency, or indirect dependency. Direct dependency will manifest in those situations where the parties, unilaterally or mutually would be immediately affected by the exclusivity agreement, this means that the consequences and benefits of the exclusive dealing have an immediate effect between the parties and remain in that scope. On the other hand, indirect dependency would be the case when the benefit of the exclusive relationship between the parties translates into a benefit or ulterior benefit with third parties.

4.4. Effects *inter-partes.*

It is not uncommon for businesses to develop their processes and certain know-how that may not be protected under trade secrets, copyright, patents, or other similar laws. These assets are useful or necessary for the companies for reasons of retaining a competitive edge or simply for remaining operational, and certainly, any degree in between those two different situations a company could be in.

When it comes to securing the retention of a certain profile of professionals, having an exclusive employment agreement would allow an employer to ensure that the competition does not have access to a certain skill in developing or executing a given business item.[103] This is not only benefiting the company solely in situations where the employee or contractor in question would compromise the competitiveness or operativity of its employer, but it would also prevent the other undertakings that are non-competitors from having access to the specific skills or talents of the employee, and eventually becoming competitors.

However, the benefit or restricting an employee or contractor from engaging in employment or business with third parties can also serve to assure that the company retaining the work has the reliance on the exclusive availability of the worker. This can be helpful in operations requiring that the employee is available at irregular times. Also, in cases the business operations may expand in the future and would require further availability from the worker.

[103] Mukherjee, Arijit, and Luís Vasconcelos. "Star Wars: Exclusive Talent and Collusive Outcomes in Labor Markets." *Journal of Law, Economics, & Organization* 28, no. 4 (2012): 754–82. pp.754–755

4.5. Effects *extra-partes.*

In the case of businesses in a vertical situation, exclusivity dealings can provide the undertakings involved with a reliance effect created by the exclusivity relationship. Having a supplier exclusively supplying to another business would create a situation of reliance on the business, as it can rely on the availability of supply as it doesn't have to be concerned by other businesses restricting access to it. Similarly, a store that would have an exclusive supply agreement whereby the supplier can only buy from one manufacturer, this manufacturer would rely on the fact that it may not lack orders from this particular store.

From the point of view of the Market and understanding it under such values as free and fair competition, exclusivity agreements can also have an effect of promoting competition.[104] Let's bear in mind that anticompetition is affected by the restraint of competition, not necessarily by the restraining effect that exclusivity terms have between the parties and their contractual restrictions to perform or to contract with. If we see the example whereby the restriction imposed by the exclusivity dealing is about one party being restricted to commerce with a certain product. The fact that it is limited to that product, does not entail that it cannot compete in the market with other businesses trading with the same product. Competition is not restricted but stimulated.[105]

Consumers can also benefit from exclusivity dealings. Manufacturers and retailers in an exclusivity dealing would, for instance, allow a retailer to acquire from the manufacturer at a better price, giving margin for the retailer to have the possibility to extrapolate the benefit of cheaper pricing to the consumers.[106]

Not only the parties involved can benefit from an exclusivity agreement, as the effects of it can reach further than the parties involved. This would be the case when the enabling effect takes place, and an undertaking relies on the exclusivity dealing to invest for its development. This can lead to societal benefits as it can serve to promote employment or even stimulate development in science.

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[104] A. Douglas Melamed *"Exclusive dealing agreements and other exclusionary conduct—are there unify ing principles?"* (2006) Pp. 377-378

[105] Richard M. Steuer,Exclusive Dealing in Distribution (1983) 69 Cornell L.Rev. 101-125.

[106] Mathewson, G. Frank, and Ralph A. Winter. "The Competitive Effects of Vertical Agreements: Comment." (1987) (The *American Economic Review*, vol. 77, no. 5, pp. 1057–62

5. Risks of exclusivity.

The risks of exclusivity clauses not only need to be balanced against its benefits, but certain risks may also not simply be business risks such as operational restrictions or financial burdens, such as risks that can easily be assessed and taken on, sometimes the benefits can be outweighed by heavy penalties.

Risks are best assessed with a high degree of certainty, whereas the consequences and derivations of using exclusivity agreements can be assessed clearly. However, legal certainly can be as certain as it can be predictable depending on the level of flexibility that a given legal system allows its laws and regulations to change. We can expect higher certainly from a legal system that recognises the protection of a legal value or the prohibition against threats to it at a constitutional level, than a system that protects a certain value by decree.

In international commercial dealings, the risks are higher than operating in a single jurisdiction. Not only because the parties involved may have similar knowledge of the law of their country and would be able to operate at a certain level of compliance, but other operational elements can include a risk. As we will discuss below there are certain risks that the parties are not able to assess without considering the multilateral dimension of their relationship, as this would be the case of an international business operation. That is, awareness of each other will not be sufficient to identify risks, but also awareness of each other circumstances such as position in the supply chain, and contractual or operational limitation with third parties could affect the reliability of the commercial dealing in question.

5.1. Risk degrees.

We have established that exclusivity clauses have some effects inherent to them. These effects whether they are vertical, horizontal, mutual, or unilateral, have restrictive elements to them, or a degree of compromise, that needs to be considered when applying exclusivity terms into commercial dealings.[107] This could be the case of having exclusive reliance on a

[107] In 4.1. We discussed the restrictive effect, and whilst this can be an incentive for one party over the other, this can present a risk for the excluded party.

supplier[108] or a supplier having reliance exclusively on a distributor, pointing the risk at a supply chain level that is contingent on the compliance of the parties concerning each other.[109] This risk could be tagged as a first-degree risk, as it is one risk arising from the immediate business relationship between the parties and are those who can and must assess the risks, considering their operational capabilities as well as the legal framework and strategy they may be attempting to implement.

5.1.1. First-degree risks.

In this subsection we are exploring first-degree risks, those that arise from the parties' behaviour, this includes performance in all aspects and by either party. The parties to an exclusivity agreement rely on the performance of the parties having been granted an exclusive dealing, and due to the restrictive effect, they carry the risk of their expectation of performance not being met. This does not necessarily trigger failure to perform as in the case of "poor workmanship".[110] It is virtually impossible for a contract to cover all eventualities in every single detail and aspect, and contracts can regulate the expected performance in the form of a result, and not the result being the performance itself. This is, there are dealings where goods and services are exchanged, and the parties are not involved in the processes of their respective parties when performing according to a contract.

The default operational independence of the parties to an exclusivity contract can lead to situations whereby the performance of the parties granted exclusivity may not match the expectations of the party granting exclusivity. The risk is lesser the more the parties are involved in each other processes. In the case of service agreements in which all parties are involved at the same level in the process of performance, the risk for unexpected or undesired performance levels is lesser than in those cases where the performing party is not executing as expected. Most cases of non-performance may constitute a breach of contract, and the solution will be provided per contract or applicable law.[111] However, it is in those cases

[108] Kissi, Ernest & Osei-Tutu, Ernest & Tutu, Safowaa, *SOLE SOURCING PROCUREMENT: THE GHANAIAN PROCUREMENT EXPERIENCE*, (2018) P. 5

[109] Costantino, Nicola & Pellegrino, Roberta, *Choosing Between Single and Multiple Sourcing Based on Supplier Default Risk: A Real Options Approach*, (2010) Journal of Purchasing and Supply Management. 16. 27-40. P. 35

[110] *Ewing Constr. Co. v. Amerisure Ins. Co.* Texas Supreme Court

[111] A contract may specify what is the expected performance and what remedies will apply in case of these not being fulfilled. Similarly, a contract may specify what would constitute breach, and define expected situations of unsatisfactory performance as instances of breach of contract. Alternatively, the Law can

when the unexpected performance is not severe enough or remains within the lines of the exclusivity contract when the risk of unexpected performance arises. This is mostly notable in international operations, when for cultural reasons, or other circumstances inherent to a certain territory, a party in another territory may not be aware of or familiar with the customs, method, and local processes for executing the operations agreed by an exclusivity contract.

