Anglo-American Contract Models and Norwegian or other Civilian Governing Law
Introduction and Method

Giuditta Cordero Moss
Contents

1. Introduction: the project ................................................................. 7
   1.1 The aim of the project .............................................................. 7
   1.2 The topics dealt with in the project ........................................... 9
       1.2.1 Boilerplate ....................................................................... 9
       1.2.2 Recurring legal terms/contractual concepts ....................... 10
       1.2.3 Clauses in maritime insurance contracts ............................. 12
   1.3 The project’s method ............................................................... 12
   1.4 The project’s organisation ....................................................... 13
   1.5 The common law advisors to the project .................................. 13
   1.6 The international network ...................................................... 14
   1.7 The users’ group ................................................................... 14
   1.8 The project’s financing ........................................................... 15
   1.9 Outline of this paper ............................................................... 15

2. The project’s framework: a three-tier approach for common law-inspired contracts subject to a civilian governing law ........................................................................... 17

3. The first tier: private international law ........................................... 23
   3.1 The governing law ................................................................. 26
   3.2 Partial choice of law ................................................................ 27
   3.3 Tacit choice of law .................................................................. 30
   3.4 Closest connection .................................................................. 35
   3.5 Conclusion .............................................................................. 37
4. The second tier: international commercial law ....................... 39
  4.1 Trade usages ........................................................................ 40
  4.2 Non-state sources and the lex mercatoria .............................. 43
  4.3 The tension between common law and civil law as a reason for desiring a lex mercatoria: the example of good faith and fair dealing ...................... 51
    4.3.1 English law privileges predictability ............................... 53
      4.3.1.1 Good faith and interpretation .................................... 53
      4.3.1.2 Good faith as a corrective of the regulation agreed to by the parties ........................................... 56
      4.3.1.3 Good faith as a duty between the parties ..................... 58
    4.3.2 Civil law privileges justice, but to different extents ............. 61
    4.3.3 German law .................................................................. 62
      4.3.3.1 Good faith and interpretation .................................... 63
      4.3.3.2 Good faith as a corrective of the regulation agreed to by the parties ........................................... 64
      4.3.3.3 Good faith as a duty between the parties ..................... 65
    4.3.4 Norwegian law ............................................................. 65
      4.3.4.1 Good faith and interpretation .................................... 66
      4.3.4.2 Good faith as a corrective of the regulation agreed to by the parties ........................................... 67
      4.3.4.3 Good faith as a duty between the parties ..................... 68
    4.3.5 Italian law ...................................................................... 68
      4.3.5.1 Good faith and interpretation .................................... 70
      4.3.5.2 Good faith as a corrective of the regulation agreed to by the parties ........................................... 71
      4.3.5.3 Good faith as a duty between the parties ..................... 72
    4.3.6 The tension between the common law drafting technique and the civil law governing law ........................................... 73
  4.4 Good faith and fair dealing in the restatements of the lex mercatoria ........................................... 75
    4.4.1 Good faith and interpretation ........................................... 76
4.4.2 Good faith as a corrective of the regulation agreed to by the parties ............................................................. 78
4.4.3 Good faith as a duty between the parties ......................... 78
4.4.4 Good faith and fair dealing as an autonomous standard in international trade ............................................. 81
4.5 Non-state sources and the interpretation of contracts .......... 86

5. The third tier and the project’s focus:
   the interpretation doctrine of the applicable contract law .... 89
5.1 The meaning of the choice of model .................................. 89
5.2 Choice of model as a presumption of choice of effects? ....... 90
5.3 Compatibility with the governing law ............................... 91
   5.3.1 Convergence of common and civil law
       assumes no clear wording to the contrary ....................... 91
   5.3.2 Formally correct use of clauses with speculative purposes .... 93
5.4 The impact of the contract style: does it affect
   the interpretation doctrine? .............................................. 96
   5.4.1 Exhaustiveness of the contract regulation ...................... 97
   5.4.2 Exhaustiveness within the scope of freedom of contract ..... 99

6. Do contract practice and contract regulation
   develop in opposite directions? ........................................ 103

7. Conclusion ........................................................................... 107

8. List of literature .................................................................. 109
1. Introduction: the project

This paper opens a series that collects the work produced in the framework of the research project “Anglo-American contract models and Norwegian or other civil law governing law”, running from 2004 to 2009 at the law faculty of the Oslo University.

The next sections in this paper (from section 2 to section 6) present and discuss the circumstances that render it relevant, both in terms of contractual practice and in terms of legal analysis, to research and analyse the most important uncertainties that can arise out of the use of Anglo-American contract models for contractual relationships that are regulated by Norwegian law (or by another legal system belonging to the civil law family).

Section 1 gives a presentation of the project’s purpose, organisation and structure.

1.1 The aim of the project

The aim of the project is to achieve a systematic overview of the frictions that might run counter to the expectations of each of the parties when a common law-inspired contract is governed by a civilian law: this includes the party that had relied on the effects of the (common law-inspired) contractual formulation, as well as the party that had relied on the applicability of the (Norwegian or other civilian) governing law. Furthermore, the project analyses some of the specific clauses or contract practices that form the origin of these frictions: it assesses the specific function of each clause or contract practice in the contract model under the original common law system, and it verifies the extent
to which the clause is capable of exercising the same function once the contract is inserted in the context of a different governing law (primarily Norwegian law). The project consists, therefore, of a series of papers, each of which is devoted to the study of a specific contractual clause or practice under (primarily, but not exclusively) English law, as well as its effect under (primarily, but not exclusively) Norwegian law. On the basis of these specific studies, the project develops knowledge relevant to and useful for the interpretation of contracts and, eventually, to a feasible extent, the harmonisation of contract law across the borders of national states.

