

The Starbucks of Commercial Law: *Romalpa* and Contractual Innovation

James Davey and Cliona Kelly*

A. Introduction

Much has been written about reservation of title clauses in the last forty years. The vast majority of those articles and texts concerned themselves with the technical law, and the limits of reservation of title clauses as seen in the litigated cases. In this field, the work of Sir Roy Goode and Tony Guest are perhaps useful exemplars. Both are well respected commercial law scholars, but with connections to practice: Goode as creator of the Centre for Commercial Law Studies at QMW and consultant to Mishcon & Co; Guest as a leading QC and editor of the first edition of relaunched *Benjamin's Sale of Goods* in 1974. Outside of these doctrinal studies lies a penumbra of fascinating interdisciplinary works. Most notable is Sally Wheeler's *Reservation of Title Clauses: Impact and Implications*, a socio-legal study of the extra-judicial enforcement of reservation of title clauses across 259 disputes prior to publication in 1991.¹

This paper seeks to establish an additional branch of inquiry. We are not concerned directly with the law in the courts ('law on the page'), or with doubts about the practical enforcement of the rights ('law in action') but in the mechanism by which the change in legal culture occurred ('innovation in legal culture'). Most accounts describe a period of rapid transition in the mid-1970s, with frequent reference to Muir Hunter QC's simile of the clauses spreading 'like a dreadful weed'.² John De Lacy contrasted the position in 1965 and 1993:

'As Goode and Ziegel once remarked "... in England conditional sale agreements are virtually unknown and such authority as there is may be regarded as turning on the facts of

* Cardiff Law School. This is work in progress. Comments are welcome to DaveyJA@cf.ac.uk and KellyC@cf.ac.uk.

¹ S Wheeler, *Reservation of Title Clauses: Impact and Implications* (Clarendon Press, Oxford, 1991). See also J Spencer, 'The commercial realities of reservation of title clauses' [1989] JBL 220 (empirical) and J Snead, 'Rationalising Retention of Title Clauses with Insolvency Law' [2004] UCL Jurisprudence Rev 288 (law & economics).

² I Davies, *Effective Retention of Title* (1991, Fourmat Publishing), 10.

the particular agreement under consideration"; *Hire Purchase and Conditional Sale* (1965), p.100; cf. *Lipe Ltd v. Leyland Daf Ltd* [1993] BCC 385, 385G-H where it is stated that in the context of one administrative receivership alone about 400 retention of title claims had been made against the company'.³

What remains contested is the trigger point for this sudden proliferation. For many, it is the Court of Appeal decision in the *Romalpa* case in 1976,⁴ for others it is the (unlitigated) insolvency of Brentford Nylons in February 1976.⁵ What is undoubted is the rapid replacement of one contractual norm with another. Prior to the mid-1970s reservation of title clauses were largely unused in English commercial practice. Within a few years, the landscape had changed fundamentally, with such clauses becoming an integral part of the boilerplate of sales agreements. The puzzle is why change in the market is so rapid and so pervasive. The mechanisms for the passing of property in sales is clearly established in ss. 17 - 19 of the Sale of Goods Acts (1893 and 1979) as a series of defaults, largely controlled by the intentions of the parties, whether express or implied. As Snead noted of section 19:

'This section is an embodiment of the "very basic contractual principle" that parties are free to contract as they will, subject only to vitiating factors such as fraud or deceit'.⁶

Moreover, case law recognised the efficacy of simple retention of title clauses as far back as *McEntire* in 1895.⁷ It was always possible for parties to use simple reservation of title clauses, but they did not (generally) do so in the United Kingdom even though the device was well established in other jurisdictions. Why then the sudden shift?

³ J De Lacy, 'Romalpa Theory and Practice under Retention of Title in the Sale of Goods' (1995) 24 Anglo-Am L Rev 327, 329 (fn 14).

⁴ Eg R Goode, 'The Modernisation of Personal Property Security Law' 100 LQR 234, 248: 'The plaintiffs [in *Romalpa*] successfully claimed that they had not only a right to repossess the unsold foil but an equitable right to trace the proceeds of the resold foil and to recover these from the company... The result was predictable. Romalpa clauses in sales contracts began to proliferate; receivers and liquidators of debtor companies, arriving at their desks on a bright Monday morning would find that an apparently healthy cash balance at the debtor's company's bank, together with a substantial amount of receivables, was all so much waste paper...'

⁵ See, for example, I. Davies, *Effective Retention of Title* (1991, Fourmat Publishing), 10. The Brentford Nylons collapse ended up in a settlement between supplier and manufacturer ('because of the 1,500 jobs at stake': *The Times* 06 March 1976) and with substantial government assistance for a takeover by Lonrho Plc.

⁶ J. Snead, 'Rationalising Retention of Title Clauses with Insolvency Law' [2004] UCL Jurisprudence Rev 288, 290.

⁷ *McEntire v Crossley* [1895] AC 457.

Our original thoughts on this question, and indeed the initial impetus for the project, came from a short section of Dan Ariely's book *Predictably Irrational*.⁸ Dan Ariely talks about how Howard Schultz, the creator of Starbucks, managed to convince consumers to move away from the cheap coffee available at Dunkin' Donuts and instead pay several times as much for Starbucks coffee. The problem which had to be overcome by Schultz is known to behavioural psychologists as 'anchoring' – the trait of forming a first impression, say as to the value of a product, and then having a difficulty in moving away from that initial reference point. American consumers were 'anchored' to the cheap coffee prices at places such as Dunkin' Donuts and would use these prices as a reference point for other, new coffee shops. Thus, any competitor charging substantially more than Dunkin' Donuts would be seen as a bad bargain and would ultimately fail. Schultz's solution to this problem was to make the Starbucks experience entirely different from the Dunkin' Donuts experience, by designing Starbucks to feel like a continental coffee house, with fancy names for coffees and high quality coffee. Hence consumers 'would not use the prices at Dunkin' Donuts as an anchor, but instead would be open to the new anchor that Starbucks was preparing for [them]'.⁹ Ariely's example illustrates that to shake initial impressions, we need a strong shift in the paradigm so that we create a new vision of the ideal.

This leads us to question how this applies in the legal sphere, and in particular how commercial practitioners, when initially anchored to one idea or way of doing things, move away from that initial reference point. What paradigm shifts provoke widespread innovation in contract and commercial law? Taking reservation of title clauses as our case study, we identified the leading case of *Romalpa* as creating a shift in legal perceptions of the role of passing of property – *Romalpa* was the Starbucks of the law on reservation of title clauses.

Moving on from this starting point, we developed the theory that contractual innovation mirrors technological development. This builds on the application of network theory to contract design, as developed in particular by Kahan and Klausner,¹⁰ and on recent work by Gulati, Scott and Posner

⁸ D. Ariely, *Predictably Irrational* (Harper Collins, 2nd ed., 2009) p.37 – 39.

⁹ *Ibid.*, p.39.

¹⁰ See for example M. Kahan and M. Klausner, 'Standardization and Innovation in Corporate Contracting (Or the Economics of 'Boilerplate')' (1997) 83 Virginia L. Rev. 713; M. Kahan and M. Klausner, 'Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases' (1996) 74 Washington U.L.Q. 347 and M. Klausner, 'Corporations, Corporate Law, and Networks of Contracts' (1995) 81 Virginia L. Rev. 757.

in the United States on innovation in contract design.¹¹ We reject the simplistic model of contract design reliant on individual wealth maximizing actors seeking optimal atomized contractual positions. Rather, we identify discontinuous, abrupt shifts in the market with the displacing of an existing standard (to which undue deference was given until its dominance is undermined) until a ‘tipping point’ is reached. This theory of the evolution of contracts is a good ‘fit’ with the adoption of reservation of title clauses in contracts post-*Romalpa* and explains the shift to the new contract norm.

B. The Formal Law of Retention of Title Clauses: A Brief Summary

A retention of title clause, or reservation of title clause, is a clause in a contract for sale that says that the seller retains title to the goods until the buyer has paid for them. The major advantage of a retention of title clause is that gives the seller priority in the event of the insolvency of the buyer. The title in the goods never passes to the buyer, and so they do not form part of the buyer’s assets for the purposes of the insolvency proceedings. Thus the clause effectively places the seller of goods, who would otherwise most likely be an unsecured creditor, at the head of the scheme of distribution in insolvency, ahead of even the holders of fixed charges:

‘The broad purpose of an agreement that a seller retains title to goods pending payment of the purchase price and other moneys owing to him is to protect the seller from the insolvency of the buyer in circumstances where the price and other moneys remain unpaid. The seller’s aim in insisting on a retention of title clause is to prevent the goods and the proceeds of sale of the goods from becoming part of the assets of an insolvent buyer, available to satisfy the claims of the general body of creditors.’¹²

Unsurprisingly, liquidators and other creditors will often object to retention of title clauses, as they take away from the resources of the insolvent company and reduce the amount that is left for other creditors. Liquidators argue that the clause is essentially a charge, which, as is it

¹¹ The project (which we refer to collectively as the Scott / Gulati project) has spawned at least three substantial publications since Winter 2012. A text- M Gulati & R Scott *The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design* (2013, Univ of Chicago Press) and two articles: S Choi, M Gulati and E Posner, ‘The Dynamics of Contract Evolution’ (2013) 88 NYU L Rev 1 and M Weidemaier, R Scott, and M Gulati ‘Origin Myths, Contracts, and the Hunt for *Pari Passu*’ (2013) 38 Law & Social Inquiry 72.

¹² *Compaq Computer v Abercorn Group* [1993] BCLC 602 at p. 611 per Mummery J.

unregistered, is void against a liquidator or creditor.¹³ This argument has succeeded in some instances and not in others.

Reservation of title clauses are sometimes called 'Romalpa' clauses, after the leading case of *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd.*¹⁴ *Romalpa* was the first modern decision on reservation of title, and led to a dramatic increase in the use of reservation of title clauses. However the clause relied upon in that case was one of the more complex types of reservation of title clause; there are other types of clause which are more straightforward and which require brief explanation before discussing the exact basis of the decision in *Romalpa*.