An example of unexpected or unfavourable performance not related to the exclusivity dealing but, would be the one used before, whereby a store is restricted by being allowed to acquire a specific range of products from one manufacturer only. In that situation, the manufacturer's reliance on the fact that it may not lack of orders from this store can be shadowed by elements such as disadvantageous marketing processes, or risky marketing campaigns.[112] This is important in international operations as there could be different cultural approaches to a certain range of products. Some countries see products such as alcohol and tobacco as a social taboo and tend to apply strict regulations or banning of such products, and other countries do not have social restrictions on these products.[113] These factors can be detrimental to the expectations of a supplier if the expectations are based on the performance of the other party, beyond the scope and control of the first party.

There can also be instances whereby the risk of the party granting exclusivity to a local partner, would lead to losing operational control that it would otherwise have. Therefore, is worth considering the inclusion of exclusivity clauses in certain commercial operations, as the counterpart would gain absolute control under certain exclusivity dealing, especially those that exclude one party from doing business altogether in certain territories, as it may not only lose what it is granted away within the scope of the exclusive dealing but also general control over such territory.

identify instances of breach and provide remedies for breach that are not specified in the contract, as is the case with the Chapter 8 of the Finnish Sales of Goods Act 335/1987 of 1987.

[112] In 2023 Bud light in support for the LGTQ community launched a campaign and this caused a backlash due to the bulk of their customer based not agreeing with Bud light's support to the social cause. More info: Jennifer Maloney, *How Bud light blew it,* The Wall Street Journal (New York, 21 May 2023)

[113] As a case of strict regulating and banning Tobacco products is that of New Zealand and its "Smokefree Aotearoa 2025 Action Plan". Ministry of Heath of New Zealand. https://www.health.govt.nz/publication/smokefree-aotearoa-2025-action-plan-auahi-kore-aotearoa-mahere-rautaki-2025

Extended exclusivity terms lead to a general lack of operational control for the excluded party. If limits are not applied to exclusivity, this can overshadow the intended scope of the commercial arrangement, and even compromise potential alternative or supplementary opportunities to engage in business with other operators. This is a manifestation, in the form of risk, of the restrictive effect suffered by the excluded party, and such restriction can become unproportioned compared to the desired outcome of the business dealing.

In an international context, the territorial element of a dealing may create a substantial risk, as the excluded party may end up compromising its operations in other territories by not limiting the exclusivity to a certain territory. The exclusive party may end up exceeding an intended or assumed scope of operations by the excluded party.

Parties entering into a contract are generally expected to perform as agreed. However, there are cases where the parties may willingly choose not to perform according to a contract, as it is the case of *"efficient breach".*[114] This term, commonly used in law and economics, refers to a situation whereby one party is better off by breaching the terms of a contract.[115] The risk of efficient breach, and especially their consequences can be substantial, and affect dramatically to the interest of the injured party. Due to the nature of exclusivity agreements, there can be an effect of dependency, leading to a situation of reliance, and the greater the reliance more attention should be put into the chances for efficient risk to take place. Naturally, a company that relies on a supplier for the supply of a section of its product range, which makes for a marginal part of the company's revenue, is not in the same situation as a company relying on one supplier for the supply of products that amount into the majority of its revenue. In the first instance, we will find that in the case of a vertical relationship, the restrictive effect takes place, and the inherent risk of efficient breach ensues.

An issue of applying efficient breach is that it can become "inefficient" as courts in some jurisdictions tend to put the non-breaching party in the same position as they would have been in if the contract had been honoured[116]. There is the risk that insufficient calculation based on the operational balance sheet can lead to unexpected consequences of exercising

[114] Maria Bigoni, Stefania Bortolotti, Francesco Parisi & Ariel Porat, "Unbundling Efficient Breach" (2014) CoaseSandor Institute for Law & Economics P. 14
[115] Maria Bigoni, Stefania Bortolotti, Francesco Parisi & Ariel Porat, "Unbundling Efficient Breach" (2014) CoaseSandor Institute for Law & Economics P. 35
[116] Francesco Parisi, *The Oxford Handbook of LAW AND ECONOMICS*, Vol 2. Pag. 20

efficient breach, as the benefit of breaking a contract can be overshadowed by the compensation awarded to the other party. Moreover, a court may order a breaching party to perform according to the contract and find itself in a predicament whereby it may end up bound to perform to more than initially expected, and in some cases end up facing super-compensatory damages.[117] In the case of exclusivity agreements, this is a fundamental problem. As one exclusive party exclude all others from performing a certain and or from being an actor.

Breaking an exclusivity agreement based on another and more beneficial exclusive dealing may have the risk that the consequences go beyond being put back into the initial exclusivity dealing and would end up compromising the new and more beneficial dealing becoming a burden and a considerable legal liability.

Not only the supply chain is tainted by this risk, but also in situations where "actor exclusivity"[118] is the focus of the dealing between parties, the risk is also greater the greater the reliance, as this could be the case of an exclusive sponsorship contract. Let's imagine the example of a famous footballer who is sponsored by a well-established sportswear brand.[119] We can see the synergy between them,[120] they both are well-known in the sports world. The reliance of the footballer on the sportswear brand may vary in degree depending on many factors such as financial dependence, or reputational dependence. Those factors that may affect directly or indirectly[121] the risks of "efficient breach" are to be taken into account. The risk of efficient breach, despite being essential to exclusivity dealings has several angles and needs to be assessed accordingly. Following the same example, the sports brand's exposure to the risk would not be the same if its range of products all belong to the same sport as the footballers', as in the case that the sportswear company offers general sport-related products. Should the footballer decide to breach in the case that the sportswear reliance is in the promotion of its products by the footballer, the consequences would have a lesser effect if the range of products is greater than the specific sport the footballer is representing.

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[117] Francesco Parisi, *The Oxford Handbook of LAW AND ECONOMICS*, Vol 2. Pag. 11

[118] This is, in cases where the excluded party find a greater incentive in a third party, whereby the excluding party relies on the image or brand of the excluded party.

[119] In 2017 Lionel Messi and Adidas signed a deal which includes the exclusive rights of Adidas for the use of the sportsman's image and likeness.

[120] Sabah Qasim Khedir, *The Legal Protection and Regulation of Sponsorship Rights in English Football,* (2018) P. 25

We identified that the reliance created under the dependency effect is paramount to the assessment of the consequences of "efficient breach" in an exclusivity agreement.[122] The greater the reliance the greater the risk is, and parallel to the assessment of the risk, the consequences of such risk need to be calculated.

In the case of a unilateral relationship of exclusivity, the party who is granting the exclusivity in an exclusive dealing bears the risk mainly and in principle, in case of efficient breach. That is because the potential incentive of breaching the terms of a contract of exclusivity would be for the party that is under the restrictive effect and may find itself better off relieving itself from it. Let's see the example of a store that has an exclusive deal with a supplier. This store can only purchase a specific type of product from that supplier, and the supplier, however, can supply the same product to any third party. The exclusivity dealing here is not restricting the supplier in any way, it is bound to supply the product to the store, and on the other hand, the store is restricted by the exclusive agreement. The only risk affecting the exclusivity dealing in case of "efficient breach" would be the store finding a better deal with other suppliers that would justify the consequences of breaching the agreement.[123]

In the case of mutual exclusivity dealings, the risk is shared between the parties as they all could potentially find a better deal.[124] If the situation concerning the other party is of mutual dependency, this is, both are equally restricted from the opportunities of finding a better deal, most likely the risk for such better dealing is shared between all parties. This does not necessarily mean that the risk is neutralised since other parties are sharing the risk, as the risk of efficient breach being an attractive option can arise not only because the exclusive deal is no longer attractive, but because exiting from it would be more beneficial due to a company's review of strategy that would include a better plan than dealing with exclusive terms in their operations. Therefore, lack of stimulus and inceptive for all parties involved, or dropping efficiency and reliability in performance would be factors for parties to an exclusivity dealing to consider exiting.

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[122] Steven Shavell, Damages Measures for Breach of Contract (1980), P. 474

[123] Maria Bigoni, Stefania Bortolotti, Francesco Parisi & Ariel Porat, "Unbundling Efficient Breach" (2014) CoaseSandor Institute for Law & Economics P. 21

[124] As explained above, mutual exclusivity tends to create a restrictive effect mutually, which may lead to the parties being a mutual risk of finding a better incentive elsewhere to relief the restriction.