Some of the aspects that are the subject-matter of the project are common to a large number of contract types, and arise as a result of the so-called “boiler plate clauses” that are often similar irrespective of whether the underlying transaction is a sale, a loan, a licence, a distribution or another type of relationship. Among these clauses are representations and warranties, hardship, assignments, amendments, clauses regarding the interpretation of the contract, etc. Each of these issues deserves a comparative analysis of the function that the clause is meant to fulfil under the common law, and how this function is fulfilled in the governing Norwegian or other civil law system. As a result of the comparison, where possible the research papers identify an interpretation that coordinates the assumptions of both systems or solves any conflicts that may arise between the two systems.

Further issues that are not specific to certain contracts, and where coordination between the contractual models and the governing law is desirable, are to be found in the areas of guarantees and of damages. Anglo-American models operate within each of these areas with distinct concepts: covenants, warranties, representations, guarantees, indemnification, reimbursement, liquidated damages, penalties. The various implications of these legal terms and their coordination with the governing law is also the subject-matter of the project.

The use of Letters of Intent is also increasingly widespread and is affected by clauses that create tensions with the principles implied in the
The function of a Letter of Intent and the coordination between the assumption that it is not binding and the regulation of the formation of contract in Norwegian law and other systems of civil law forms another part of the subject-matter of the project.

### 1.2 The topics dealt with in the project

A list of the topics that have already been dealt with in the project, as well as those that it is planned will be dealt with, is provided below; as long as the project is ongoing, the list will be continuously updated and can be retrieved at http://www.jus.uio.no/ifp/anglo_project/essays.html. It is intended that each of the papers produced in the frame of the project will be published in this series. The papers are mainly in Norwegian, but an extensive abstract is added in English. The papers produced in connection with the specific branch of maritime insurance are published separately.

#### 1.2.1 Boilerplate

<table>
<thead>
<tr>
<th></th>
<th>&quot;No Oral Amendments&quot;:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>This is a typical “boiler-plate” clause: changes to the contract have to be made in writing. Is it possible for the parties to the contract to define the procedure for valid changes? What happens if the parties practice this in another way?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>“Entire Agreement”:</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>This is a typical “boiler-plate” clause aiming at clarifying what terms may be considered to be part of the contract. This may be in contrast with general principles on interpretation and loyalty in Norwegian law. Dealt with by: Henrik Wærsted Bjørnstad.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>“No reliance”:</th>
</tr>
</thead>
<tbody>
<tr>
<td>c.</td>
<td>This is a typical “boiler-plate” clause that aims at excluding the relevance of information exchanged during the negotiations. This may be in contrast with general principles of interpretation and loyalty in Norwegian law.</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>d.</strong></td>
<td>“No-waiver”:&lt;br&gt;This is a typical “boiler-plate” clause. Its purpose is to prevent the loss of remedies for breach of contract even if they aren’t invoked within reasonable time. The clause may be abused. The relationship with the Norwegian doctrine of acquiescence is to be analysed. Dealt with by: Fredrik Skribeland.</td>
</tr>
<tr>
<td><strong>e.</strong></td>
<td>“Subject to contract ”:&lt;br&gt;This is a typical clause in Letters of Intent. Can the parties exclude any liability for their conduct during negotiations if they insert this clause? Dealt with, only in respect of English law, by: Christine Halvorsen</td>
</tr>
<tr>
<td><strong>f.</strong></td>
<td>“Subject to contract and best efforts, reasonable efforts”:&lt;br&gt;This is a typical clause in Letters of Intent. Can the parties exclude any liability for their conduct under negotiations if they insert this clause? Dealt with by: Bodil Kristine Høstmælingen</td>
</tr>
</tbody>
</table>