The most basic type of retention of title clause, often referred to as a 'simple' retention of title clause, reflects the basic principle found in section 19(1) of the Sale of Goods Act that the seller of goods may reserve the right of disposal of the goods until certain conditions are fulfilled.¹⁵ Hence the seller seeks to retain title to the goods supplied under the contract until their price is paid. This clause reserves title to the goods in their original form and will generally be effective once the goods can be identified as the goods supplied under the contract.¹⁶ If the goods have undergone a process of manufacturing or are no longer in their original form they may be irrecoverable.¹⁷ There are mixed views as to whether it is possible to draft a retention of title clause such that it provides for retention of title over goods which have had work done to them by the buyer. In *Borden* Lord Bridge suggested that if the seller wishes to acquire rights over the manufactured product, he could do so by express contractual stipulation,¹⁸ whereas in *Clough Mill* Goff LJ stated:

¹³ See the Companies Act 2006, s.874.

¹⁴ [1976] 1 WLR 676.

¹⁵ Section 19(1) states: 'Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.' See also s.17(1) which states: 'Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.'

¹⁶ See *Clough Mill Ltd. v Geoffrey Martin* [1985] BCLC 64.

¹⁷ See *Borden (UK) Ltd. v Scottish Timber Products Ltd.* [1981] Ch 25; *Re Peachdart Ltd.* [1984] Ch 131. The goods may be recoverable if the process they have undergone is reversible: *Hendy Lennox (Industrial Engines) Ltd. v Grahame Puttick Ltd.* [1984] 1 WLR 485.

¹⁸ *Borden (UK) Ltd. v Scottish Timber Products Ltd.* [1981] Ch 25, 42. See also the views of Oliver J in *Clough Mill Ltd. v Geoffrey Martin* [1985] BCLC 64,77: 'I am not sure that I see any reason in principle why the original legal title in a newly manufactured article composed of materials belonging to A and B should not lie where A and B have agreed that it shall lie.'

‘I find it impossible to believe that it was the intention of the parties that the seller would thereby gain the windfall of the full value of the new product, deriving as it may well do not merely from the labour of the buyer but also from materials that were his, without any duty to account to him for any surplus of the proceeds of sale above the outstanding balance of the price due by him to the seller.’¹⁹

Of course this leaves open the possibility that the parties could draft a suitable clause which provides that the seller has a duty to account for any surplus of proceeds; however although this does not seem to have been litigated in the UK, in an Irish case an attempt to claim ‘joint ownership’ of manufactured goods was held to be insufficient to retain the seller’s title, and was instead declared a charge, which was void as it was unregistered.²⁰

A more complex type of clause is an ‘all sums due’ or ‘current account’ clause. This clause provides that the goods supplied remain the property of the seller until all sums due to the seller (not just the payment for the goods in question) are paid. For many years there was considerable doubt over whether this type of clause would be effective, as it could mean that for as long as the buyer had *any* debt outstanding the property in the goods would remain with the buyer. However, in *Armour v Thyssen*²¹ the House of Lords upheld such a clause, basing its judgment on the parties’ intentions as expressed in the contract.²²

In the *Romalpa* case the plaintiffs, a Dutch company, had sold aluminium foil to the defendants, an English company, subject to a complex reservation of title clause.²³ This clause provided *inter alia* that if the buyer were to manufacture the aluminium supplied, or mix it with other materials, then

¹⁹ *Clough Mill Ltd. v Geoffrey Martin* [1985] BCLC 64, 73.

²⁰ *Kruppstahl AG v Quitmann products Ltd.* [1982] ILRM 551.

²¹ *Armour v Thyssen* [1990] 3 All ER 481.

²² See R. Bradgate, ‘Retention of Title in the House of Lords: Unanswered Questions’ (1991) 54 MLR 726.

²³ Clause 13 stated: “The ownership of the material to be delivered by A.I.V. [the seller] will only be transferred to purchaser when he has met all that is owing to A.I.V., no matter on what grounds. Until the date of payment, purchaser, if A.I.V. so desires, is required to store this material in such a way that it is clearly the property of A.T.V. A.I.V. and purchaser agree that, if purchaser should make (a) new object(s) from the material, mix this material with (an)other object(s) or if this material in any way whatsoever becomes a constituent of (an)other object(s) A.I.V. will be given the ownership of this (these) new objects(s) as surety of the full payment of what purchaser owes A.I.V. To this end A.I.V. and purchaser now agree that the ownership of the article(s) in question, whether finished or not, are to be transferred to A.I.V. and that this transfer of ownership will be considered to have taken place through and at the moment of the single operation or event by which the material is converted into (a) new object(s), or is mixed with or becomes a constituent of (an)other object(s). Until the moment of full payment of what purchaser owes A.I.V. purchaser shall keep the object(s) in question for A.I.V. in his capacity of fiduciary owner and, if required, shall store this (these) object(s) in such a way that it (they) can be recognized as such. Nevertheless, purchaser will be entitled to sell these objects to a third party within the framework of the normal carrying on of his business and to deliver them on condition that — if A.I.V. so requires — purchaser, as long as he has not fully discharged his debt to A.I.V. shall hand over to A.I.V. the claims he has against his buyer emanating from this transaction.”

the seller would be the owner of the new manufactured goods. The buyer was to keep these goods for the seller “in his capacity as fiduciary owner” and was to store them in such a way that they could be recognised as such. Finally, the buyer was entitled to sell these goods on to a third party within the normal course of business, but if the goods were not paid for was to hand over to the seller any claims he had against this sub-buyer.

The defendant buyers became insolvent before paying for the aluminium foil, and this clause was sufficient to allow the sellers to claim a quantity of unsold foil held by the receiver. However, a difficulty arose in relation to a quantity of aluminium foil which had been sold on to a third party before the seller had been paid. The sub-buyer would have obtained good title to the goods under s.25(2) of the Sale of Goods Act, thus extinguishing the seller’s rights over the goods. The seller could not therefore claim the goods themselves, but instead claimed an interest in the proceeds of the resale, basing their claim on a right to trace the proceeds of sale.²⁴ The Court of Appeal upheld this claim, holding that when the buyer lawfully sold on the aluminium, he had a duty to account for those goods in accordance with the normal fiduciary relationship of principal / agent or bailor / bailee. Roskill LJ stated:

“I see no difficulty in the contractual concept that, as between the defendants and their sub-purchasers, the defendants sold as principals, but that, as between themselves and the plaintiffs, those goods which they were selling as principals within their implied authority from the plaintiffs were the plaintiffs' goods which they were selling as agents for the plaintiffs to whom they remained fully accountable. If an agent lawfully sells his principal's goods, he stands in a fiduciary relationship to his principal and remains accountable to his principal for those goods and their proceeds. A bailee is in a like position in relation to his bailor's goods.”²⁵

Thus, the first modern case on retention of title clauses established not merely that these clauses were effective in their simplest form, but that even when goods were sold to a third party, a far reaching claim to the *proceeds* of this re-sale could also be effective. Subsequent cases may have

²⁴ Based on the principle in *In re Hallett's Estate* (1880) 13 Ch.D. 696: “The modern doctrine of equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them.” Per Jessel MR.

²⁵ [1976] 1 WLR 676, 690.

shed doubt on whether such claims would always be effective,²⁶ but *Romalpa* certainly introduced the potential of reservation of title clauses with a big bang.

C. The Impact of the *Romalpa* decision

Although it is difficult to assess the impact of the *Romalpa* decision some 37 years after the fact, and nigh on impossible to determine the number of sales contracts containing retention of title provisions,²⁷ there is evidence of a surge in both the use and complexity of retention of title clauses post-*Romalpa*, in the late 1970's and early 1980's. This is not to say that conditional sales were unknown before *Romalpa*,²⁸ but rather that their potential as a means of additional security for the seller was still underestimated.

Leading commercial law textbooks in the years leading up to *Romalpa* include brief discussions on conditional sales.²⁹ These very general discussions recognise that imposing a condition to be fulfilled before the property will pass will be effective to prevent the property from passing, with for example Tony Guest in the 1974 edition of *Benjamin's Sale of Goods* commenting that 'the condition most frequently encountered in such a reservation is the payment or tender by the buyer of the price'.³⁰ This text then moves on to a discussion of the passing of property when the seller takes a bill of lading making the goods deliverable to his own order, with instructions that property is not to pass to the buyer except on payment.³¹ The underlying presumption in the text is that although reservation of title until payment is made is a legal possibility, it only has any real

²⁶ See for example *Re Andrabell Ltd.* [1984] 3 All ER 407 and *Compaq Computers Ltd. v Abercorn Group Ltd.* [1991] BCC 484.

²⁷ Wheeler stated that there is 'no practical way of accurately determining the number of suppliers who purport to include some sort of reservation of title provision in their sales documentation': S. Wheeler, *Reservation of Title Clauses: Impact and Implications* (Clarendon Press, Oxford, 1991) p.5.

²⁸ See B. Collier, *Romalpa Clauses: Reservation of Title in Sale of Goods Transactions* (Sweet & Maxwell, London 1989) p.2- 3.

²⁹ See for example P.S. Atiyah, *The Sale of Goods* (Pitman Publishing, 5th ed., 1975) p.154 – 155, p.224 – 225. It has to be said that the 6th edition of this book, published in 1980, does not elaborate much on the law post-*Romalpa* – in the discussion on s.19(1), the case is relegated to the status of a brief mention in a footnote. Moreover the accompanying description of the case is not accurate, as it refers to the seller having a good claim to *goods* (as opposed to proceeds of sale) if a third party obtains good title under s.25(1) of the Sale of Goods Act: P.S. Atiyah, *The Sale of Goods* (Pitman Publishing, 6th ed., 1980) p.192. See also the brief discussions at p.178 – 179 and at p.309.

³⁰ A.G. Guest (Ed.), *Benjamin's Sale of Goods* (Sweet & Maxwell, London, 1974) para.384.