The degree of dependency also plays a role in the risk of efficient breach, as the chances for a party to find itself in a situation whereby it would be compelled to breach the exclusivity agreement. The element of gain, or benefit of one party over breaking an exclusivity dealing must be seen under the disabling effect that the dependency created by the exclusivity dealing. This is, if the inability to perform of a party under exclusivity turns restrictive in a way that prevents it from carrying on business as it would have expected, it would be more likely compelled to free itself from such a situation. However, if the situation of dependency would not have a disabling effect in a manner that the restricted party would not be in a situation of disadvantage for it to continue in business as it would have expected. Therefore, if the exclusivity dealing leads to an unbalance of interests or is prone to become disproportionally beneficial to one party only, efficient breach will be something to consider as a high risk.

5.1.2. Second-degree risks.

A second-degree risk involves those eventualities that will affect the parties engaged in an exclusivity agreement but are sourced not directly involved. These need to be assessed beyond the scope of the legal framework between the parties, as we are seeing the risk arising out of the relationship between the parties, and it is not their contractual or business behaviour that would trigger any eventuality, but the effect or behaviour of third parties, who simultaneously can be second parties to one of the parties to an exclusive dealing. It is important to point out that in the instances of this category of risk, the parties or individually, together by agreement or other means of control, can assess the risk as foreseeable and thus be in a position to mitigate or neutralize it altogether.

Similarly, when dealing with two parties in a supply chain, despite the contractual relationship they may be involved in and limited by, they are in the position to assure or affect the other immediate links in their respective position to the chain of supply.

We mentioned above that the parties to an exclusivity dealing may lose operation control by excluding themselves from exercising such control.[125] Local customs and processes in

[125] BNP Paribas in 2014 issued in A Risk management Policy , and in its Chapter 7, (B) P. 19 of the acknowledges the risk of using exclusivity agreements would restrict the excluded other units from

international commercial operations can derail the outcome of a business operation, as they can differ considerably from those expected from a foreign company.

Operating in a certain territory different or strange for a party, in an international dealing with exclusivity terms, can be affected by local particularities such as cultural aspects and local business processes among others.

The risks of including exclusivity clauses lie beyond the scope of the parties involved. Such things as local business culture as well as local market operators can affect the expected functioning and results of an international operation.[126] Concretely, factors such as language barriers can alter substantially the efficiency of a business dealing, declining into a situation whereby a foreign manager appointed by a company to deal with local operations is unable to communicate efficiently to make the local employees understand the instructions that they are given. This can affect the operations in a range of ways as well as in various degrees. If exclusivity dealing is included in an international operation it can lead to one party being unable to operationally remedy a complication during the execution of a given business operation. The risk for these complications to take place is enhanced by the restrictive effect in the operativity of control of one undertaking part of an international operation, having exclusivity terms that would block a party from overseeing and applying a remedy to one of the complications mentioned above can result in damaging the fluency of the business arrangement if not compromising it in whole.

The risk mentioned above can be affected both in vertical and horizontal exclusive relationships, whether they are mutual or unilateral. Considering the same situation above, the particular differences would not be necessarily unfamiliar or strange for one of the parties only in relation to a particular territory, as it could be strange to all involved, and the restrictive effect on the ability to tackle any issues during the implementation of an international business arrangement be due to the contractual arrangement that is restraining one of the parties to remedy a problem because of the exclusivity clauses restriction apply horizontally between those parties in respect to applying a solution to a matter that is caused

involvement in the same transactions.
https://cdn.territories.bnpparibas/app/uploads/sites/29/2022/01/risk-management-policy.pdf

[126] Umar K. Mohammed, *Culture and Conflict Management Style of International Project Managers,* (2008) International Journal of business and management, P.3

due to the territory they are operating with. On top of that, we could also have a third element to it, if we consider a multilateral dealing that due to the exclusive contractual arrangement a local party blocks even further the remaining parties from remedying an issue for the causes mentioned above.

Another source for risk when entering into an exclusivity dealing would be applicable laws and regulations that affect the commercial relationship between the parties, such as antitrust laws, or employment law, as these would fall into this category of second-degree risk, because the parties can mitigate or neutralize the risk, by taking pre-emptive measures. The existence of risk is not at their discretion, it can arise by the action or lack thereof of the other parties, such as legislators, involved in a commercial arrangement.

We explored how some jurisdictions look at the relationship between two or more companies or a group of companies when it comes to regulating not only the exclusivity dealing itself but also the effects it may have beyond the parties involved in a dealing.[127] To assess the risks of falling into one of the categories that are regulated by law and may carry swift penalties, depending on what jurisdiction the exclusivity dealing is affected by the risks may arise from different angles.[128]

Some business operations require a high level of expertise this being critical for the success or smooth progress of a specific project. It would not be unusual for an undertaking to hire the services of an expert in a foreign territory due to the lack of that undertaking's knowledge of a specific territory. Exclusivity agreements allow the businesses accessing the knowledge to put themselves in an advantageous position with their competitors, as well as those providing the knowledge by negotiating exclusivity terms to their contracts can have exclusive access to privileged information and business secrets that may benefit them strategically considering their market and competitors.

As any business dealing has a goal or objective that needs to be executed, from the planning to the execution of any project natural persons are necessarily involved. A workforce is

[127] A. Douglas Melamed *"Exclusive dealing agreements and other exclusionary conduct—are there unify ing principles?"* (2006) P. 403

[128] Case C-680/20. Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (2023) paras 9, 11,

something that business operations need, and their efficiency can sometimes be critical for the achievement of a certain goal. Sometimes a business may choose to bring its workforce into a foreign territory as part of an international operation, or they may instead choose to hire local staff. In any of those cases, mostly labour law would be an element linking a certain company and its staff.

In any of the choices taken by the business expanding its operations abroad, due to the need to protect its business secrets and know-how, or for the need to have full and exclusive access to skills in high demand, exclusivity terms can be attractive for an employer.

The Regulation "Rome I" can trigger situations in which the certainty on the validity of exclusivity terms in employment contracts which are assumed to be valid based on governing law by choice if that choice of law is deemed to result in depriving the employee of rights or benefits that it otherwise would.[129] The same regulation may cause uncertainty for the validity of exclusive employment agreements in situations where the exclusive employment agreement is presumed valid or uncompromised due to choice of law, as specifically Rome I Regulation allows other laws excluded by choice of law, to be applied to the Employment contract could still be applied over the choice of law beneficial for employer, allowing *"overriding mandatory provisions"* to be applied over the chosen governing law, to protect public policy, political, social and economic interests of member states of the European Union.[130]

In the case of retaining the same workforce and using it in a different jurisdiction as part of an international operation, the fact that the relationship between company and staff remains the same; their work contracts are the same, and the work dynamics also remain, does not prevent from it to fall into a precarious situation due to the change of jurisdiction. The applicable law to an employment contract; either default in the home jurisdiction of an undertaking may at times be challenged and create a situation of uncertainty to the employer, in some jurisdictions such as Ontario, if the choice of law clauses in a labour contract are

[129] REGULATION (EC) No593/2008 if the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Art 8

[130] REGULATION (EC) No593/2008 if the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Art 9 and point 37 of its preamble.

deemed to be against "*bona fide"* the choice of law would not supersede the governing law, despite the location of the work being in a different jurisdiction than that of the parties.[131]

The "workers statute" of Spain permits the inclusion of exclusivity clauses in employment contracts, as long as such restriction of being simultaneously employed by third parties is expressly agreed upon and specifically compensated as a financial complement to the salary[132] The same statute establishes that Spanish law will be applied to the work of Spanish workers hired in Spanish who are abroad working for Spanish companies unless other *"public order norms apply"* [133] That would resonate with those "*overriding mandatory*" provisions, and there can be a case that exclusivity relationships between employer and employee are seen against such things of public order or social interests. The inclusion of such exceptions to the applicable law is integral to the legal systems of the member states of the European Union, with certain local variations.