### 1.2.2 Recurring legal terms/contractual concepts

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>g.</strong></td>
<td>“Representations, warranties, conditions, covenants”:&lt;br&gt;The terms have different implications in common law, which ought to be explained and compared to Norwegian law. Dealt with by: Tor Sandsbraaten</td>
</tr>
<tr>
<td><strong>h.</strong></td>
<td>“Hardship”:&lt;br&gt;A clause typical for long term contracts, whereby the parties agree to renegotiate the contract in the case of a change in circumstances. Dealt with by: Herman Bruserud.</td>
</tr>
<tr>
<td><strong>i.</strong></td>
<td>“Hold harmless, indemnification”:&lt;br&gt;Indemnity clauses allocate the risk of losses between the parties. The wording of these clauses may have significant implications under English law. The ability of the wording to modify principles on liability and the reimbursement of damages in Norwegian law should be analysed. Dealt with by: André Bjerketveit</td>
</tr>
<tr>
<td><strong>j.</strong></td>
<td>“Representations and Warranties in share purchase agreements”:&lt;br&gt;Dealt with by: Margrethe Buskerud.</td>
</tr>
<tr>
<td>k.</td>
<td><strong>Force majeure:</strong></td>
</tr>
<tr>
<td>----</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>A typical clause of this type would be as follows: A circumstance that is beyond the control of the prevented party, which could not be foreseen, etc., excuses the party from liability for non performance. How is “beyond the control” to be interpreted? As an objective allocation of risk between the two parties, or as a reference to the actual control that a party may have in a situation (i.e. by reference to that party’s diligence). Its relationship with the common law doctrine of frustration, with CISG, with diligence of civil law (and with Nordic doctrine of control-liability) will also be considered. Dealt with by: Anders B. Mikelsen.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>l.</th>
<th>“<strong>Analysing Liquidated Damages Clauses under Norwegian Law: Interpreting U.S. Clauses</strong>”:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dealt with by: Edward T. Canuel</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>m.</th>
<th>“<strong>Liquidated damages, penalties</strong>”:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The concepts have different structure but similar functions in common law and Norwegian law. Their relationship with the other rules of damages (in contract) should be analysed. Dealt with by: Kyrre Kielland</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>n.</th>
<th>“<strong>Sole remedy</strong>”:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>This clause is often used to exclude liability for any damages beyond the reimbursement of the pre-estimated losses made in the liquidated damages clause. Its effects in respect of the Norwegian doctrine of damages should be studied.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>o.</th>
<th>“<strong>Material Adverse Change</strong>”:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A special condition precedent, especially within the acquisition of shares. The buyer shall be released from his obligations if the financial or other situation of the company being acquired has changed in the period between when the offer becomes binding and the acquisition is completed. Dealt with by: Lars Ole Sikkeland</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>p.</th>
<th>“<strong>Retention of title</strong>, “<strong>Hold in trust</strong>”:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>These clauses aim at affecting the ability of third parties to attach goods transferred to a contractual party. Their effect might not be compatible with principles of Norwegian law on obligations.</td>
</tr>
</tbody>
</table>
1.2.3 Clauses in maritime insurance contracts

<table>
<thead>
<tr>
<th>q.</th>
<th>“Various reinsurance clauses”:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dealt with by: Kaja De Vibe</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>r.</th>
<th>“Mortgagees’ interest insurance”:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dealt with by: Silje Gundersen</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dealt with by: Ingrid Lind Groh</td>
</tr>
</tbody>
</table>

1.3 The project’s method

Through the analysis of the function of the contractual formulation (seen in the light of the common law system), as well as of the function of the applicable Norwegian (or other civil law) regulation, the project aims at proposing satisfactory solutions that take the international contractual practice into due consideration. Solutions may reconcile the two conflicting systems and suggest an interpretation that meets the expectations of all the involved parties, or they may assess that the contradiction cannot be overcome and suggest alternative contractual structures that might permit the protection of the involved interests to be achieved. The method of the project, therefore, is comparative, and the aim is to develop knowledge that may support the international contractual practice.

The material analysed in the course of the project consists partly of easily accessible standard agreements and standard clauses, such as those produced by the International Chamber of Commerce, or by branch associations such as the ISDA in the field of financial instruments, or the FIDIC and the ORGALIME in the field of engineering and construction. Moreover, the analysed material is taken from existing standard contracts currently applied by leading Norwegian and international law firms, as well as from the practice of the project's
members, who have had a significant amount of practical experience as arbitrators, consultants or practicing lawyers.

1.4 The project’s organisation

The project is organised within the Institute of Private Law and, for the papers on maritime insurance, the Scandinavian Institute of Maritime Law, both part of the Faculty of Law, University of Oslo.

The project is managed by Professor Dr Juris Giuditta Cordero Moss and has a board consisting of Professors Dr Juris Viggo Hagstrøm and Lasse Simonsen, in addition to Giuditta Cordero Moss, all from the Institute of Private Law, as well as, from the Scandinavian Institute of Maritime Law, Professors Dr Juris Erling Selvig and Trine-Lise Wilhelmsen.

In addition to relying on the individual research of the permanent members of the project, a research group of three PhD research fellows and numerous research assistants is active in the framework of the project, dealing with each of the topics listed in section 1.2 above. The papers to be published in this series are produced primarily by this group of researchers.

1.5 The common law advisors to the project

Because a significant part of the research carried out in the framework of the project consists of assessing and understanding the originally intended function of clauses that stem from common law contracts, it is essential to ensure that proper knowledge of the common law of contracts is acquired.

To reach this aim, the project enjoys the permanent cooperation of English and American academics and practitioners, who participate in the project’s workshops, comment on each paper and contribute with their knowledge and insight: Mr Edwin Peel, Fellow and Tutor in Law, Keble College, Oxford University, Mr Jim Percival, Head of Dispute
Resolution, British Nuclear Fuels plc, and Mr Edward T. Canuel, U.S. Embassy in Oslo.

1.6 The international network

The practice of adopting common law-inspired contract models is not limited to Norway, and the tension that may arise between the common law system of the origin of the contract and the law governing the contract becomes relevant whenever the latter belongs to the civil law family. Therefore, it is highly relevant to exchange views and experiences with other civilian systems. Numerous academics and practitioners from a number of civilian countries have contributed, and will contribute, to the project’s seminars and workshops. Their papers will be published separately in due course.