³¹ A.G. Guest (Ed.), *Benjamin's Sale of Goods* (Sweet & Maxwell, London, 1974) para.388. See *Wait v Baker* (1848) 2 Exch 1; 154 ER 380.

commercial implications in the context of carriage of goods by sea.³² Indeed, the 1975 edition of Atiyah's *Sale of Goods* explicitly states that 'by far the most important illustration of the reservation of the right of disposal' is concerned with the carriage of goods by sea.³³ No reference is made to the late 19th century House of Lords' decision in *McEntire v Crossley*,³⁴ even though this is arguably the leading case on reservation of title prior to *Romalpa*, and even though this case not only indicates the potential use of reservation of title in sales contracts—albeit an instalment sales contract which closely resembled a hire purchase agreement—but also discusses the possible threat such clauses pose to statutory insolvency regimes. There is no fact no discussion in the 1974 edition of *Benjamin's Sale of Goods* of the benefits of including a reservation of title clause, i.e. no mention of the priority it would afford a seller in the event of the buyer's insolvency. A reader with no knowledge of reservation of title would be left somewhat underwhelmed as to its potential use as a means of security; although paradoxically the same reader would also be unaware of the possible limitations of reservation of title clauses, or of the issues they raise with regard to the existing insolvency regime. Reservation of title simply appears to be a non-issue, or at the very most a peripheral feature of a sales contract.³⁵

Although early editions of *Benjamin's Sale of Goods* focused on reservation of title in the context of the carriage of goods by sea, Roy Goode acknowledged their use pre-*Romalpa* in a different context. In the aftermath of *Romalpa*, he commented that although reservation of title was 'known to English law for a very long time', that such clauses had 'been mainly confined to instalment sale and hire purchase agreements'.³⁶ This is in fact more of an allowance for the existence of retention of title clauses than he had been prepared to make in 1965, when he stated that 'in England conditional sale agreements are virtually unknown and such authority as there is

³² However, even then it is noted that 'The need for [security] is nowadays met by the use of bankers' commercial credits so that property rights as between buyer and seller have become much less important.' A.G. Guest (Ed.), *Benjamin's Sale of Goods* (Sweet & Maxwell, London, 1974) para.387.

³³ P.S. Atiyah, *The Sale of Goods* (Pitman Publishing, 5th ed., 1975) p.155.

³⁴ [1895] AC 457. Reference is however made to *Re Shipton Anderson & Co and Harrison Bros & Co's Arbitration* [1915] 3 KB 676, although the wording of the contract here is relatively unclear, and the court appears to have implied the existence of an intention to retain title with the seller until payment of the goods.

³⁵ Although it should be noted that there was recognition of the need for reform of personal property security law, with the Crowther Committee on Consumer Credit (Cmnd. 4596, 1971) as early as 1971 recommending reform based on Article 9 of the United States' Uniform Commercial Code. See R. Goode, 'The Modernisation of Personal Property Security Law' (1984) 100 LQR 234.

³⁶ R. Goode, 'Reverberations of Romalpa' *The Times*, 11 May 1977 p.25. See also Prior's comment that although the use of such clauses is not 'presently common practice' in the UK, it is 'by no means unknown': R. Prior, 'Reservation of Title' (1976) 39 MLR 585, 585f.

may be regarded as turning on the facts of the particular agreement under consideration'.³⁷ Moreover, any reservation of title clauses tended to be simple rather than complex: 'English lawyers have tended to concentrate on the efficacy of the title retention or security against third parties in relation to the original asset rather than in relation to proceeds.'³⁸

This lack of innovation regarding reservation of title can be contrasted with the position elsewhere, in particular in Germany³⁹ and the Netherlands where the use of retention of title clauses and claims to proceeds was routine.⁴⁰ It is no surprise that the *Romalpa* case itself concerned a clause inserted by a Dutch supplier,⁴¹ and that the Brentford Nylons scandal (discussed below) similarly concerned the supply of goods by an overseas supplier.⁴² Moreover, there appears to have been an awareness in the UK of the fact that such clauses were used across Europe.⁴³

Although we do not currently have access to sales contracts from the years immediately after *Romalpa*, contemporaneous accounts of the change in legal culture exist. Roy Goode was particularly vocal on the impact of the decision.⁴⁴ In an article in *The Times* in May 1977 he famously stated that 'it is doubtful whether any case decided this century has created a greater impact on the commercial world than *Romalpa*.'⁴⁵ In terms of the practical impact *Romalpa* had on commercial practice, he stated: 'In the wake of *Romalpa*, suppliers all over the country began to include reservation of title clauses in their contracts, stamp 'Romalpa' on their invoices and

³⁷ R. Goode & J. Ziegel, *Hire Purchase and Conditional Sale* (1965), p.100. Cited in J. De Lacy, 'Romalpa theory and practice under retention of title in sale of goods' (1995) 24 *Anglo American Law Review* 327, 329f.

³⁸ R. Goode, 'Reverberations of Romalpa' *The Times*, 11 May 1977 p.25.

³⁹ For a discussion of the development of the German (and French and English) position, see R. Pennington, 'The *Pactum Reserva ti Dominii* in Twentieth century Europe' (1977) *Acta Juridica* 257. Pennington suggests that the increasing use of reservation of title in Germany in the nineteenth century was because bank loans for buyers were less readily available than in England, so sellers were forced to extend credit to buyers. See also the discussion of German law in the Irish case of *Re Interview Ltd* [1975] IR 382, 392.

⁴⁰ R. Goode 'Reverberations of Romalpa' *The Times*, 11 May 1977 p.25. It has also been commented that this was the practice in Sweden and Denmark: R. Prior, 'Reservation of Title' (1976) 39 *MLR* 585, 585.

⁴¹ The contract in *Romalpa* contained a clause stating it was to be governed by Dutch law, but as neither party invoked Dutch law it was decided according to English law: see R. Fentiman, 'Foreign Law in English Courts' (1992) 108 (1) *LQR* 142, 149.

⁴² 'Suppliers threaten legal action over Brentford Nylons' *The Times* March 2, 1976.

⁴³ See articles cited in last 2 footnotes. See also JH Farrar & NE Furey, 'Reservation of Title and Tracing in a Commercial Context' (1977) 36 *Cambridge LJ* 27, 32: 'So far, reservation of ownership does not seem to be widely used in the United Kingdom ... It is, however, widely used in the E.E.C.'

⁴⁴ See for example, R. Goode, 'The Modernisation of Personal Property Security Law' (1984) 100 *LQR* 234; R. Goode, *Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell, 1985).

⁴⁵ R. Goode, 'Reverberations of Romalpa' *The Times*, 11 May 1977 p.25.

assert proprietary claims to the goods on the buyer's bankruptcy'.⁴⁶ *Romalpa* clauses were said to 'have now become so common in this country as to present a serious threat to the smooth running of business'.⁴⁷ Other contemporaneous literature backs up this contention that in the aftermath of *Romalpa* there was an increased use of retention of title clauses.⁴⁸

Furthermore, Goode commented that not only have such clauses become more common, but 'encouraged by *Romalpa*, sellers have developed more extended clauses which are sometimes extremely elaborate'.⁴⁹ Thus sellers started to develop clauses which claimed not only title to the original goods but also any products and proceeds of sale and 'current account' clauses.

Such empirical evidence that exists, while limited, appears to back up Goode's claims of a rise in both the use and complexity of reservation of title clauses. In a small scale study of 35 businesses, conducted by Julie Spencer in the late 1980's, 59% of respondents said that they included reservation of title clauses in their contracts.⁵⁰ This study further demonstrated that businesses using these clauses did not just use simple retention of title clauses, but also proceeds of sale clauses, current account clauses and clauses claiming manufactured goods.⁵¹ When asked when they had first included a reservation of title clause in their conditions of sale, answers ranged from 1976, the year *Romalpa* was decided, to 1986, with 71% of those who used reservation of title clauses indicating that they had only included the clause since 1980. Spencer opines that the greater influence of *Romalpa* from 1980 might be due to the 'substantial increase in the annual number of insolvencies since 1980'.⁵² However, court decisions continued to have an influence,

⁴⁶ R. Goode, *Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell, 1985) p.90

⁴⁷ R. Goode, 'Reverberations of *Romalpa*' *The Times*, 11 May 1977 p.25.

⁴⁸ See for example R. Pennington, 'The *Pactum Reserva ti Dominii* in Twentieth Century Europe' (1977) *Acta Juridica* 257, 258, commenting that in England it is only 'in recent years' that retention of title clauses 'have come into widespread use in imitation of European practice'; M. Kerr, 'Modern Trends in Commercial law and Practice' (1978) 41 *MLR* 1, 9 commenting that there has been a 'sudden upsurge in interest in the reservation of title in goods by sellers until payment has been received'; I Davies, *Effective Retention of title* (Fourmat Publishing, London, 1991) p.10: 'Since *Brentford Nylons* [in 1975] such clauses have become prolific in commercial contracts to that Muir Hunter QC told delegates at the Touche Ross Insolvency Conference in November 1980 that there was a proliferation of reservation of title clauses like a 'dreadful weed'. An increase in the use of reservation of title clauses was also predicted by R. Prior: R. Prior, 'Reservation of Title' (1976) 39 *MLR* 585, 589: 'Vendors of goods and materials can be expected to incorporate, into their standard conditions, *Romalpa* type provisions and company secretaries will certainly be looking to their lawyers to achieve this.'

⁴⁹ R. Goode, *Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell, 1985) p.82

⁵⁰ J. Spencer, 'The Commercial Realities of Reservation of Title Clauses' (1989) *JBL* 220, 221.

⁵¹ *Ibid*, 225 – 229.