However, that uniformity in regulating which would be the applicable law does not necessarily mean that the rules applied to exclusive employment contracts would be uniformly similar. Some distinctions could make the difference between the enforceability of exclusivity clauses and them being simply redundant. The risk is inherent when in the European Union not only local laws can challenge the applicability of exclusivity terms, but also European Union's rules, which come in different forms and levels of applicability. Focusing on Regulations such as Rome I. This may lead to misinterpreting local rules that may elaborate further than Rome I. Then, if we the individuals designing the legal strategy of an international venture are not familiar with the indirect effect of the Directives of the European Union[134], and how this plays a role in the consistency of EU Law and EU member states national law.[135]

[131] McMichael v The New Zealand & Australian Lamb Company, 2018 ONSC 5422
[132] Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores. Art 21
[133] Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores. Art 1.4
[134] Ondrej Hamuľák & Tanel Kerikmäe, *Indirect Effect of EU Law under Constitutional Scrutiny – the Overview of Approach of Czech Constitutional Court,* (2016), ICLR, 2016, Vol. 16, (69-82) No. 1. Pp 72-73
[135] EU Directives have an indirect effect because they need to be implemented by members states internal laws, and this law will be regulating the topic of the EU Directive.

The risk of the validity of exclusivity terms in a labour contract is not limited to choosing the most suitable employment Law when it comes to the validity of those terms but making a choice without considering the validity of the choice itself.[136]

When hiring local expertise, it is not uncommon for a foreign undertaking to try to avoid the burden of local laws and regulations, with all the complications mentioned above, if it can be prevented. Labour laws vary from country to country, jurisdictions with similar legal traditions, and even within the same legal system. It could be unattractive for companies to deal with the local employment laws due to the financial and legal uncertainty it can incorporate.

To avoid the application of employment law, it is only natural that employment is an essential aspect to be discarded. However, businesses cannot discard the human factor from a commercial equation, especially those requiring manual work. So sometimes the work is contracted not from individuals but from businesses, which are run by an individual and perform the same tasks as an employee would. The legal and commercial relationship is then intended to be that of not employer and employee but of two businesses engaging in a service contract. For the same reasons for applying exclusivity terms to employment contracts, undertakings lean towards having contractors working exclusively for them.

The risks of undesired consequences or threatening the validity of the exclusivity agreement of employees can also be shared when using contractors in an international commercial undertaking. The jurisdictional risk as explained before, can also mean that those unplanned burdens can take place. These can affect negatively and even compromise the financial or operational viability of a commercial operation. Let's have the example of an undertaking that chose to use contractors rather than employees to avoid the application of labour law terms that affect the reliability of predictable workforce costs.[137] Sick leave, paternity leave, and other variables such as statutory holidays[138] can affect the expected results of a business undertaking, so businesses operating abroad would prefer to neutralise and risk of those

[136] Robert Howe QC, Mark Vinall & Tristan Jones, "Jurisdiction and choice of law in employment disputes" (2009) https://www.blackstonechambers.com/news/analysis-jurisdiction/ P. 10
[137] Richard R. Carlson Employment by Design: Employees, Independent Contractors and Employment by Design: Employees, Independent Contractors and the Theory of the Firm, (2018) Carlson Arkansas Law Review, Volume 71 Number 1 Article 3 (127-214) P. 134
[138] C-396/13, **S**ähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna (2015) ECJ

variables impacting their operations. A service agreement allows the main company to limit and control the costs and specify performance and reliability due to the versatility and freedom that a regular service contract may allow,[139] depending on what law the service contract in question is governed by.[140]

The provisions regarding the choice of law when it comes to private contracts may not be as strenuously burdening as in the case of employment contracts, due to the different socio-political approach that labour has compared to business arrangements, despite both often sharing the same function in a commercial operation. However, when it comes to contractors being free of those burdens, depending on the jurisdiction, there can be the risk of the contractors ending up being a bundle that the principal company wanted to avoid.

The protection of the principle of fairness could expose exclusive dealings to the risk of becoming unfair, due to an unbalance between the position of the parties created by a contract, and depending on what jurisdiction and to what level this could be the contract from the moment it was entered into force or for circumstances, which evolved after its formation and during its term.

Exclusivity contracts, where the exclusive element is the main and sole basis for it it's a greater risk for it to be compromised,[141] and business arrangements that include supplementary or complementary exclusivity clauses have a lesser risk of being compromised. Generally, when two or more undertakings enter into an exclusivity deal, they could fall under the attention of competition law.[142]

Exclusivity agreements that affect or control a substantial share of the market fall at risk of anticompetitive behaviour, if such commercial dealings, although they may be desirable for

[139] Richard R. Carlson Employment by Design: Employees, Independent Contractors and Employment by Design: Employees, Independent Contractors and the Theory of the Firm, (2018) Carlson Arkansas Law Review, Volume 71 Number 1 Article 3 (127-214) P. 163

[140] Richard R. Carlson Employment by Design: Employees, Independent Contractors and Employment by Design: Employees, Independent Contractors and the Theory of the Firm, (2018) Carlson Arkansas Law Review, Volume 71 Number 1 Article 3 (127-214) P. 158

[141] Case C-680/20 ECJ. Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (2023) para 5

[142] Unilever had a network of distributors and the Italian competition authority investigated if their arrangement constituted a violation of competition regulations. Case C-680/20 ECJ. Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (2023) paras 29

their profitability, could be against competition laws if they are deemed to be abusive due to their effect and constituted position in the market.[143]

Undertakings engaging in exclusivity dealings are exposed to competition regulations of a foreign jurisdiction, as some jurisdictions contemplate foreign undertakings as subjects of scrutiny when operating or affecting their territories.[144]

Exclusive dealings that put the parties in a situation of dominance in the market, could be deemed to be abusive, and the abuse of the dominant position in the market can lead to a legal risk.[145] Parties to an exclusivity arrangement that are in a dominant position can fall in the risk of their dealings being prohibited. The risk lies in that parties that are in a dominant position and exercising a monopoly may be valid and legal in some jurisdictions, and their dealings can also be compliant, however, this is not what the companies are achieving by an exclusivity dealing what is prohibited, but the way the dealing is made, in light of the way it affects competitiveness.[146]

5.1.3. Third-degree risks.

There could be other instances, that we would call third-degree risks, whereby intrinsic risks to an exclusive dealing cannot be mitigated or pre-emptively tackled by the parties; either operationally or contractually. The problem with these risks lies in their un-foreseeability, as is the case of "*force majeure".* There would not be anything that the parties could do to mitigate something unforeseeable. Un-foreseeability included in this risk is not only "acts of god" as a degree to the un-foreseeability, but those instances that are beyond the control of the parties. Such as in the case of a sudden and compelling circumstance that could be foreseen, by one or all the parties in an exclusive dealing, and could also be mitigated, but for a compelling reason, the means for mitigating or neutralizing such risk, are no longer available or effective.

[143] Treaty on the Functioning of the European Union. Art 102.
[144] Competition Act (Canada), PART VIII Art. 84
[145] Competition Act (Canada), PART VIII Art. 78
[146] Patrick Bock and Kenneth Reinker "Dominance 2020", Law Business research. pag 245

This case is also affected by jurisdictions notorious for lack of legal certainty which legislative tradition is unpredictable. In those cases, we can see that regulatory bodies are also a risk to consider as the exclusivity dealing affected under a certain jurisdiction could be jeopardized by a sudden turn of events, such as a *"coup d'état",* a legislative initiative taken by a state having a secretive legislative process, or simply a country in a situation of instability.[147]

In this category, we can include natural disasters specifically, as these are something that the parties have no control or influence over them. Natural disaster carries the risk of having a negative impact in operations if not compromising it all altogether, as these have a severe impact on business operations.[148]

The inherent risk in exclusivity clauses, as stated above, lies along the dependency effect. These third-degree risks can overturn the attractiveness of an exclusive dealing due to causes out of the control of the parties. Deserves to be mentioned that those causes do not always need to be un-foreseeable always. Anyone can foresee the risk of an accident happening, and the better preventive measures are applied, the less the likelihood for these to happen. However there are always unforeseen risks that cannot be assessed, these could be sudden and unexpected natural disasters such as floods or earthquakes, that could wipe out an entire reserve of gain, that could, for instance, be the storage from an agricultural company, waiting to be delivered to a food manufactured, who is exclusively reliant on the grain, to make its products, hence dependant on the relationship, and reliant on the exclusivity deal to work as expected.