1.7 The users’ group

The interaction of contract models and governing law is a topic of interest not only for the academy and for the legislator (in view of possible reforms to enhance the unification of the contract law), first of all it has a considerable amount of relevance to the practice of international business. Practicing lawyers, both in private practice and in-house company lawyers, are confronted with the topics mentioned in section 1.2 above on a daily basis, and the project’s research is of immediate and direct relevance to their practice. To gain advantage of this common interest, a users’ group was established, with representatives from the main Norwegian law firms and legal departments of Norwegian companies who are active in the field of international contracts.

The Users’ Group is meant both as an advisory forum and as an addressee of the project’s research. As an advisory forum, the group provides input on the identification and formulation of research themes, as well as contributing with practical insight to ensure the relevance of the perspectives chosen for the research. As an addressee
of the project’s research, the group receives presentations of the results of the research.

1.8 The project’s financing

The project is primarily based on the financing by the Research Council of Norway, by the Institute of Private Law and, for the part on maritime insurance, the Scandinavian Institute of Maritime Law. In addition, the project receives financing of one research assistant per year by the Norwegian law firm DLA Nordic.

1.9 Outline of this paper

In section 2 the topic of the project is presented in its context, with the purpose of clarifying why the question of Anglo-American contract models and civilian governing laws is relevant, and how this question can be approached.

The paper suggests that the widespread use of Anglo-American contract models requires a three-tier approach: first an analysis from the point of view of private international law (does the use of Anglo-American models imply choice of an Anglo-American system to govern the contract?), then an analysis from the point of view of international commercial law (are there any trade usages or generally acknowledged principles that govern the interpretation and application of Anglo-American contract models?), and finally an analysis from the point of view of the contract law belonging to the law that governs the contract (is the wording and the function of Anglo-American contract models compatible with the principles of the governing contract law?).

Section 3 analyses the question of private international law, and concludes that the use of a common law-inspired drafting style does not imply a choice of law.

Section 4 analyses the question of international commercial law, and concludes that only seldom is it possible to find sources of
international commercial law that permit us to interpret an Anglo-American contract based simply on its own wording and on the tradition that has inspired it.

Section 5 observes, thus, that is necessary to verify the compatibility of the contract with the contract law that governs it. The section suggests some lines of thought that may be useful in such an analysis. The research papers that will be published in the present series contain an analysis of the compatibility of certain contract clauses and contract practices with the governing law (mainly, Norwegian law).

The main lines of the reasoning developed in section 2 and in section 5 were published as a separate article, “Harmonised contract clauses in different business cultures”, in Wilhelmsson, T. (ed.), Private Law and the many Cultures of Europe, Kluwer Law International, 2007. The reasoning presented in section 3 was published as a contribution to the Essays in honour of Helge Johan Thue, “Lov og toleranse” (Giertsen, J., Frantzen T. Moss, G.C. (eds.), Gyldendal 2007: “Tacit choice of law, partial choice and closest connection: The case of Common Law contract models governed by a Civilian law”. The arguments presented in section 4 are based on an article published in Global Jurist: Vol. 7: Iss. 1 (Advances), Article 3 pp.1-38: “International contracts between Common Law and Civil Law: Is non-state law to be preferred? The difficulty of interpreting legal standards such as good faith”. Further references relevant to the topic of this paper may be found in the teaching material that I prepared for my lectures at the Oslo University and at the Centre for Energy, Petroleum, Mineral Law & Policy, University of Dundee: “Lectures on international commercial law”, Publications Series of the Institute of Private Law, University of Oslo, 2003 nr 162, pp. 1-161, and “Lectures on comparative law of contracts”, Publications Series of the Institute of Private Law, University of Oslo, nr 166, 2004, pp. 1-194.
2. The project’s framework: a three-tier approach for common law-inspired contracts subject to a civilian governing law

In the past few decades it has been possible to observe that commercial contracts are written primarily using the model of English or US contracts. This contract practice obviously started because the communication between the parties in international transactions takes place mainly in English. It is, therefore, only natural that the contract is also written in English.

However, using a certain language does not necessarily mean that the legal system that is expressed in that idiom is also applied. This is clearly testified by the numerous contracts written in English and yet where the parties have expressly chosen to subject their contract to a governing law that is not expressed in English – be it the law of the state to which one of the parties belongs, the law of the state where the contract shall be performed, or the law of a third state which is deemed to be neutral and therefore preferred by both parties. It should not, therefore, be surprising to see commercial contracts written in English but structured in such a way as they would normally be structured under the law that the parties have chosen to govern their relationship. These contracts would be thought out and written according to the legal technique and the legal tradition of the governing law, and only from a linguistic point of view would they be expressed in English. The process of drafting would not necessarily have to take place in two tiers, first writing the contract in the original language and then
translating it into English. It could very well be possible to think and structure the contract according to the criteria of the governing law and write it directly in English, although the difficulties of expressing legal concepts in a foreign language, that is of separating the means of expression from the object that is expressed, are well known.

However, international commercial contract practice does not seem to follow this path. Not only does the drafter of the contract use English, it also applies contract models that are developed in England, the USA, or other jurisdictions of common law. It means that the drafter (directly or indirectly through the application of contract models that are already available) thinks and structures the contract according to the common law legal tradition under which the model was developed, and not under the law that it has chosen to govern the legal relationship between the parties.