⁵² *Ibid*, 222.

with a new surge of businesses using a clause, or adapting an existing clause, after the decision in *Clough Mill Ltd* in 1984.⁵³

This is not the first time it has been suggested that prevailing economic conditions accelerated the process by which suppliers adopted reservation of title clauses. For example, De Lacy stated that with the economic downturn it was 'hardly surprising that parties began to re-evaluate their contractual relations and the expectations contained therein',⁵⁴ and writing in 1978 Kerr stated that while concept of reservation of title 'is old and well-known' it had been 'brought to the fore by economic instability.'⁵⁵

A further factor which contributed to the impact of the legal decision in *Romalpa* was the media attention afforded to the Brentford Nylons 'debacle'⁵⁶ around the same time as the *Romalpa* decision. Brentford Nylons was a large textile manufacturer which specialised in the manufacture of cheap nylon shirts and light household furnishings such as sheets and curtains. The company originally sold its goods by mail order, but moved to a new business model whereby it sold from stores. The difficulty with this was that it was 'difficult if not impossible for any one manufacturer to provide a sufficient range of own-brand goods to attract custom in sufficient volume'.⁵⁷ In addition, the industry was moving from nylon manufacture to other types of materials, and the company incurred significant debt constructing a large new factory in Northumberland to facilitate a move to polyester cotton. All these factors were thought to put a strain on resources, and in February 1976 the company called in a receiver.⁵⁸ However, two of Brentford's major creditors, a German fibre manufacturer and its main UK supplier, both of whom were associated with a large Dutch fibres company, almost immediately threatened the receiver with an injunction to stop the sale of £5 million worth of raw materials supplied to Brentford Nylons but which had not been paid for.⁵⁹ They claimed that the stock had been sold subject to a reservation of title clause and

⁵³ Ibid, 222 - 223.

⁵⁴ J. de Lacy, 'Romalpa theory and practice under retention of title in sale of goods' (1995) 24 Anglo Am L Rev 327, 338f.

⁵⁵ M. Kerr, 'Modern Trends in Commercial law and Practice' (1978) 41 MLR 1, 9.

⁵⁶ R. Goode, 'The Right to Trace and its Impact on Commercial Transactions – II' (1976) 92 LQR 528, 548. See also I Davies, *Effective Retention of title* (Fourmat Publishing, London, 1991) p.10: 'Since *Brentford Nylons* [in 1975] such clauses have become prolific in commercial contracts to that Muir Hunter QC told delegates at the Touche Ross Insolvency Conference in November 1980 that there was a proliferation of reservation of title clauses like a 'dreadful weed'.'

⁵⁷ P. Ollerenshaw, 'Innovation and Corporate Failure: Cyril Lord in UK textiles 1945 – 1968' in K. Gratzner and D. Stiefel (Eds) *History of Insolvency and Bankruptcy from an International Perspective* (Sodertorns hogskola, 2008) p.158.

⁵⁸ 'Receivers take over at Brentford Nylons', *The Times*, February 24, 1976.

⁵⁹ 'Suppliers threaten legal action over Brentford Nylons' *The Times* March 2, 1976.

thus still belonged to them. The dispute was settled through private negotiations rather than taken through the courts, supposedly because of the number of jobs that would have been lost if production was forced to cease due to an inability to use the raw materials.⁶⁰ The Brentford Nylons story did not however end there, as the Government subsequently offered Lonrho, an international trading group with large textile interests, a loan of £5 million to purchase Brentford Nylons and save jobs.⁶¹ This was despite the fact that the Department of Trade had recently conducted a controversial investigation into Lonrho's activities in Africa and parts of its report had been forwarded on to the police.⁶² This case appears to have provoked reactions from several quarters, with, for example, the Institute of Chartered Accountants commencing an enquiry to assess the implications of this type of clause and to see how widespread its use was.⁶³ Thus the *Brentford Nylons* scandal represented the 'law in action' illustration of the effect of reservation of title clauses, and would have added to the public consciousness of the impact of insolvency. This scandal, combined with the economic conditions of the time, no doubt added to the impact of *Romalpa*.

It is sometimes argued that the impact of the *Romalpa* decision has been overstated, based solely on the fact that in subsequent cases where suppliers have attempted to rely on clauses drafted based on *Romalpa*, the courts have distinguished *Romalpa* on rather shaky grounds and refused to follow it.⁶⁴ Thus, for example, De Lacy has stated in relation to Goode's statements regarding the significance of *Romalpa*:

'At the time the case was decided such a statement would undoubtedly have been an accurate reflection of popular commercial sentiment. However, from today's perspective it appears to be an embarrassing largesse, more reflective of a "pious hope"⁶⁵ than a judgment upon the beginning of a commercial revolution. It will be seen that far from

⁶⁰ 'Fibre makers in pact with Brentford Nylons Receiver' *The Times* March 6, 1976.

⁶¹ 'Government offers Lonrho £5m loan to save 1,600 jobs at two Brentford Nylons factories' *The Times* June 25, 1976. Employees of the company had also sought State aid in a bid to take over the company: see 'Outlook for Brentford Nylons aid' *The Times* June 22, 1976.

⁶² 'Government offers Lonrho £5m loan to save 1,600 jobs at two Brentford Nylons factories' *The Times* June 25, 1976. Lonrho, and in particular its head Tiny Rowland, was later cleared of any charges but the company and its leaders remained controversial: 'Tiny Rowland, African Giant' BBC News, July 26 1998. Available at <http://news.bbc.co.uk/1/hi/world/africa/139596.stm>

⁶³ 'Fibre makers in pact with Brentford Nylons Receiver' *The Times* March 6, 1976. It is unclear whether this enquiry commenced before or after the Brentford Nylons scandal.

⁶⁴ See for example *Re Andrabell Ltd.* [1984] 3 All ER 407 and *Compaq Computers Ltd. v Abercorn Group Ltd.* [1991] BCC 484.

⁶⁵ Citing *Bridge LJ in Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 39.

having a great impact upon commercial law the case has fallen by the wayside and has all but been overruled by the courts of first instance.’⁶⁶

However, the point being made in this article—and possibly by Goode at the time of writing—is that the case had reverberations for commercial practice and contractual innovation, regardless of whether subsequent court decisions then diminished the effectiveness of proceeds of sales clauses.⁶⁷

The impact of *Romalpa* is also sometimes rejected on the basis that in practice such clauses are rarely litigated or enforced. It is true that actual legal decisions on reservation clauses are few and far between, but the limited empirical evidence that does exist shows that given the correct circumstances and proper drafting, reservation of title clauses, particularly ‘simple’ reservation of title clauses,⁶⁸ are enforced and have effect.⁶⁹ The difficulty with enforcement appears to occur mostly when a clause is poorly drafted,⁷⁰ where there is a lack of evidence that the goods claimed were in fact the subject of a contractual provision for retention of title,⁷¹ and where the supplier of goods does not move fast enough to put a receiver on notice of his retention of title claim.⁷² Worthington has made the point that retention of title devices fail where ‘the substance of the parties’ agreement triumphs over the form used to define property ownership’.⁷³ Wheeler in contrast has focused on the importance of the negotiating powers of the parties involved in

⁶⁶ See for example: J. de Lacy, ‘Romalpa theory and practice under retention of title in sale of goods’ (1995) 24 *Anglo American Law Review* 327, 327.

⁶⁷ See S. Wheeler *Reservation of Title Clauses: Impact and Implications* (Clarendon Press, Oxford, 1991) p.33; ‘It would be incorrect to think that drafters of reservation of title clauses do not attempt to assert ownership of new products and trace proceeds of sale of original goods and new products despite seemingly adverse case law and the practical difficulties of setting up concepts like fiduciary relationships in a commercial context.’

⁶⁸ See S. Worthington *Proprietary interests in Commercial Transactions* (Clarendon Press, Oxford, 1996) p.8 (although this does not seem to be based on empirical evidence).

⁶⁹ See for example J. Spencer. ‘The Commercial Realities of Reservation of Title Clauses’ (1989) JBL 220, 229 – 231. Although this study is rather inconclusive and a little unclear on this issue, 30% of respondent suppliers stated that their claims had generally been successful. Accountancy firms were somewhat more pessimistic on the likelihood of the success of claims, but again answers seem to have been quite varied as between a small number of firms.

⁷⁰ See for example *Re Bond Worth Ltd.* [1980] 1 Ch 228 where an attempt to retain ‘equitable and beneficial ownership’ was held to be a charge.

⁷¹ R. Goode *Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell, 1985) p.90: ‘In the wake of *Romalpa*, suppliers all over the country began to include reservation of title clauses in their contracts, stamp ‘Romalpa’ on their invoices and assert proprietary claims to the goods on the buyer’s bankruptcy. Initially, many of these claims were accepted, but over time receivers and liquidators became much more hard-headed, demanding clear evidence that the goods claimed were in fact the subject of a contractual provision for retention of title. In consequence, a considerable number of these claims are now rejected.’

⁷² See E. Bailey & H. Groves, *Corporate Insolvency Law and Practice* (3rd ed, 2007, Lexis Nexis) paras 11.51 – 11.54 for the steps a supplier should take in the event that he has a retention of title claim.

⁷³ S. Worthington *Proprietary interests in Commercial Transactions* (Clarendon Press, Oxford, 1996) p.10

determining whether or not the clause is enforced.⁷⁴ Moreover the lack of enforcement of clauses says nothing about their existence, or about the number of claims made in relation to them.⁷⁵ However, the focus of this paper is not so much on the issue of whether or not these clauses are *enforced* but rather on the impact the *Romalpa* decision had on commercial practice and innovation, in the sense that there was a sudden, noticeable increase in the number of contracts including complex reservation of title clauses after the decision. Whether or not these clauses are ultimately enforced is essentially irrelevant to this issue.

Thus, within 10 years, there appears to be a new, stable position of using a reservation of title clause in the majority of such contracts, and a supply of goods on credit terms. The insolvency risk is now shared in a more complex fashion. If the reservation of title clause is effective, then the supplier will recover the goods, although this may well provide less than full recovery of the profit obtainable through payment of the contract price.⁷⁶ Often the supplier will have traded the 'book debt' owed by the purchaser to a second finance house, and it will now hold the risk of enforcing the *Romalpa* clause. Moreover, the supplier's financiers will not be able to look to those apparent assets to meet any outstanding indebtedness to it. It is vital to these creditors that they are able to properly price the credit being offered, as either unsecured or secured on incoming assets. However, there remains a substantial risk of a reservation of title clause not being enforced in practice to full effect, if at all. The information costs of verifying each incoming shipment would prohibit dealing with credit management on an *ad hoc* basis. What we have therefore, is a three dimensional co-ordination game, played by finance houses at both ends of a sales contract. The additional dimension comes in the likely chain (and web) of such deals, as raw materials are traded, processed, branded, and presented to retail customers.