[147] Childers, Brian Alan, "Coup d'état and International Trade" (2015). Chancellor's Honors Program Projects. P. 15. https://trace.tennessee.edu/utk_chanhonoproj/1802

[148] Ankai Xu * Amèvi Rocard Kouwoaye, "How do natural disasters affect services trade?" (2019) World Trade organization. P. 11,12,

6. Best practices for international exclusivity agreements.

As we examined before, using exclusivity clauses has its benefits and risks. These intrinsic risks are amplified when these exclusivity dealings are included in an international dealing. When companies decide to engage with other companies to operate in a territory, the territorial dimension needs to be taken into account. Territoriality can be seen from different angles such as jurisdiction, culture,[149] language, political alignment and so on. Awareness of those aspects of an international commercial operation would not be sufficient in case an unfavourable eventuality takes place. Readiness is also key, as being aware of an issue does not always mean that the means for dealing with it would be available.

It could be cumbersome to address all the risks and aspects of using exclusivity agreements in an international context, due to the complexity of applying a detailed focus on international commercial operations in general.[150] For this, we will explore solutions that would apply to the problems that including exclusivity terms would imply, as well as possible ways of using such terms more safely, operationally and from a strictly legal point of view.

This Chapter will not only explore practices that would serve to remedy risks or prevent them altogether but will also deal with other practices and proposals that would be useful or beneficial when dealing with exclusivity agreements.

6.1. Between the parties.

Encompassing the exclusive dealing inside the scope of contracting parties, the agreement would be a suitable reference for indicating suitable practices for the best development of the commercial arrangements between the parties. This subsection will cover best practices

[149] Umar K. Mohammed, *Culture and Conflict Management Style of International Project Managers,* (2008) International Journal of business and management, P.4

[150] Jonathan Wood, The Challenges and Opportunities of Cross-Border Compliance ,https://c2risk.com/the-challenges-and-opportunities-of-cross-border-compliance/, C2Risk, October 11, 2023, accessed 05 November 2023

addressing first-degree risks as well as other aspects to be considered within the relationship between the parties.

The parties would benefit from conducting due diligence before venturing into an international business arrangement. This should be performed as extensively as possible considering several aspects, and not simply as a mere procedural item. Solely identifying the respective parties' legal identity and structure, as a simple understanding of due diligence would not be sufficient to tackle potential issues that may arise during the execution of the commercial operations if it's not conducted robustly, especially when the dealings are incorporated in an international context.[151] Being familiarised with the corporate culture as well as national culture is essential for covering all possible angles.[152] This will help to draft execution and contingency plans.

When negotiating an international business arrangement that includes exclusivity is important to be aware of the differences between the parties involved. Cultural differences will impact the negotiations and exclusivity agreements, due to their particularities, will be seen differently depending on the customs and culture of the parties.[153]

Knowing the capabilities of the other parties, in terms of performance and reliance for the duration of the business operations would allow them to enter into a contractual relationship covering certain terms to deal with the contingencies. These terms vary in range but address the same issue, dealing with the other parties' particularities.

The party granting exclusivity may consider including conditional terms to the exclusivity to apply a degree of reliance to the expectations towards the counterparties and ensure that good faith is present when a party trust another in excluding itself by an exclusivity agreement.[154] These conditions could be formulated as performance requirements, and that would provide a stronger contractual framework as "expected performance" would become,

[151] Universities UK, *managing risks in internationalisation: security related issues*, (2020) P. 18
[152] Example of Intercultural management services: https://www.hofstede-insights.com/intercultural-management
[153] Qu, Dongya Marcia) "The Impact of Cultural Difference on International Business Negotiations," (2015 Academic Leadership Journal in Student Research: Vol. 3, Article 4. P.1,3,4
[154] Arpit Saini. " Comparative study of conditional contracts in different jurisdictions" (2020) P. 92

"required performance".[155] Let's bear in mind that the performance mentioned here is not a contractual performance that would be strictly related to the core matter of the commercial arrangement, such as transporting one item from A to B, this would go beyond that line and deal with how A is transported to B, while that act is solely in control of the party who has the exclusivity to act.

The conditional term of required performance above serves the party that is excluded from performing the act, which may be critical for the successful development of a given commercial operation, as assurance for its ability to take control in case its interest may fall into risk. Let's put the example of a Supplier that is exclusively relying on the delivery of its products on one single transport company. The Supplier is used to the business standards of its country and has entered into an exclusive logistic agreement with a transport company abroad. They both are aware of their respective good reputation in each other territories. However, they belong to substantially different business and national cultures, which translated into misunderstood expectations, delays, cargo labelling or wrapping methods that do not compromise the object of the commercial arrangement and not significant enough for being failure to perform, but significant enough for the reputation of the supplying company towards its distributors in the territory of the transport company This is possible in certain complex operational environments, whereby the supplying company may have reputational concerns in the country of the transport company, with a business partner that may not share the same cultural particularities with the transport company. Important cross-cultural issues, such as legal understanding can be overshadowed if the sole point of attention is given to the object of the exclusivity dealing.[156]

Continuing with the example above, the supplier could, for instance, include certain conditions for the exclusivity agreement, which would be those assumed by the supplier but not by the transport company. Other conditions could address staffing and their language or professional skills, which may be important for the supplier but not for the transport company.

[155] This, however, is without its own risks as setting of targets in join distribution context is considered as a "hard restriction" in the Eu thus in violation of Article 101.1 of the TFEU. COMMISSION REGULATION (EU) No 1218/2010 of 14 December 2010, Art 5, a),ii.

[156] Nishanova Farida Mamasharifovna, *LEGAL CULTURE AND THE MAIN FACTORS OF ITS FORMATION,* (2021), EPRA International Journal of Multidisciplinary Research (IJMR) - Peer Reviewed Journal Volume: 7 | Issue: 5, (187-190) P. 188

Within the category of conditional terms, we can find the use of "targets" set by the excluded party. Including targets as a condition for the validity of the exclusive rights, allows the excluded party to set financial expectations in targets set as economic terms, and production expectations in the case of productivity targets. Similarly, it would serve for the excluding party as a reference to know what is expected and increase the trust vested upon by its counterparty.

Including conditional terms for the validity of exclusivity would allow the supplier to free itself from the restrictive effect and allow it to look for an alternative transport company that would serve according to its expectations, and at the same time it would not necessarily mean that it would have to stop operations in the meanwhile.[157] This is because, if the conditional terms are applied to the exclusive nature of the commercial arrangement and not to the overall object of it, the parties would remain bound by it. However, it is important to consider other contractual terms, when ceasing exclusivity dealings and the service contract in question remains in force. The exclusivity terms should not be parallel to or amount for a specific contracted service. If the supplier company above had been able to end the exclusivity terms with the transport company, it would still have a minimum transport order equivalent to the total order with the transport company, and that would mean that it would not be able to find alternatives without breaching the agreement.[158]

Efficient breach of contract is something that could relieve one party from a strenuous situation, but the consequences of a contractual breach need to be considered when considering taking such a step. For this, adding appropriate contractual clauses can help mitigate the effects of an incidental breach of contract. A party affected by loss of exclusivity due to breach can benefit from a contract that would cover the financial loss suffered due to the breach of the exclusivity terms if that is the scope of the losses, and this could be achieved by including liquidated damages, as a price to pay for the breaching of the exclusivity

[157] In the author's professional experience, when negotiating commercial contracts which include exclusivity clauses. The excluded party agreed to grant exclusivity with the condition that the objectives it is trying to achieve by granting such right to the excluding party. The excluded party can regain performing right in case these conditions are not met, thus regaining operational capabilities which are restricted by these exclusivity clauses.

[158] The Supplier of the example above would think of a way out of that situation. Perhaps because not being able to find an alternative becomes too much of a business burden and it is straining its operations and needs to consider if sticking to the contract would be worthwhile.

agreement.[159] This, however, may not cover consequential or other indirect damages, hence the contract, when regulating the event of breach of contract, must address not only the exclusive nature of the agreement but also the object of the business arrangement.

The point of exclusivity, in cases of "action exclusivity" may be aimed at a specific financial or operation objective that could safeguarded in cases of breach of exclusivity. Let's say that Company B relies on the exclusive services provided to Company A to reach a financial target. Under the potential risk of efficient breach, company B should not only aim to protect the exclusivity dealing but also the achievement of that financial target.