This is a relatively unconscious process. It started several decades ago, largely because of the desire to ensure a proper linguistic result: the numerous publications that commented or collected model contracts in English were very useful as a basis for non-native English speaking lawyers to properly draft contracts in English. Adopting these models, however, also meant adopting the legal structures of the legal system under which the model was developed: separating the proper use of the English language from the adoption of the underlying legal structures would have assumed (i) a thorough knowledge of the English or other common law system under which the model had been developed, (ii) an understanding of the function of the various contract clauses in that legal system, (iii) a systematic comparison with the governing legal system and (iv) an exclusion or correction of the contract clauses that turned out to be tailored to the legal system under which the model was developed, and not to the governing legal system. Such an extensive process cannot always be expected in the framework of a commercial case, and as a result contract models were simply adopted as they were. International commercial practice has therefore gradually acknowledged the drafting style that is typical for common law contracts. This
contract practice was also certainly enhanced by the large international success of English and US law firms, which exported their contract style and data bases to the legal systems in which they became involved, and of their major clients, multinational companies and financial institutions, which expected their model contracts to be applied in all the international transactions in which they were involved.

Today international commercial contracts are, with only few exceptions, drafted on the basis of common law models. This ensures a better flow in the language of the contract and a prima facie result which is linguistically much more proficient than if the drafter had translated legal concepts from the governing law.

The sources of these models are often not clearly identifiable and usually not unitary. Every lawyer or law firm will have an archive with texts taken from international branch associations, from international publications, from electronic databases and from previous transactions of various types in which the lawyer or the law firm has been involved in various jurisdictions. Any new draft will be based on a mixture of all these texts, improved with new elements taken from recent experiences, inspired by drafts that had been proposed during the negotiations of a previous deal, added with clauses that had appeared in yet another set of deals. In summary, commercial contracts are, with the exception of specific areas where there is a widespread use of recognised standard contracts, a potpourri of texts originating from various contract types and different jurisdictions, international documents and personal experience, all of which adopts the common law legal drafting, and without necessarily devoting any particular thought to the compatibility of these models with the governing law.

This drafting practice creates the need for the coordination of the legal concepts upon which the contract is based with the legal concepts that the governing law imposes on the contract. There are various examples of clauses that are obviously inspired by a common law system and do not have a corresponding provision in the chosen law, if the law chosen by the parties to govern the contract belongs to a civilian system.
An example of this is a contract that contains the choice of a civilian governing law and the exclusive choice of forum in a civilian country, and still regulates to what extent the parties may invoke equitable remedies such as estoppel (which is a phenomenon of common law and does not exist in civilian laws). There are, however, much more subtle examples of poor coordination between the common law contract model and the civilian governing law. The function of the ubiquitous clauses of representations and warranties, for example, is primarily connected to the common law distinction between pre-contractual representations and terms of the contract, a distinction that does not exist, at least not with the same legal effects, in many civilian systems. While it may be possible to dismiss the clause in the former example as an irrelevant regulation taken in because the parties did not notice its incongruity, the interpretation of the latter example requires more consideration: representations and warranties are a contractual regulation of the information exchanged between the parties, which is regulated by rules and principles of many civil law systems. Does such a clause mean that the parties intended to add the contractual regulation to the rules and principles of the governing law? Or does it mean that the parties wanted to regulate the matter as set forth in the contract instead of following the governing law’s rules and principles? And, if so, are the parties allowed to depart from the governing law’s rules and principles?

When international contracts governed by a civilian law are written in the common law style, therefore, the interpretation of the contract may require coordination between the different legal traditions. There seems to be at least three phases in this process:

1. The private international law phase, aiming at verifying whether adopting a contract model developed under a certain legal system may mean that the parties have chosen the law of that system to govern the contract,
2. The international commercial practice phase, aiming at verifying whether the clauses and the effect that those clauses were
meant to achieve in the system under which they had been developed may be deemed to have become generally acknowledged in international commercial practice, and therefore may be applicable as a trade usage irrespective of the governing law, and

iii. The interpretative phase under the applicable contract law, aiming at verifying what effects those clauses were originally meant to achieve and, if those effects are the same as the originally intended effects, whether they may be obtained under the governing law.

This process does not always necessarily result in giving the contract the effects that the clauses had originally intended to achieve in the system under which they were developed. The following sections will briefly touch upon these phases, and will indicate that it should not be surprising if some clauses taken from a common law contract have different effects once they are governed by a civilian law. For many clauses the simple fact that they originated in a legal tradition different from that of the governing law will not create particular problems of interpretation. For other clauses, however, the originally intended results might be incompatible with the law that governs the contract. In such cases, even if certain clauses might have been intended to achieve certain results by the original drafters of the model, such intentions are not relevant and should not be given effect. These clauses will therefore have to be interpreted in another more restrictive, more extensive way, or even be deprived of their effect, if that is more in line with the applicable law.

It is the task of the project described herein to identify the most common clauses that may be subject to discrepant treatment under the common law and under the civil law, and it is the task of each of the papers collected in this series to analyse the originally intended effects of the respective clause and the actual effect under the governing law.
3. The first tier: private international law

An international contract is potentially governed by the laws of at least two different countries, those with which the legal relationship has a connection: it could be the countries where the parties have their respective place of business, the country where the contract is to be performed, or other countries with which the contract had other connections.