It is thus evident that *Romalpa* thus had a serious impact on the commercial world, in that there was an increase in the number of sellers including reservation of title clauses into their contracts, and the clauses which were drafted were more complex and detailed. The question that this paper poses is why *Romalpa* had such an impact, when reservation of title clauses were already known in the commercial world. This paper relies on a theory of the evolution of contract innovation to

⁷⁴ S. Wheeler, 'Lawyer Involvement in Commercial Disputes' (1991) 18 J. L. & Society 241.

⁷⁵ J. De Lacy refers to the case of *Lipe Ltd v. Leyland Daf Ltd* [1993] BCC 385,385G-H where it is stated that in the context of one administrative receivership alone about 400 retention of title claims had been made against the company: J. de Lacy, 'Romalpa theory and practice under retention of title in sale of goods' (1995) 24 Anglo Am L Rev 327, 329f.

⁷⁶ See eg S. Wheeler, above n 74, and J. Spencer, above n 50.

explain why these clauses were ignored or left on the periphery until the dramatic shift in practice brought by *Romalpa*.

D. Modelling Change: The 'Innovation in Contract' Literature and Romalpa

In order to understand the process of innovation in boilerplate, we need first to debunk some myths of contract negotiation. As Feinman noted, the process of agreement of supply chain contracts will not meet the idealised vision of neoclassical contract theory:

‘The image that motivated [the] realm [of neoclassical contract theory] was the isolated bargain between independent, self-interested individuals. Steely-eyed bargainers carefully calculated their interests in a particular exchange, gave a promise or performance only in return for something else, and embodied their transaction in an agreement that carefully defined the terms of performance and therefore could provide the basis for a determinate remedy in case of breach’.⁷⁷

The work of Marc Galanter suggested instead that the legal system favours repeat players (who act strategically over the long-term) over ‘one shotters’ for whom the litigation represents their sole experience of the issue.⁷⁸ The long term perspective of the repeat player will include litigation strategies to develop the law to best suit their long term goals. Outcomes, in litigation and negotiation,⁷⁹ will depend on expertise and resources, rather than the ‘law on the page’ or in the contract. Within sales contracts, the contracting parties may be expert repeat players in some areas (such as duties relating to delivery, or non-legal recovery of the price) but are likely to be closer to ‘one shotters’ in respect of insolvency issues. The insolvency practitioner and the finance houses involved indirectly are much more likely to be familiar with the process of business failure, but are not contracting parties. In the case of the banks, they can influence the contractual position by imposing formal or informal controls on the flow of credit, such as differential pricing for credit where the goods are subject to a retention of title clause. Obviously, the insolvency

⁷⁷ J Feinman, ‘The Significance of Contract Theory’ (1989-90) 58 U. Cin. L. Rev. 1283, 1286.

⁷⁸ M Galanter, ‘Why The ‘Haves’ Come Out Ahead: Speculations On The Limits Of Legal Change’ (1974-1975) 9 Law & Soc’y Rev 95.

⁷⁹ This extends to the ‘ugly but expressive’ (ID Campbell, (1992) 19 J.L. & Soc’y 488, 491) hybrid concept of ‘litigotiation’, whereby legal rights are asserted as a part of the settlement process.

practitioner would not have been in a position to influence the contract as drafted, but as Wheeler demonstrated, has considerable practical influence on the contract as implemented.⁸⁰

How then are we to understand the process of negotiation and retention of title clauses within sales contracts? The first point is to note that we do not expect 'steely eyed bargainers' scrutinizing the clause for its probable effect. A more realistic description of the process is given by Richman, who imagined the mass production of contracts by law firms:

'If we understand the literature on organizational economics, and if we apply that literature to the large law firm, we will conclude that the creation of mass-produced goods that do not ideally meet consumer demands should come as no surprise. This is not the consequence of agency costs or a lack of attorneys' fidelity to their clients; it merely illustrates the limits and, indirectly, the strengths of large organizations. Indeed, observing that legal products do not perfectly match contemporary needs might be no less provocative than observing that Detroit is long overdue to produce high-mileage cars. So there is a moral, and a rather mundane moral at that. The moral is that law firms, legal products, and lawyers are all subject to the same laws of organization and innovation as the rest of the economy, and that lawyers should not be presumed to be all that different from assembly line workers'.⁸¹

The result of this is that bespoke contract design is not a high priority within routine commercial arrangements. 'Boilerplate': the use of standard, non-negotiated terms is rife. This is not restricted to 'mass market' contracts, either:

'... standard terms would appear to be no less widespread in contracts among the sophisticated. Notwithstanding their representation by able counsel, charged to craft comprehensive and detailed, but also particularized, contracts, such parties will commonly conclude agreements comprised heavily of traditional terms--contracting norms of a sort--rather than terms tailored to the distinct features of their particular bargain'.⁸²

The 'sausage factory' production of contracts leads to a sharp division between the perceived high powered litigators and less 'legal' drafters and negotiators. Moreover, the division was not merely in approach but in source material and interest in doctrine. Gulati and Scott reported:

⁸⁰ Above note 1.

⁸¹ B Richman, 'Contracts Meet Henry Ford' (2011-12) 40 Hofstra L Rev 77, 79.

⁸² R Ahdieh, 'The Strategy of Boilerplate' (2005-06) 104 Mich. L. Rev. 1033, 1034.

‘... neither one of us had seen much evidence of transactional lawyers engaged in a dynamic process of regularly reading cases and incorporating that learning into novel innovations in subsequent contracts. Some of the transactional lawyers we knew did not appear to have looked at a case in years. The task of reading cases seemed to be the province of the litigators, while the thinking about contract drafting remained with the transactional lawyers. In theory, the two groups might be specializing and transferring information across the artificial boundary that separated them. However, we had seen little evidence of interaction among transactional lawyers and litigators, let alone a process by which they collaborated in R&D on contract design’.⁸³

This leads then to two simple questions:

1. Why do contractual provisions converge?
2. When (and why) do contracts then change?

In order to answer these questions, we adapt the network theory as used by Eric Posner, Richard Scott and Mitu Gulati *et al* in respect of *pari passu* clauses in sovereign debt contracts and apply this theory to *Romalpa*. In the section below, we start with a little background on network theory as a basis for modelling contractual innovation. We then apply network theory to *Romalpa* and identify where and how that theory can help explain the proliferation of reservation of title clauses in the late 1970’s and early 1980’s. We then discuss how Posner/Scott/Gulati developed this theory and how their version of this theory explains this phenomenon. We conclude by evaluating whether their version is a better ‘fit’ than the more traditional explanations of network theory.

[1]. Network Theory and Contract Innovation

Once limited to the explanation of the adoption of technological innovations, in more recent years network theory has been used to explain the spread of legal innovation, and to predict the success or failure of new legal regimes such as the Common European Sales Law.⁸⁴ In this section we provide a brief overview of network theory, as ‘traditionally’ applied to contractual innovation,

⁸³ M Gulati & R Scott, *The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design* (Univ of Chicago Press, 2013).

⁸⁴ See C. Kelly, ‘The Proposal for a Common European Sales Law: Looking Beyond the Merits of Optional Instruments’ [2013] 7 JBL 703.

and examine whether this account of network theory can provide an explanation for the increased use of reservation of title clauses post-*Romalpa*.

The principal feature of networks is that ‘the utility that a given user derives from [a network product] depends upon the number of other users who are in the same “network”’.⁸⁵ Hence, the value of the network increases as the number of users increases. The classic example of this is the use of telephones – if only one person ever owned a telephone, then it would be a useless innovation; the value of a telephone is dependent on other people also owning telephones.⁸⁶ The benefit of increased usage to all users on the network is referred to as a ‘positive network externality’ or a ‘network effect’, and network effects may be direct and indirect.⁸⁷

The difficulty with networks is that positive network effects can result in ‘excess inertia’ – a ‘socially excessive reluctance to switch to a superior new standard when important network externalities are present in the current one’.⁸⁸ Users may be reluctant to switch to a new product which has relatively few users in the early stages, and thus few network benefits, instead preferring to stick to an existing product which has network benefits, even if the existing product is in other ways inferior to the new product. This phenomenon, described as ‘standardization-by-sheer-force-of-numbers’,⁸⁹ has been used to explain the dominance of, for example, the QWERTY typewriter, despite the fact that alternative forms of keyboard exist.⁹⁰

This network analysis can be applied not only to different types of technology, but also to legal culture and practices,⁹¹ and, importantly for our purposes, to contracts⁹² and contract terms. In

⁸⁵ M. Katz and C. Shapiro, ‘Network externalities, Competition and Compatibility’ (1985) 75 *American Economic Review* 424, 424.

⁸⁶ The exact relationship between the number of users and the value of the network is referred to as Metcalfe’s Law. In essence this provides that a tenfold increase in the size of the network leads to a hundredfold increase in its value. See C. Shapiro & H. Varian *Information rules : a strategic guide to the network economy* (Harvard Business School Press, Boston) 1999 p.183

⁸⁷ See C. Kelly, ‘The Proposal for a Common European Sales Law: Looking Beyond the Merits of Optional Instruments’ [2013] 7 *JBL* 703, 705 – 707 for a discussion of network effects.

⁸⁸ J. Farrell and G. Saloner, ‘Installed Base and Compatibility: Innovation, Product Preannouncements and Predation’ (1986) 76 *American Economic Review* 940, 940. See also J. Farrell and G. Saloner, ‘Standardization, Compatibility and Innovation’ (1985) 16 *RAND Journal of Economics* 70.

⁸⁹ M. Katz and C. Shapiro, ‘Technology Adoption in the Presence of Network Externalities’ (1986) 94 *Journal of Political Economy* 822, 824.