As in some cases, it would be difficult to protect with full certainty the exclusive dealing. It would be beneficial to ensure specific performance that would match the intended goal of the breached party. For that, is important for the parties to an exclusivity dealing to identify which would hypothetically have a better position in case of efficient breach.[160]

Overall, exclusive commercial dealings have a restrictive effect on one or all the parties, and this may cause dependency.[161] In such situations, the risks for one of the parties ending up constricted in the business dealing can be prevented by the parties aiming at a situation of balance. It is understandable that undertakings involved in an international commercial operation look for their respective interests and seek a benefit from a given business arrangement. However, comparing or weighing how the other parties' interests and expected benefits allow for better-balanced dealings, would be advantageous to prevent situations whereby a party may decide to breach a contract or the input it may give to the arrangement considering its output.

In the case of mutual exclusivity, the situation of affinity may seem to create an automatic balance, yet again, this cannot be taken for granted, and not be relied on without considering if such affinity is in balance. Entering a mutually restrictive commercial environment can

[159] Tess Wilkinson-Ryan" Do liquidated damages encourage efficient breach? A Psychological experiment (2020). P.10,11

[160] Maria Bigoni, Stefania Bortolotti, Francesco Parisi & Ariel Porat, "Unbundling Efficient Breach" (2014(P. 35

[161] OECD Secretariat with the help of Dr. Steven Brenner, Senior Associate, Charles River Associates, Washington, D.C. and Professor Patrick Rey, *Competition Policy and Vertical Restraints: Franchising Agreements (1994)* P. 17-18

benefit if the extent of such restrictions is balanced. This means that the element of dependency needs to be factored in.[162]

As mutual restriction does not necessarily imply interdependence, this needs to be assessed, not only to prevent situations of efficient breach but also to ensure that the effects of the exclusivity relationship do not hinder the development of the international operation in question. Some companies' internal operations and processes may be used to operate in a non-restricted manner, or perhaps the exclusivity dealing may entail internal restructuring, which can affect such processes, and even derail the progress of the business arrangement. Therefore, it would be recommended to apply the same degree of caution as if the relationship would be of unilateral exclusivity, by establishing the reference of scrutiny not in the type of exclusive relationship, but in the effects that it has for all the parties.

Understanding the principle of fairness while drafting an exclusivity agreement will help to balance and address the incentive properties that exclusivity dealing may have.[163] The principle of fairness is relevant when the parties decide to adapt to a contract that would match their expectations and limit the risks of the other parties' potential change of course, or decreased level of performance due to lack of incentives.

Applying the factor of fairness to the contractual equation of exclusivity dealings will protect a commercial arrangement from falling into the category of unfairness, either by specific exclusivity clauses or the contract as a whole.[164]

It is important to identify the weight that exclusivity has in the entire dealing for all parties involved. Whether we are dealing with an exclusivity contract or a contract with exclusivity clauses, all parties could benefit from understanding the starting point of their counterparts, as it would assist them in adjusting the commercial deal in its entirety, from start to conclusion. Awareness of the interests and business culture of the other parties allows for a better projection of the commercial arrangement, and it would be more feasible to have a

[162] Merz, Jessica Paige, "The effects of exclusive contracts on organizational competitiveness" (2012).Senior Honors Projects, 2010-current. 448, P. 43
[163] Fehr, Ernst, et al. "Fairness and Contract Design. (2007)" *Econometrica*, vol. 75, no. 1 P.121–54.
[164] Fehr, Ernst, et al. "Fairness and Contract Design. (2007)" *Econometrica*, vol. 75, no. 1 P.121–54.

pre-emptive approach by being able to foresee potential contingencies, including misunderstanding in the purpose of the dealing in question.[165]

The scope of an exclusivity agreement is fundamental when considering applying limitations to it. These can be limiting the risk for the excluded party from being restricted from operating in the market in creating an undesired situation of dependency or limiting the risk that an exclusive party would have unlimited territorial control over the object of the exclusivity dealing.

Applying territorial limitations to an exclusivity agreement would allow the excluded party to have any other territory open to operate itself. This not only limits the control that the exclusive party subtracts from the excluded party, but also could allow for the exclusive dealing to be locked in a single territory, thus facilitating legal certainty by having one jurisdiction to consider.

6.2. The environment of exclusive dealings.

An international business operation is not only affected by the relationship between the parties and their binding legal instruments but also by other factors that, out of their control and awareness, will affect their commercial dealings.[166]

In the previous subparagraph, we indicated that is important to conduct due diligence and familiarise with all the parties involved in international commercial dealing. The transnational element of such dealing generates certain vicissitudes and risks that are projected beyond the scope and direct control of the parties[167]. An additional degree of due diligence, this being directed to the circumstances, surroundings, and other business

[165] Qu, Dongya Marcia "The Impact of Cultural Difference on International Business Negotiations, (2015) " Academic Leadership Journal in Student Research: Vol. 3, Article 4. P.1,3,4

[166] P Samantha Yoder, John K. Visich, Elzotbek Rustambekov, *Lessons learned from international expansion failures and successes* (2016) The Journal of the Kelley School of Business, Indiana University V. 59. Issue 2 pp. 233-243 P. 242

[167] S. Tamer Cavusgil, Seyda Deligonul, Pervez N. Ghauri, Vassiliki Bamiatzi, Byung Il Park, & Kamel Mellahi, *Risk in international business and its mitigation (2020) Journal of World Business Volume 55, Issue 2*.P. 3

operators in the territories of the counterparties in a commercial dealing could be beneficial in the assessment of potential risks.

Contractually, using indemnification causes would be recommended to tackle potential undesired outcomes due to the dealing of a party in a commercial arrangement concerning its interactions with third parties,[168] this being the workforce or other operators that may affect the business operation in question. This is especially useful when entering into a different territory for business, due to the local particularities and legislation not being only unfamiliar, but also being more likely to be less accessible for the entering party.

Indemnification clauses may not prevent any of the eventualities but may serve the purpose of indicating to a local party the need for additional caution in order not to trigger such a clause. This can be seen as an incentive to apply due care on behalf of the indemnifiable party, as the desire for the avoidance of potential risk is passed to the indemnifying party. This, however, may not be the case of the indemnified party seeking protection from its own negligence.[169]

If the above cannot be helped, then the clauses need to be drafted in a manner that would allow operational control or at least the chance to remedy or drift the execution or operations according to the expected direction. This can be achieved by limiting the delegated power of the excluding party.

The jurisdiction that covers an exclusive dealing needs to be identified as well as the law that would govern the dealings. Having "choice of law" clauses will require these to be examined, as there could be a risk that these would be overruled by treaties or supranational regulations.[170]

In cases of exclusive international operations requiring transferring workforces to different territories, an undertaking's workers' home jurisdiction would present an obstacle to the

[168] Anthony L. Eugeni, Esq. *CONTRACT DRAFTING AND NEGOTIATION: INDEMNIFICATION AND RELATED ISSUES*.(2019) P. 8

[169] Charles M. Pisano,*Judicial Interpretation of Indemnity Clauses*, (1987) Louisiana Law review Vol. 48 149-181. P. 170

[170] As the case with the Rome I regulation, choice of law clauses will be overruled in cases that local laws would deem it necessary.

workers' employment terms for work abroad.[171] It would be advisable to consider the use of leased workers from a local business partner in case the specific task of the works requires exclusive dedication, but the employment of such workers would not be feasible for the undertaking in question.