A judge who has to decide a question arising out of an international contract has first of all to find out which law governs the contract. To do so, the judge will look at the private international law of its own country. As we know, private international law, also known as conflict of laws or choice of law rules, is a branch of the national law of every single legal system, which means that each private international law might contain its own peculiar rules to identify which country’s substantive law governs the contract. This might lead to a considerable lack of harmony in the field of international contracts, because the identity of the law governing the contract might change according to which private international law is applied, i.e. according to which country the proceeding was started in. To avoid this undesirable result, many rules of private international law have been made uniform by international convention.

The most relevant convention in the area that is of interest here is the Rome Convention of 1980 on the Law Applicable to Contractual Obligations, binding the members of the European Community and about to be transformed into a directly applicable Council Regulation (so-called “Rome I”). Although Norway has not ratified it nor does it fall within the scope of application of the future Rome I Regulation,
the observations made in respect of the Rome Convention are also highly relevant to Norwegian law: the Rome Convention is the private international law in the area of contracts that prevails in the whole European Community, including the other Nordic countries. Traditionally, court decisions and legal doctrine of Sweden and Denmark have been given considerable weight in Norway, where most of the conflict rules are not codified. Furthermore, private international law is a field where harmonisation is highly recommendable for the sake of predictability in respect of the governing law, which is an essential feature in international transactions. The Rome Convention should therefore be given a central place in private international law reasoning carried out under Norwegian law. Because of the importance of harmonisation, the Rome Convention was the basis for a draft codification on which the Norwegian Department of Justice worked in 1985. It was not finalised due to some prospective developments of the European sources, and the Ministry’s desire to await the European developments in order to permit a better coordination with the future Norwegian legislation.¹ The Norwegian Ministry of Justice has again, in 2003, clearly confirmed the desire to coordinate any new legislation, in respect of choice of law for international contracts, with the European sources.² It is expected that Norwegian conflict rules will be codified, in respect of contractual obligations, shortly after the issuance of the Rome I Regulation, and that the Norwegian codification will clearly and willingly be inspired by the Regulation. The Rome Convention is deemed to reflect the current status of Norwegian private international law, even prior to the planned codification. It is, therefore, highly relevant to look to the Rome Convention when establishing the

¹ The notice with which the draft bill was sent to the interested parties is dated 20.5.1985
² See the notice of 13.6.2003 with which the Ministry of Justice sent to the interested parties the Commission’s Green Paper on the Rome I Regulation, see http://www.odin.dep.no/jd/norsk/dok/hoeringer/under_behandling/012041-080051/dok-bn.html
regulation under Norwegian law. In a few respects today Norwegian law has slightly different rules or practices: this will be mentioned here whenever relevant.3

In the field of commercial contracts, the most important connection that determines the governing law is the choice made by the parties, so-called party autonomy. If the contract contains a choice of law clause, or if the parties have afterwards specified what law shall regulate their relationship, the contract will have to be interpreted in accordance with that law and will have to be subject to the rules of that law. If the parties have not chosen the governing law, this will be determined by other conflict rules, based on various connecting factors - in the Rome Convention article 4, as well as in Norwegian private international law, the closest connection.

The question that will be examined below is: how explicitly do the parties have to choose the governing law? If the contract contains a choice of law clause determining that the contract is to be governed by a civilian law, for example Norwegian law, the choice is expressed quite clearly. However, if the contract is written on the basis of a common law model and contains some clauses that do not make any sense under Norwegian law but have a clear effect under the original law, could the parties be deemed to have made a tacit choice of the original law for that particular part of the contract? The Rome Convention permits different parts of the contract to be subjected to the law of a different country, and this would be an example of this principle of severability.

The question of tacit choice of law would become even clearer if the contract did not contain any choice of law at all, so that it would be quite legitimate to scrutinise whether the parties have meant to subject the whole contract (as opposed to only part of it) to the system of origin

---

of the contract model. Could the parties be deemed to have made an implied choice of law in favour of the original law under which the model was developed, rather than being deemed not to have made any choice (the latter alternative would lead to the application of the law determined by the other applicable conflict rules, usually the rule of the closest connection)?

### 3.1 The governing law

An international commercial contract, more or less consciously inspired by one or more common law systems, as seen above, is, generally, subject to one single governing law. As will be seen below, a contract is actually governed by more than one law, since conflict rules may render different laws applicable to specific areas, such as the legal capacity of the parties, securities or overriding mandatory rules. The questions of pure contract law, however, such as the rules on the interpretation of the contract, general principles on the mutual rights and obligations between the parties, the validity of the contract, the consequences for breach of contract, etc., are generally subject to one single governing law, unless the parties have decided otherwise, as will be seen below.

Article 3 of the Rome Convention permits the parties to choose the governing law. The same rule of party autonomy is present in Norwegian law as an unwritten principle as well as codified in connection with specific contracts (first of all in the 1964 Act on Choice of Law for Contracts for the Sale of Goods, section 3). The drafters of international commercial contracts often make use of their party autonomy and insert a clause in the contract choosing the governing law. If the contract contains a choice of law clause, or if the parties have afterwards specified what law shall regulate their relationship, there is no doubt that the contract will have to be interpreted in accordance with that law and will have to be subject to the rules of that law (assuming that the choice was valid). As specified in the Rome Convention article 10, this extends to filling any gaps of the contract with rules of the chosen law,
3. The first tier: private international law

as well as correcting any clauses that might be contrary to mandatory rules of the governing law. If the law chosen by the parties belongs to a civilian system, therefore, the common law inspired contract will be fully governed by the chosen civilian law.