⁹⁰ P.A. David, ‘Clio and the economics of QWERTY’ (1985) 72 *American Economic Review: Papers and Proceedings of the Seventh Annual Meeting of the American Economic Association* 332. Although for a contrary view see S.J. Liebowitz and S.E. Margolis, ‘The Fable of the Keys’ (1990) 33 *Journal of Law and Economy* 1; S.J. Liebowitz and S.E. Margolis, ‘Network Externality’ (1994) 8 *Journal of Economic Perspectives* 133.

⁹¹ See A. Ogus, ‘The Economic Basis of Legal Culture: Networks and Monopolization’ (2002) 22 *Oxford Journal of Legal Studies* 419, 423.

the 1990s Kahan and Klausner took the lead in this particular field of analysis, arguing that the widespread use of contract terms by many firms confers network benefits on the users.⁹³ These network benefits include the availability of high levels of expertise as lawyers and accountants gain experience with the term, and also the availability of judicial interpretations of the term, which reduces uncertainty as to how the term is to be applied. In contrast, there will be little expertise and potentially much to lose⁹⁴ from a 'new' or innovative term which is not used by many firms. Hence a commonly used but clumsy contract term with network benefits will often trump a 'better' contract term lacking these network benefits.⁹⁵

Where network theory is of assistance to us in our efforts to understand the move towards the incorporation of retention of title clauses, is in relation to its explanation of why users sometimes do move to a new standard, even in the face of an existing network or norm.⁹⁶ Certain factors greatly increase the chance of migration to a new standard, and when taken together can explain the shift to the increased use and complexity of retention of title clauses.

First, predictions as to the success of a new network result in 'positive feedback'; hence a strong focus on the popularity of a new network product will, in itself, increase the popularity of the product:

'If consumers expect your product to become popular, a bandwagon will form, the virtuous cycle will begin, and consumers' expectations will prove correct. But if consumers expect your product to flop, your product will lack momentum, the vicious cycle will take over, and again consumers' expectations will prove correct. The beautiful if frightening

⁹² For a discussion of contractual innovations as a form of technological progress, see K. E. Davis 'Contracts as Technology' (2013) 88 NYU L. Rev. 83

⁹³ See for example M. Kahan and M. Klausner 'Standardization and Innovation in Corporate Contracting (Or the Economics of 'Boilerplate')' (1997) 83 Virginia L. Rev. 713; M. Kahan and M. Klausner, 'Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases' (1996) 74 Washington U.L.Q. 347 and M. Klausner, 'Corporations, Corporate Law, and Networks of Contracts' (1995) 81 Virginia L. Rev. 757.

⁹⁴ C. Hill and C. King, 'How do German contracts do as much with fewer words?' (2004) 79 Chi-Kent L Rev 889, 904 point out that 'abiding by the norm will never engender criticism, but if there should be a dispute over the contract language later on, not having abided by the norm may very well be punished'.

⁹⁵ C. Hill, 'Why Contracts are written in Legalese' (2001-02) 77 Chi-Kent L. Rev. 59, 70; M. Kahan and M. Klausner, 'Path Dependence in Corporate Contracting' (1996) 74 Washington U.L.Q. 347, 352-353; J. S. Johnston, 'The Influence of the Nature of the Firm on the Theory of Corporate Law' (1993) 18 J. Corp. L. 213, 242.

⁹⁶ For the argument that standard can change despite strong network effects see S.J. Liebowitz and S.E. Margolis, 'The Fable of the Keys' (1990) 33 *Journal of Law and Economy* 1; S.J. Liebowitz and S.E. Margolis, 'Network Externality' (1994) 8 *Journal of Economic Perspectives* 133.

implication: success and failure are driven as much by consumer expectations and luck as by the underlying value of the product.’⁹⁷

Positive expectations can thus ‘tip’ the market in favour of a new network.

The importance of expectations management means that the existence of a network ‘sponsor’ who can strategise and promote a new product can be crucial in the adoption of a new network.⁹⁸

This sponsor is often the owner of the new technology, and frequently has proprietary rights (such as intellectual property rights) over the new technology. Although retention of title clauses clearly had no ‘owner’ and no clear ‘sponsor’, owing in part to the accidental nature of their creation,⁹⁹ this does not mean that they were not promoted. In particular, expert academic practitioners played a vital role as communicators of the message that the *Romalpa* decision was not one to be ignored, and made crucial predictions as to the likelihood that suppliers would increasingly use these clauses. Thus for example, Prior stated:

‘Vendors of goods and materials can be expected to incorporate, into their standard conditions, *Romalpa* type provisions and company secretaries will certainly be looking to their lawyers to achieve this.’¹⁰⁰

Similarly, comments to the effect that there has been a ‘sudden upsurge in interest’ in reservation of title clauses,¹⁰¹ or that they are in ‘widespread use’¹⁰² not only represent a comment on the *existing* commercial practice, but greatly affect the *future* state of things, and can, in and of themselves, increase the use of retention of title clauses. Nor were these comments limited to academic journals – Goode’s article in *The Times* in 1977, in which he stated that *Romalpa* clauses ‘have now become so common in this country as to present a serious threat to the smooth running of business’¹⁰³, could feasibly have increased the use of the clause by suppliers. Similarly,

⁹⁷ C. Shapiro and H. Varian, *Information Rules* (1999), p.181. See also Katz and Shapiro, ‘Network externalities, Competition and Compatibility’ (1985) 75 *American Economic Review* 424.

⁹⁸ M. Katz and C. Shapiro, ‘Technology Adoption in the Presence of Network Externalities’ (1986) 94 *Journal of Political Economy* 822.

⁹⁹ It is possible to have a ‘sponsor’ even where there are no proprietary rights in a creation. Thus for example the European Commission could be viewed as the ‘sponsor’ of new legislation such as the Common European Sales Law: see C. Kelly, ‘The Proposal for a Common European Sales Law: Looking Beyond the Merits of Optional Instruments’ [2013] 7 *JBL* 703, 712.

¹⁰⁰ R. Prior, ‘Reservation of Title’ (1976) 39 *MLR* 585, 589: ‘Vendors of goods and materials can be expected to incorporate, into their standard conditions, *Romalpa* type provisions and company secretaries will certainly be looking to their lawyers to achieve this.’

¹⁰¹ M. Kerr, ‘Modern Trends in Commercial law and Practice’ (1978) 41 *MLR* 1, 9

¹⁰² R. Pennington, ‘The *Pactum Reserva ti Dominii* in Twentieth century Europe’ (1977) *Acta Juridica* 257, 258,

¹⁰³ R. Goode ‘Reverberations of *Romalpa*’ *The Times*, 11 May 1977 p.25.

the initiation of investigations into reservation of title clauses by the Institute of Chartered Accountants could simply have added to the idea that they were becoming increasingly popular.¹⁰⁴ This is arguably backed up by the fact that although these comments about the purported popularity of retention of title clauses were all made in the 1970s, the empirical evidence by Spencer shows that many businesses did not start incorporating retention of title clauses until a few years later.¹⁰⁵ Using Malcolm Glidewell's analysis of the spread of ideas, discussed below, these academic commentators who spread the word about this new innovation can be viewed as the 'Mavens' of commercial law.

Coordination is another key feature of the transition to a new network. Farrell and Saloner have shown that only firms that *strongly* favour a switch to a new network will join early, whereas if firms only moderately favour a change they may be 'insufficiently motivated to start the bandwagon rolling, but would get on it if it did start to roll'.¹⁰⁶ This is referred to as 'symmetric inertia', where all firms prefer the new technology yet do not make the change. This problem is often exacerbated by a lack of information – it is difficult to know whether other firms are thinking of changing; hence nobody changes. New networks are thus more likely to succeed where the move to the new network is coordinated or where a 'big player' makes the first move or encourages others to do so. Thus Kahan and Klausner have commented on how underwriters have significantly influenced firms' contracting choices, and how these intermediaries have the ability to affect a high volume of contracts.¹⁰⁷ In the case of retention of title clauses it is not immediately clear where this coordination came from, as law firms are not as a rule coordinated. Here, the role of expert, market leaders such as Roy Goode may have been crucial. We explore this in more depth below.

Finally, sponsors who wish to ensure that a new network succeeds may choose to ensure compatibility of the new system with the existing network, taking what is described as an 'evolutionary' strategy by Shapiro and Varian.¹⁰⁸ Compatibility with the old system facilitates migration to the new system, as it is not necessary to entirely overhaul or abandon the old system.

¹⁰⁴ See 'Fibre makers in pact with Brentford Nylons Receiver' *The Times* March 6, 1976

¹⁰⁵ J. Spencer. 'The Commercial Realities of Reservation of Title Clauses' (1989) *Journal of Business Law* 220, 222.

¹⁰⁶ J. Farrell and G. Saloner, 'Standardization, Compatibility, and Innovation' (1985) 16 *RAND Journal of Economics* 70, 72.

¹⁰⁷ M Kahan & M Klausner, 'Standardization and Innovation in Corporate Contracting (Or the Economics of 'Boilerplate'' (1997) 83 *Virginia L. Rev* 713.

¹⁰⁸ C. Shapiro and H. Varian, *Information Rules* (1999), p.191.

Similarly, retention of title clauses were essentially compatible with the existing contracts -- no major changes to the structure of the contract were necessary, at least in the immediate aftermath of *Romalpa*.¹⁰⁹ This would have facilitated the change to include such clauses. However, the difficulty with this aspect of network theory is that although it certainly contributes to the explanation of why ROT clauses were adopted, it does little to explain *why* the change happened at that particular point in time, and not previously.

A second, alternative explanation for the uptake of new networks provides a possible answer to this question. This is the idea that a new network may be adopted, even where it is not compatible with existing networks, if it offers a 'revolutionary' change; if the new product is 'so much better than what people are using that enough users will bear the pain of switching to it'.¹¹⁰ The *Romalpa* case provided this revolutionary change; offering innovative benefits which did not exist before hand. Retention of title clauses were no longer useful only where goods were unchanged and unsold before the buyer became insolvent; now they had potential to protect a supplier even when the buyer had manufactured goods from the products and sold the goods on.