We have mentioned above that it is important to see what the effects of the parties' relationship have in the market. We can consider that the market is part of the environment of an exclusive agreement. Such an environment can be affected by an exclusive commercial arrangement and what position the parties are in the market. Parties that are not in a dominant position would not be under the same scrutiny that undertakings with a dominant position, whose exclusive dealings will have consequences, even in cases where the operations are carried out by their contractual counterparties.[172]

A secondary focus beyond the best practices between the parties needs to be applied to the surroundings of the parties, and in the case of the market, competition rules need to be observed. For this, there are several recommendations and guidance given by regulatory bodies.[173]

In the case of exclusivity dealings of horizontal relationships, the undertakings are in a privileged situation concerning other market operators, as their exclusive dealings most likely may include an exclusive exchange of information. To avoid these from having a negative effect in the market such as restriction of competition, the conditions of relevant

[171] In the case of Posted Workers, article 3 paragraph 1 of the DIRECTIVE 96/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL reads "Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1(1) guarantee, on the basis of equality of treatment, workers who are posted to their territory the terms and conditions of employment covering the following matters which are laid down in the Member State where the work is carried out:" This means that a company whose posted workers are based on a member state which labour regulations are more financially favourable compared to the host member state would not be financially incentivized to post its own workers, and could instead chose to use self-employed contractors.
of 16 December 1996

[172] Case C-680/20 ECJ. Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato (2023) paras 29

[173] Public bodies have an interest in the compliance of the laws and regulations under their competence. The European Union's commission has issued guidelines on how to comply with EU law. ibid.

markets and information specific need to be analysed to assess the impact these may have in the market.[174]

Similarly, vertical relationships need to assess the impact they have in the market and apply certain vertical restraints such as exclusivity agreements in such a way that it would not only not conflict with the market's interests but also affect them positively. There are reasons to apply exclusivity agreements in vertical relationships to deal with issues such as free-riding, or the result of high prices, which would be allowed.[175] However, these exclusive dealings need to be considered along with the positive effect it has on the market and not only on the interests of the parties.

The duration of an exclusivity agreement is an element worth the attention. Sometimes the effective need for an exclusivity term may be justified in terms of duration, as the anticompetitive effect can take place after a certain period of time, hence for a period of time as restrictive as it can be, it may not have negative consequences for the market.[176]

6.3. Contingencies.

Unfortunately, the parties to a commercial endeavour cannot prevent or assess the risk of an eventuality that as such cannot be identified, as it's the case of unforeseeable events.[177] Now, the fact that the parties cannot prevent the consequences of an eventuality does not always mean that they are not able to estimate the potential for it to take place.

Un-foreseeability of an incident means that contractually it could be difficult to address it, as causes of force majeure would normally exclude the applicability of contractual provisions. However, it is useful to bear in mind the degree of dependency that an exclusivity

[174] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance 2.2.3.
[175] Communication from the Commission COMMISSION NOTICE Guidelines on vertical restraints 2022/C 248/01 2.1. (16)
[176] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance p. 319.
[177] This type of events would be those ones for which there is no data to prevent or identify, as in the example of a chain reaction accident.

dealing has on the parties, or the business operation as a whole. In the case of international commercial arrangements, the element of un-foreseeability is greater, as there will be other elements that the parties would not be able to take into account, as unforeseeable.

It is important to measure the reliance put into a commercial dealing and to explore the possibilities of sharing the risk of any eventuality that may affect the commercial dealing. In these cases, is best to put the focus on what elements of the commercial dealing are most critical and assess the possibilities of having alternatives in place. Having in-depth knowledge of the region or territory where operations are based, will allow for vulnerabilities to be identified and assess potential losses.[178]

On the other hand, some situations may not be prevented but they could be expected, or at least predicted.[179] Let's put the case of accidents or situations in which risks can be assessed, despite their unlikelihood.[180] In this case, the use of insurance policies and including the other parties in the obligation to insure the elements of the commercial arrangement is important.[181] These insurance policies can be used to mitigate this and implementing contingency measures in case of eventualities out of the scope of force majeure will counter the risk of the potential negative consequences.

Requiring that all the parties to an international operation have insurance policies applied to the critical elements of such operation can help to mitigate the effects of an event out of the control of the parties, and even secure the expected financial result.[182] This can be in the case of insuring logistical elements, or the business dealing itself.

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[178] Howard Kunreuthe, "Mitigation and Financial Risk Management for Natural Hazards" (2001) P. 4

[179] The Department of Atmospheric Science Colorado State University issued a FORECAST OF ATLANTIC SEASONAL HURRICANE ACTIVITY AND LANDFALL STRIKE PROBABILITY FOR 2023. Philip J. Klotzbach1, Michael M. Bell2 and Alexander J. DesRosiers, *FORECAST OF ATLANTIC SEASONAL HURRICANE ACTIVITY AND LANDFALL STRIKE PROBABILITY FOR 2023,* (2023)

[180] An example of a Rare Act of nature that can occur and not be prevented is the "Great mog of London, which can cause havoc and disrupt commercial operations. Martinez, J.. "Great Smog of London." *Encyclopedia Britannica*, August 10, 2023. https://www.britannica.com/event/Great-Smog-of-London.

[181] Assistant Treasurer, Hon Bill Shorten MP in the Australian parliament, in the "Natural Disaster Insurance Review" result of an Inquiry into flood insurance and related matters Executive Summary and Recommendations September 2011 in its page 5, mentioned the recommendation for small businesses to have insurance coverage for floods. This acknowledges the negative effects on businesses of these natural events. Hon Bill Shorten, *Natural Disaster Insurance Review* (2011) page 5,

[182] Barry Sheehan · Martin Mullins · Darren Shannon · Orla McCullagh, *On the benefts of insurance and disaster risk management integration for improved climate-related natural catastrophe resilience* (2023) Sec. 3

Different jurisdictions have different scopes for insurance, and their use and claims can be complicated to apply from one jurisdiction to another. Therefore, having local parties having local insurance policies can serve to apply a greater degree of certainty in securing the operation in light of a potential incident.[183]

6.4. Sole vs exclusive.

Bearing in mind that an exclusive right allows the recipient to exclude everyone including the grantor and sole rights exclude everyone apart from the grantor and the recipient.[184] Retaining control over a certain right or business activity can be sourced for several reasons including the optimal exercise of a commercial activity lies on the business retaining control, or due to lack of trust in others for carrying on with such activities.

In cases when a local business in a certain territory is the only one capable of performing according to the interests of a foreign company, and this company is not willing to exclude itself from the possibility of operating in such territory[185], it would be worthwhile considering alternatives to exclusive relationships.[186]

Sole business relationships applied vertically or horizontally can help to limit the disabling effect and provide alternative options for the parties in a case. As an example, A sole distribution agreement could help the supplier to complement or supplement the activities of the distributor.[187]

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[183] Suresh Krishnan, *Structuring multinational insurance programmes in Europe Intragroup risk financing – considering the issues,* (2012) P. 6

[184] Legal Services, University of Queensland. Intellectual property-.key issues" P. 2

[185] In Zymurgorium Ltd v Hammonds of Knutsford Plc, (2021) EWHC 2295 (Ch) Hammonds of Kutford Plc claimed that the defendant breached and exclusivity distributions agreement. The defendant used the claimant as a distributor for its products, as it was not willing to exclude itself from engaging with other companies in the market. This is an example of a situation where the supplier needs to be aware of what relationship is been established in respect of other companies, as a supply agreement needs to specify its nature, whether exclusive, sole, or open.

[186] Sole rights, such as in sole distributions agreements, see paragraph below.

[187] Let's see the case of a well-established company that manufactures and distributes its own products in a territory. It would provide an incentive for a distributor to enter into a sole arrangement, as it would exclude other competitors to compete with the same products, and at the same time it would allow the principal to expand it operational reach, without compromising its own operations.

This substitute option can be useful for the territorial dimension of an international commercial arrangement when the element of exclusivity granted is intended to be aimed at other local operators. In this case, the local party would exclude other local operators and be able to rely on the input of the foreign counterparts. However, in this case establishing the goal and scope, as well as applying contractual restrictions is key to prevent a granting party from exceeding the intended scope of the agreement. This would be the case when a local business partner's interest is based on controlling its operations in a certain market, undisturbed.

This alternative would limit the restrictive effect that would, for instance, take place in a vertical relationship whereby the excluded party would grant exclusivity to a party in a certain territory. The restriction would apply horizontally to other parties in that territory but would not have an effect vertically between the parties, because the restriction is directed to third parties.

The effects of exclusivity can be extrapolated to "sole agreements" as the restrictive effect can be placed into suitable market operators, giving the sole party the desired control over a certain territory, product, or activity. This would be without excluding other effects that could take place, depending on how the exclusivity agreement or clauses are formulated.

Sole agreements as a form of single sourcing, can provide the benefits of the close relationship between the parties, as dealing with the same party over time can potentially create standardized and reliable operational processes.[188]

The dependency effects of exclusivity can be averted for those cases when the granting party relies on the performance of the sole party, as it is not excluding itself from performing, should it need to.