If the parties have not chosen the governing law, this will be determined by other conflict rules, based on various connecting factors: in the Rome Convention the connecting factor is the closest connection, regulated in article 4, and that will be analysed more extensively below. The connecting factor of the closest connection is the main rule also in Norwegian law. If the party making the characteristic performance has its place of business in a country belonging to the civil law family, the contract will be governed by that law. The common law inspired contract will, yet again, be governed by a civilian law.

3.2 Partial choice of law

If the contract contains a choice of law clause determining that the contract is to be governed by a civilian law, for example Norwegian law, the choice is expressed quite clearly. However, if the contract is written in a common law legal style and contains some clauses that do not make any sense under Norwegian law but have a clear effect under the original law, can the parties be deemed to have made a tacit choice of the original law for that particular part of the contract?

In article 3, the Rome Convention permits different parts of the contract to be subjected to the law of different countries, and the scenario described above would be an example of this principle of severability.

The principle of severability is well known in private international law. The general rule within international contracts is the unitary principle, providing that the governing law shall be applied to the near

4 “By their choice the parties can select the law applicable to the whole or a part only of the contract.” The severability is also expressly mentioned in respect of the governing law identified on the basis of the rule of the closest connection, see article 4 first paragraph.
totality of questions arising out of a contract. In spite of the unitary principle, there is a series of areas where the governing law does not apply, for example: the legal capacity of the parties to the contract, the ability of the agent to bind the principal, the clause choosing the competent courts or the arbitration clause, the validity of the consent of one party under certain circumstances, or any area where the law of the forum or the law of a third country has mandatory rules of such nature that they need to be applied in spite of a different governing law (so-called overriding mandatory rules). Whenever a contract covers any of these areas, it will be subject to severability: the part of the contract falling within each area will be severed from the rest of the contract and will be governed by the law determined on the basis of the relevant conflict rule. The remaining parts of the contract will be subject to the governing law as chosen by the parties, or as determined on the basis of the general conflict rule for contracts.

Thus, article 3 of the Rome Convention has not introduced a new principle to the private international law. In spite of this, it has been met with some criticism, and its precise effects are not completely un-

5 Article 10 of the Rome Convention provides that the governing applies to interpretation, performance, consequences of breach, extinguishing of obligations and consequences of nullity. Article 14 extends the applicability of the governing law to presumptions at law and burden of proof.
6 Article 1.2 (e)
7 Article 1.2 (f)
8 Article 1.2 (d)
9 Article 8.2
10 Article 7.2
11 Article 7.1
12 See M. Bogdan, “1980 års EC-konvention om tillämping lag på kontraktsrättsliga förpliktelser – synpunkter beträffande den svenska inställningen”, in Tidsskrift for Rettsvitenskap, 1982, pp. 14f.; but see the same author’s more positive analysis of the matter now that the principle has become part of Swedish law: M. Bogdan, Svensk internationell privat- och prosessrätt, 7th ed., pp. 249f.
controversial. However, in the decades during which this rule has been in force, it does not seem to have presented particular problems.

The Giuliano-Lagarde Report to the Rome Convention specifies that the severability permitted to the parties under article 3 assumes that the separation of the contract into different parts must be logically consistent. A choice of law according to which the rights of the seller are governed by a certain law, whereas the rights of the buyer are governed by another law, therefore, would not be valid.

Whenever a contract regulates a complex transaction that can be divided into various independent parts, it is possible to sever these parts and subject them to different laws. The most evident example is the arbitration clause, which is independent from the main agreement and is sometimes even regulated in a separate document. Other evident

13 For example K. Siehr, Internationales Privatrechts, 2001, p. 125, considers an illogical division of the contract as valid and it leaves it to the parties to suffer the consequences that may arise thereof, whereas J. Kropholler, Internationales Privatrecht, 2004, p. 442 considers the feasibility of the severability to be an assumption of a valid partial choice of law.

14 The rule of severability in article 3.1 is not often commented upon particularly at length, see for example, P.A. Nielsen, International privat- og procesret, 1997, p. 500. The Trier Academy of European Law’s database on the Rome Convention does not show a particular affluence of cases on severability, see http://www. rome-convention.org/cgi-bin/search.cgi. For a reference to some German cases see U. Magnus, Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebegesetzen, Einleitung zu Art 27ff EGBGB, Art 27-33 EGBGB, etc., 2002, Art. 27, notes 90ff. Severability is a well known phenomenon within private international law even beyond the European systems, see, for example, in respect of the United States of America, W. Reese, “Dépecage: a Common Phenomenon in Choice of Law”, in 73 Colum. L.Rev. 58 1973, as well as, emphasising the advisability of avoiding unnecessary splitting of the contract, E. Scoles, P. Hay, P. Borchers and S. Symeonides, Conflict of Laws, 4th ed., § 18.39.

examples are guarantees or other ancillary obligations that may also be regulated in separate documents. Even parts of a transaction that are not usually the object of separate contracts may be logically severable, such as indexing clauses for example.\textsuperscript{16} For each of these severable parts of the contract, the parties may choose a different governing law. Another matter is whether severing the contract always is meaningful: the choice of a legal system for the liability for breach of contract and of another system for the measure of the reimbursable damages, for example, might lead to the unfortunate combination of a strict liability (which is very wide and, in many systems, is coupled with a limitation of the reimbursable damage to what is reasonably to be expected according to the normal course of events), with reimbursable damages calculated on the basis of the losses actually incurred (which is very wide and in many systems follows liability due to fault).