Moreover, the *Romalpa* judgment immediately provided this new innovation with one of the major network benefits associated with well-known existing contract terms, namely the existence of a judicial interpretation of the term. An English firm did not have to 'pioneer' the term and take the risk that it would not be of effect in an English court; instead a foreign supplier, assuming that Dutch law would apply, inserted it into their contract and inadvertently took the risk of receiving an unfavourable judgment on behalf of English suppliers. A further network benefit, the availability of some knowledge as to how these clauses would work in practice in the event of insolvency, was provided both by the *Romalpa* case and by the *Brentford Nylons* insolvency. The latter was widely reported in the press and would have demonstrated to UK suppliers that retention of title clauses can produce results for suppliers.¹¹¹

Network theory can thus tell us that *Romalpa* represented a revolutionary innovation (perhaps one similar to Dan Ariely's 'paradigm shift') which although lacking an official 'owner' was

¹⁰⁹ Later case law indicates that some changes to the overall contract were necessary: see for example *Re Andrabell Ltd.* [1984] 3 All ER 407.

¹¹⁰ C. Shapiro and H. Varian, *Information Rules* (1999), p.195.

¹¹¹ Later judicial interpretations threw doubt on *Romalpa*, meaning many proceeds of sale clauses were redundant. However the clause could still remain in the contract without doing any harm, especially if you had a separate simple ROT clause which could be severed from an unenforceable proceeds of sale / manufactured goods clause. On the persistence of redundant terms see: Claire A. Hill 'Why Contracts are Written in legalese' 77 Chi.-Kent L. Rev. 59 (2001 – 2002).

promoted by a significant number of academics, all of whom predicted its ultimate success to the point that that success became an inevitability. Choi, Gulati and Posner have recently drawn on network theory to put forward a new theory of contract evolution, and it is this development to which we now turn.

[2]. Innovation, Technologies and Market Paradigm Shift: Fitting Network Theory to Boilerplate

Over the last 6 years, a research group based on the East coast of the United States has been pondering the impact of negotiating processes on contractual boilerplate. Led chiefly by Robert Scott and Mitu Gulati, this project has sought empirical and interview based evidence on the negotiation and agreed form of sovereign debt contracts, with focus on those administered in New York and London. The sum total of these agreements would run into many billions, and might be thought to represent the pinnacle of high end contracting. Each party (whether State or underwriter) will have access to substantial expert advice, both legal and fiscal. The contracts are relatively simple, and have not evolved markedly over several hundred years. Despite this, most of these contracts contain a clause (the ‘pari passu’ clause) that is generally recognised as having no clear agreed meaning, no obvious contractual benefit, and yet carries a marked litigation risk. The clause was apparently borrowed from corporate lending agreements and stipulates that this creditor shall be treated as of equal rank to all other creditors in liquidation. In the corporate environment, this would have potential benefits to the creditor. With sovereign debt, there is no liquidation, only default, and so the clause loses its value to the creditor. It is possible that it had some beneficial usage when such clauses were first included in sovereign debt bonds (possibly as early as 1870),¹¹² although none of the practitioners interviewed for that project seemed to have a clear idea of what that might have been. It is obvious that in a modern sovereign debt contract such a statement has no obvious *prima facie* advantage to the parties, and recent litigation

¹¹² ‘We think we managed to come close to determining where the clause originated. Quite possibly, the clause originated in a bond issued by the Republic of Bolivia in 1870, which was issued to finance the attempt of an American adventurer, Colonel George E. Church, to connect Bolivia to the Atlantic Ocean’ : M. Gulati & R. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* (Kindle Edition, 2013, University of Chicago Press) [Kindle Locations 240-242].

showed some potential for litigation.¹¹³ After one research lunch, Scott and Gulati admitted defeat in their search for an easy answer:

‘Several hours later, long after the others had left the lunch table, the two of us realized that we could not suggest a plausible answer to why the clause had neither been improved nor, better yet, just deleted. The failure to revise a contract term that, owing to an aberrant interpretation, now carried a nontrivial litigation risk was inconsistent both with the theoretical models of how sophisticated contract drafters behaved and with the dynamic model of case law serving as the basis for contract drafting and innovation’.¹¹⁴

This led to a substantial empirical project, which drew on a detailed archive of contractual documents collated over several hundred years, and interviews with key market participants (mostly lawyers). Their findings have been published in at least two significant articles and a stand alone text.¹¹⁵

In seeking to understand the process of contractual boilerplate (as stagnation), and the limits of change in contractual terms, Gulati & Scott sought to measure at least 10 possible explanations.¹¹⁶ Some of these were based on rational assumptions of behaviour and others on non-rational heuristics. For the purposes of this paper we focus on one substantial component in the mix: the benefit measurable by network theory. This theory is developed in a 2013 paper published in the *New York University Review*, in which Choi, Gulati and Posner demonstrated that contract evolution goes through three stages:

‘stage one when a particular standard form dominates in the absence of external shocks; stage two when there are external shocks and marginal players experimenting with deviations from the standard form; and stage three when a new standard emerges.’¹¹⁷

This analysis fits in with the above explanation of the explosion of retention of title clauses in the sense that both rely on an external trigger – a ‘revolutionary’ strategy in the case of networks, an

¹¹³ *Elliott Assocs.*, No. 2000QR92 (Ct. App. Brussels, 8th Chamber, Sept. 26, 2000). See M. Gulati & R. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* (Kindle Edition, 2013, University of Chicago Press), Ch 4.

¹¹⁴ *Ibid*, [Kindle Locations 180-183].

¹¹⁵ See note 11 above.

¹¹⁶ In order of discussion: 1. Learning Externalities; 2. Network Externalities; 3. Negative Signalling; 4. Penalty for Remedial Measures; 5. Satisficing; 6. Contract Routines; 7. Nervous Nellies and Herd Behaviour; 8. Free Riders; 9. Endowment Effects (and Related Cognitive Biases) and 10. One Can’t Fix what One Doesn’t Understand.

¹¹⁷ S. Choi, M. Gulati and E. Posner, ‘The Dynamics of Contract Evolution’ (2013) 88 *NYU L. Rev.* 1, 1.

‘external shock’ or ‘tipping point’ in the case of Choi et al’s theory. In fact, the reference to a ‘tipping point’ is one which is often found in the network theory literature. This brings us full circle to the explanation of why reservation of title clauses took off in the late 1970s and 1980s – the *Romalpa* case, complete with poor economic conditions and the media attention given to the *Brentford Nylons* scandal, caused an external shock which had a ripple effect through the commercial and legal community.

A further development found in Choi *et al*’s explanation of contractual innovation is that contract innovations are said to arise ‘not only from high-volume intermediaries but also from marginal players’.¹¹⁸ These marginal players are more likely to be involved in the early stages of innovation but their actions may not be noticed; it is only when bigger players such as dominant law firms, or in the case of Choi et al’s study, industry groups or the IMF, begin to ‘play a key role in promulgating the innovation’ that the new standard will accelerate. However, even marginal players are said to need an external shock, or some external factor, before they begin to experiment.

In the next section we examine this theory in more detail and apply it to *Romalpa*.

[3]. Applying Scott and Gulati to *Romalpa*

The Scott and Gulati project has spawned two distinct lines of data: the interviews with key participants and the dataset of contract forms. In this piece we draw largely from their work on the second source of data, and consider the way in which established norms are broken and replaced with fresh ‘standard’ terms. As stated above, they adapt network theory for the modelling of technological change. This suggests a three phase process. First, the established norm is subject to some external shock that undermines its dominance. In phase 2, the gap is filled by innovation from fast moving smaller businesses. Finally, in phase 3, a new equilibrium is established when large scale users adopt a new standard. In this section we propose that this model explains the rise and spread of the *Romalpa* clause.

Phase 1: Boilerplate and Convergence of Contract Terms

Prior to 1974 there appears to be a settled tradition in favour of not reserving title in sales contracts. Rather, purchasers sought credit from their financiers and used those monies to obtain

¹¹⁸ Ibid, 8.

goods on cash terms. This provided immediate payment to the supplier, and the purchaser's financiers took the risk that the materials supplied would not be processed profitably due to insolvency. The financiers involved commonly took a 'floating charge' on the book assets of the company to obtain preference over unsecured creditors in insolvency.¹¹⁹

Phase 2: External Shocks and the first Transition Phase

The understood positions of the parties in this game are disrupted by the combined shocks of economic decline, and the evidence of this in the Brentford Nylons and *Romalpa* insolvencies. The shock comes from the unpaid seller having an effective claim (at least on these facts) to the unprocessed materials and the proceeds of sale of processed materials. In the familiar game of musical chairs that is business failure, the debenture holders found they had no seat when the music ended. This fundamentally changed the rules of the game.

The insolvencies in Brentford Nylons and *Romalpa* were not isolated incidents at a time of economic decline. Their significance derives from their 'other-wordly' nature. The established order of priority in insolvency was disrupted by the reservation of title clauses. These are alien for at least two reasons. First, in both cases they were incorporated as a result of cross-border trade, and the adoption of non-British norms as to the passing of property. In *Romalpa* and Brentford Nylons the suppliers are Dutch. We do not currently have access to the Brentford Nylons supply contracts, but the *Romalpa* clause was not designed to bring about a change in English Law. It was Dutch in origin, and expected to be enforced under Dutch law. This is then change by mutation rather than deliberate innovation. This is not unusual. Many technologies that have led to dramatic market shifts have been inadvertent: Viagra, stainless steel and Saccharin are all reputedly 'happy accidents'.¹²⁰

The more legal cause of their 'otherness' is the source of the broader effects in *Romalpa*: the equitable origin of the tracing remedy used by the unpaid seller to go beyond the goods supplied and makes claims over the proceeds of sale. This usage of equitable principles in commercial law

¹¹⁹ R Goode, 'Twentieth Century Developments in Commercial Law' (1983) 3 Legal Stud 283, 291.