[188] Kissi, Ernest & Osei-Tutu, Ernest & Tutu, Safowaa. *SOLE SOURCING PROCUREMENT: THE GHANAIAN PROCUREMENT EXPERIENCE,* (2018), P.3

7. Conclusion.

Businesses around the globe have greater opportunities to expand their operations, this can well be due to better communications technology and access to information.[189] The fact that the global market can be more accessible than in the past when technology made it more difficult and the possibilities for synergy were lesser can lead to a complex global market, as market operators come in from different territories, this can imply a difference in business cultures, legal traditions, and generally different particularities that add up to a dynamic yet manifold market.[190] This sets the businesses operating globally in a diverse commercial environment.

The use of contracts for conducting and concluding commercial arrangements is a common practice worldwide, this could be one of the few items that are essentially common and uniform. This helps companies to operate internationally and be able to work with a legal instrument that in principle is supposed to embody the agreement they may decide to put into action. This common denominator provides the parties to an international commercial dealing with the ability to benefit from the versatility of contracts that, as legal instruments have, to record and regulate their business operations.

The parties to an international commercial contract should adapt their needs and interests, as well as protect them by formulating the terms of their contract in such a manner that is consistent with those needs and interests, not only for the contract to be consistent with the dealing but also for legal reliance in the interpretation or the contract, as the letter of it is important when the contract is exposed in a dispute.[191] Such terms can take the form of exclusivity clauses or exclusivity agreements, and these in their right formulation can give the business relationship the form or the features that the parties require for their commercial endeavour's desired direction.

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[189] Michael Mussa, *Factors Driving Global Economic Integration,* International Monetary Fund, August 2002. https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp082500

[190] Chloe Friederichsen, *Culture & Conflict: Intertwined with International Business,* (2014) P. 19

[191] Aaron D. Goldstein,The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation, 53 SantaClaraL. Rev. 73 (2013). P.81. http://digitalcommons.law.scu.edu/lawreview/vol53/iss1/2

Exclusivity agreements can, not only mark the relationship of the parties or define the details of the executions of a business arrangement but they can also transform the contractual landscape of a business arrangement. Because of the many features described in this thesis, the extent of the effect of the commercial operation in question, can be affected and derail the expected outcome, due to the ramifications that an initial exclusive dealing entails when considering the effects that it can have along the execution and development of it.

The relationship of the parties to an exclusivity contract requires them to have in consideration not only an operational itinerary to reach their objectives but also to study the relationship they intend to have in terms of operational control or abilities and put them in contrast with the desired operational structure. This is because of a potential shift of operational control, or manifestation of the different effects that exclusivity agreements have.

International business operations, being a complex matter, require attention from different angles applied to the parties and to their business and operational circumstances, as they can substantially affect the material shape of the structure of the business dealing in question, especially when taking differences in legal culture into account.[192]

The complex aspects of exclusivity clauses, as for their effects and features do not and should not deter undertaking from using them in their business dealings, as there are substantial benefits from them, they serve to optimise resources and to secure or promote the interest of the parties. They also can have fundamental benefits for businesses using them, as their inclusion can enable some undertakings to operate, and even lift the restrictions they may be subjected to. Considering the effects on exclusivity agreement, these function differently depending on the position and territories of the parties, and if these are correctly formulated and the terms accurately assigned parties can benefit from having a local party that may exclude the granting party from operating in a certain territory, but by allowing a local party to carry on business in such territory, it may allow it, by delegation, to expand operations to that territory, that otherwise it would not have been able to.

[192] Ralf Michaels, *Legal culture* (2011), Forthcoming in Oxford Handbook of European Private Law (Basedow, Hopt, Zimmermann eds, Oxford University Press P. 6
https://scholarship.law.duke.edu/faculty_scholarship/2390

The other benefits that exclusivity agreements have should be taken into account. Social benefits such as the promotions of employment, have a local impact that can even allow the progress of developing nations, and if the overall business operation is aligned with this particular benefit the promotion and local legal sanctioning of these exclusivity agreements can have an impact in the global economy. Similarly. Other socio-economic benefits such as social welfare[193] need to be accounted for, and when negotiating exclusivity terms or checking for discrepancies with legal values the overall benefits should also be part of the overall picture.[194]

These secondary benefits, which are not directly enjoyed by the parties, although they may not be the focus of interest of a particular business operation, should not be an obstacle or be contrary to the interest of the parties. This is not only because corporations have an element of social responsibility based on their effect on society, but because the secondary beneficiaries may be protected by law.[195]

Legal values that are protected in foreign territories must be observed before venturing into exclusive dealings.[196] We have seen above that some jurisdictions focus on exclusive dealings in set on the dealing itself, and others focus on the effects of the dealing. Therefore, when designing an operational strategy including exclusivity agreements, is imperative to ensure that compliance with applicable regulations is two-fold, with regards to the contractual structure and the effects it has in the territory and its market.[197]

Employment regulations affect the feasibility of using exclusive terms in a vertical relationship, and this is not always limited to mere staffing convenience. Certain work relationships are based on the requirement of a high level of trust due to the critical nature of the task in question and how it can hinder or support the development and outcome of an

[193] A. Douglas Melamed *"Exclusive dealing agreements and other exclusionary conduct—are there unify ing principles?"* (2006) Pp. 378-379

[194] A. Douglas Melamed *"Exclusive dealing agreements and other exclusionary conduct—are there unify ing principles?"* (2006) P. 378-379

[195] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting . Art1. Par. 4

[196] Nishanova Farida Mamasharifovna, *LEGAL CULTURE AND THE MAIN FACTORS OF ITS FORMATION,* (2021), EPRA International Journal of Multidisciplinary Research (IJMR) - Peer Reviewed Journal Volume: 7 | Issue: 5, (187-190) P. 187

[197] This is, by following such recommendations and guidelines by local authorities and governing bodies, such as the commission, in the case of the EU.

international business operation. Thus, designing a commercial structure will always have to consider the relevancy of local or supranational employment regulations.[198]

On the other hand, competition regulations are also, along with employment laws, one of the main factors that need to be taken into account when outlining an international business operation. In this case, it will not be directed towards the vertical relationship between the parties but their horizontal one.

It would not be advisable for companies to engage in exclusive dealings in an international context solely focusing on the potential gains and expected outcomes. As we saw above, this undertaking is not without certain risks,[199] some of them could compromise the dynamics of its execution and some others endanger the realization of the arrangement entirely.

Risk assessment needs to be performed considering all angles, and effects directly or indirectly affected by applicable law as well as operational contingencies. Starting with the parties. They need to scrutinize the international exclusive dealing above and beyond the parties involved. They should consider market circumstances, including other market operators beyond the scope of the dealing in question, as this could end up influencing the dealing and posing a risk to the interest of the parties individually or collectively, as well as the development and outcome of the business operation, without disregarding the impact that their operations have in beyond the scope of their arrangement.[200]

We cannot simply expect that the parties can secure the culmination of their commercial operations by awareness and knowledge solely. Action plans require implementation to ensure the successful fulfilment of an operational plan, and contractual structuring cannot

[198] Such as The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022, the DIRECTIVE (EU) 2019/1152 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on transparent and predictable working conditions in the European Union (29) among equivalent laws and regulations in the rest of jurisdictions.

[199] Merz, Jessica Paige, "The effects of exclusive contracts on organizational competitiveness" (2012).Senior Honors Projects, P. 13

[200] John Gerard Ruggie* and John F. Sherman, III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale,(2017)* The European Journal of International Law Vol. 28 no. 3 P. 927

ignore the vicissitudes that companies can encounter in an international environment when engaging in exclusivity agreements.[201]

Contingency plans and steering strategies will always have their effectiveness conditioned to the level of knowledge and awareness, of what exclusivity agreements are affected by and affecting to, and not only to the jurisdiction of legal culture of the parties but to the territories they are planning to execute their operations on.

[201] P Samantha Yoder, John K. Visich, Elzotbek Rustambekov, *Lessons learned from international expansion failures and successes* (2016) The Journal of the Kelley School of Business, Indiana University V. 59. Issue 2 pp. 233-243 P. 242

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Labour Relations Act, 1995, SO 1995, c 1, Sch A, <https://canlii.ca/t/553r7> retrieved on 2023-08-18 (definitions).

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The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022.

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