¹²⁰ Development stories are often contested, but see:

Viagra (<http://www.sildenafilakaviagra.com/history-of-viagra>);

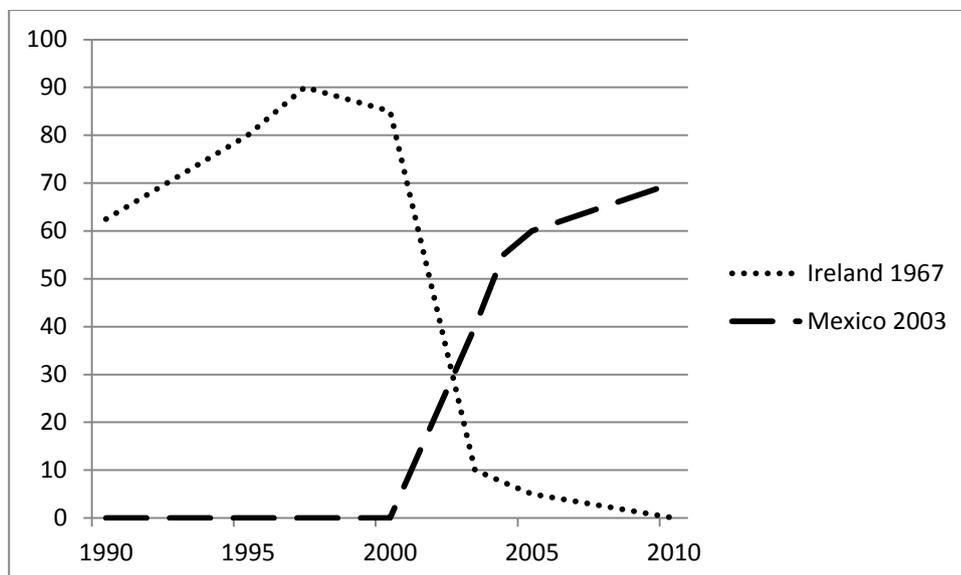
Stainless Steel & Harry Brearly (http://www.bssa.org.uk/about_stainless_steel.php?id=31);

Saccharin (<http://science.discovery.com/famous-scientists-discoveries/10-accidental-inventions.htm>).

was thought sufficiently significant to deserve a double length article by Roy Goode in the Law Quarterly Review.¹²¹

Following a shock to the system of this magnitude, Choi, Gulati and Posner predicted that the initial reaction will be limited within large, established enterprises which will adhere to the prior standard. They assert that the immediate innovation will arise within smaller organisations which will seek market share by experimenting with innovative forms. These will not displace the established norm immediately. Rather, as with technologies generally, these adaptations will need to be adopted by established market players in order to gain traction.

This model of change is best represented graphically. In the following figure¹²² we see the distribution of sovereign debt contracts between two competing sets of boilerplate- the standard Ireland 1967 terms and the innovative Mexico 2003 variant:



It is the 'S-shape' of the Mexico 2003 form that is particularly instructive. This is what network theory would predict for the market development of a new technology.¹²³ The old standard (the Ireland 1967) was already in decline as new variants were introduced even before the Mexico 2003 form gained prominence. This is due to an external shock, here: the 1995 Mexican debt crisis.¹²⁴ The Mexico form is not therefore in direct competition with the Ireland 1967 form as such, that old standard has already lost substantial position in the market. Put simply, there is a

¹²¹ R. Goode, 'The Right to Trace and its Impact on Commercial Transactions – I' (1976) 92 LQR 360-401 & 'The Right to Trace and its Impact on Commercial Transactions – II' (1976) 92 LQR 528-568.

¹²² This is a simplified version of the table at S Choi, M Gulati & E Posner 'The Dynamics of Contract Evolution' (2013) 88 NYU L Rev 1, 28.

¹²³ A Sood & G Tellis 'Technological Evolution and Radical Innovation' (2005) 69 Journal of Marketing 152, 153.

¹²⁴ Above note 122, 20.

lag between the displacement of the old standard caused by an external shock and the rise of a new standard. That represents the period in which smaller players seek to innovate and gain market share. As Choi, Gulati and Posner found:

‘The innovations in stage two all came from minor players- minor in terms of the issuers and in terms of their lawyers’.¹²⁵

Phase 3: The Struggle for Dominance and the Emergence of a New Standard

That process of fierce competition then burnt itself out as a new standard was set. Again, drawing from their study of contract form in that market, Choi *et al* were able to conclude:

‘In the wake of heated debate over [the process for handling sovereign default]... in 2002, the four new models- Mexico 2003, Brazil 2003, Uruguay 2003, and Turkey 2003-quickly began to dominate the scene. Two features of these four new models are interesting. First, they all showed up in 2003. This represents the point at which the dominant Ireland 1967 model exited from the New York market. Second, the models in stage three that appeared in 2003 were from the high-volume issuers and their high-volume lawyers, unlike what we saw in stage two. These four models are, we surmise, the big players competing to be the authors of the new dominant design’.

The significance of this predictor is that it appears to be a good fit for the rise of the *Romalpa* clause. We do not have the kind of empirical data used by Posner, Gulati, Scott and others in their wide ranging project. Nonetheless, the fit between the contemporaneous account of the spread of *Romalpa* clauses (and the many variants of such clauses) is significant. In the years after *Romalpa*, the limits of reservation of title clauses were tested in litigation. The process of challenging the *Romalpa* decision to shape it to better fit the expectations of the repeat player insolvency practitioner’s is consistent with Galanter’s account of law’s progression. However, the Scott / Gulati project explains the equivalent process for the shaping of the contractual terms in the market. This provides a useful tool for the analysis of boilerplate in commercial contracts, and ought to be employed more widely.

What is missing from the Scott / Gulati account is an explanation of how these forms spread throughout the market. We believe that it can be significantly improved by the addition of a further element: the ‘Maven’ of Malcolm Gladwell’s book *The Tipping Point*.

¹²⁵ Ibid, 22.

[4]. Boilerplate: Mavens and Tipping Points

The spread of knowledge throughout a community is part of the staple research diet of marketing, consumer behaviour, communication and political science.¹²⁶ Within marketing, the concept of the 'maven' has become established. Malcolm Gladwell, in his book about the epidemiology of ideas *The Tipping Point* called such individuals 'Mavens', the word coming from the Yiddish for a trusted source of information. Within the academic literature, market mavens are defined as:

'individuals who have information about many kinds of products, places to shop, and other facets of markets, and initiate discussions with consumers and respond to requests from consumers for market information'.¹²⁷

Their motivation for this is mixed, but in the commercial sphere it is likely that:

'individuals may transmit information as part of an implicit contract in which the information receiver pays for the information by providing information or other rewards to the giver. That is, a market maven may provide general information to individuals who, in turn, give information to the maven, perhaps on specific topics about which they are particularly knowledgeable'.¹²⁸

The crucial difference between this type and other 'opinion leaders' ('individuals who acted as information brokers intervening between mass media sources and the opinions and choices of the population')¹²⁹ is the social, face-to-face dissemination of the information.

We speculate that company secretaries became aware of the *Romalpa* decision through two distinct pathways. First, through the reports in the financial and general media attention surrounding the Brentford Nylons and *Romalpa* insolvencies. The first instance decision of *Mocatta J* was not reported (in the Law Reports) until the appeal was heard in 1976, but Roy Goode was clearly seeking to raise wider awareness of the issue through substantial pieces in *The Times* and elsewhere. This fits within the 'opinion leader' bracket. We suspect that the types of clauses that could be drafted to assimilate the *Romalpa* decision into commercial practice formed

¹²⁶ L. Feick and L Price 'The Market Maven: A Diffuser of Marketplace Information' (1987) 51 *Journal of Marketing* 83, 85.

¹²⁷ *Idem.*

¹²⁸ *Idem.*

¹²⁹ *Ibid*, 84.

a substantial part of this practice.¹³⁰ Secondly, as a consultant to Mishcon, and creator of the specialist Centre for Commercial Law Studies, he was actively involved in communicating significant legal change to London's commercial law firms. He is therefore acting as the personal conduit for change to be recognised and adaptations to be suggested. This brings him within the 'maven' class, as a trusted guide to a fluid situation, where many possible courses of action could have been pursued.

E. Conclusions, and Unresolved Questions

We suspect that the combined effect of the *Romalpa* litigation and other notable insolvencies were communicated by key figures in the commercial law world and that sparked the hunt for an improved technology for the (non-)passing of title. Banks lending to purchasers of goods could no longer confidently look to that company's store house or current account for security. Rather than spend resources verifying the status of each purchase, it is likely that this shock led to a position of equilibrium after a period of uncertainty. The fit between this theory, the contemporaneous accounts of rapid change post-*Romalpa* and the empirical evidence in the sovereign debt market seems to go beyond mere coincidence. In an ideal world we would have empirical evidence to bolster these claims. Without them, our conjecture is best used as a basis for further research projects where contract variation could be measured empirically.

We add to the Scott / Gulati conjecture the role of mavens in spreading the innovations across a diffuse market. Here, we see leading commercial law academics as vital. Whilst their doctrinal analysis might have been limited (there appears in some places to be a wilful disregarding of Wheeler's findings) it seems nonetheless to have been instrumental in legal change, at least in the boilerplate of sales contracts.

There will be those who will say that the Scott / Gulati model was too obvious to be tested. This does not discourage us. It does not seem to have been written up, or considered as subject to proof, before. We view it as a significant development in the understanding of contractual variation and adaptation. TH Huxley when told of Darwin's views on natural selection famously

¹³⁰ Within 8 months of the *Romalpa* decision in the Court of Appeal, R Goode's speculations on the broader implications of the decision were published in the Law Quarterly Review: R. Goode, 'The Right to Trace and its Impact on Commercial Transactions – II' (1976) 92 LQR 528, 547-552.

remarked: 'How extremely stupid not to have thought of that!'¹³¹ We trust that others will share our view, in time, too.

[10260]

¹³¹ L Huxley *The Life and Letters of Thomas Henry Huxley* (1900, London: Macmillan), vol 1, p. 189.