Once it has been established that the parties can in principle separate a certain clause or a certain part of the contract and subject it to a different governing law, it must be pointed out that this process may even take place implicitly. If the parties are allowed to exercise their party autonomy for part of the contract, they are allowed to do so in accordance with the form requirements that are generally applicable to party autonomy, and party autonomy may be exercised expressly or tacitly. Therefore, a partial choice of law may also be made both expressly and tacitly. The criteria that must be met in order to have a valid tacit choice of law will be analysed below.

### 3.3 Tacit choice of law

The possible relevance of tacit choice of law becomes even clearer when the contract does not contain any expressed choice of law. Lacking a

\textsuperscript{16} For a list of clauses that have been considered severable, see J. Kondring, “’Der Vertrag ist das Recht der Parteien’ – Zur Verwirklichung des Parteiwillens durch nachträgliche Teilrechtswahl”, in \textit{Praxis des Internationalen Privat- und Verfahrensrechts}, 2006, 5, p. 428.
choice of law by the parties, the general rule is that the governing law is identified on the basis of the applicable default conflict law rule. In respect of contracts, the applicable choice of law rule will be analysed in section 3.4 below. However, the alternative conflict rule becomes applicable lacking a choice made by the parties, not lacking an express choice made by the parties. The parties are, according to article 3, first paragraph of the Rome Convention, also free to make their choice of law tacitly. Could the circumstance whereby the parties adopted a common law drafting style be deemed as a tacit choice of law? In other words, can the parties be deemed to have made an implied choice of law in favour of the original law under which the model was developed, rather than being deemed not to have made any choice?

The wording of article 3 Rome Convention makes it clear that, to be considered valid, a tacit choice of law has to appear as an actual choice made by the parties, even if not made expressly. Among other things, this means that the theory of the hypothetical choice of law, which was to be found prior to the Rome Convention in, for example, German private international law, is not applicable anymore. It is, therefore, not sufficient to argue that the parties (or reasonable persons under the same conditions as the parties) would have made a certain choice of law if they had considered the question. A hypothetical choice of law may be a reasonable solution to the question of the governing law, but it is not allowed under the wording and the spirit of article 3, which requires evidence that the parties have actually considered the question and have made a real choice in favour of a specific law. This actual choice of law does not need to be expressed in words and

17 “The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.” It should be noted that Norwegian law is assumed to have a similar rule, although the wording of article 3 of the Norwegian Act on Choice of Law for Sales of Goods has a stricter wording: see G.C. Moss, “Lovvalgsregler og internasjonale kontrakter”, cit., pp. 18 See the Giuliano-Lagarde Report, comment to art. 3, paragraph 3, and Magnus, Staudingers Kommentar, cit., art. 27, notes 60ff. with further references.
it is sufficient that it is clear from the terms of the contract or other circumstances. Implying a choice of law actually made by the parties from the circumstances is, however, quite different from determining what would be a reasonable choice under those circumstances.

Among the examples of tacit choice that the Giuliano-Lagarde Report to the Rome Convention makes is the case of a specific contract-form that is known for having been written under a specific governing law, such as the Lloyd’s policy of marine insurance developed under English law.\(^{19}\) By applying this contract form, the parties may be deemed to have tacitly chosen English law.

The case of an identifiable contract form knowingly written under a certain law is quite different from the case of a contract inspired by a more generalised way of drafting agreements and resulting in a patchwork of a plurality of sources (such as international standards, international commercial publications, research data base, experience from previous transactions in a variety of countries, etc.). The practice of general commercial contracts such as agency, distribution, sale, commercial cooperation, etc., falls within the latter description. This means, firstly, that the model upon which the contract is based may be difficult or impossible to determine. Secondly, even the legal system(s) under which the model was developed cannot be evidently identifiable. While it is clear that these contracts are inspired by the common law, it is not usually at all justified to automatically assume that the original legal system is the English system, rather than the US system, the Australian system or any other system of common law. Even if they belong to the same legal family, there may be considerable differences between the contract laws of, for example, England and the US. If the state law under which the specific contract was developed is not identifiable, or if there is no international usage to subject that specific model to a specific law, the interpreter is left without specific rules on the interpretation of contracts, on contractual remedies, on duties between the parties, etc.,

\(^{19}\) Giuliano-Lagarde Report, ibid.
that can be applied to the contract. A generic reference to the common law tradition would not be of much help.

A specific state law as a system of origin is not usually identifiable in the commercial contracts drafted as described above, and this would be sufficient to exclude that an actual choice of law is demonstrated with reasonable certainty, as the Rome Convention requires. In addition, the identification of a system of origin for the contract is usually impossible when international contracts are negotiated by lawyers belonging to different legal systems (neither of which necessarily belongs to the common law family) and on the basis of their own respective international experience and documentation. Even if it is assumed that the first draft presented by one party was developed under a specific legal system (which is not necessarily the usual practice), the origin of that draft is not necessarily known to the other party, and is generally lost during the negotiations, after each of the parties has added to and modified the clauses of the first drafts in several rounds. The final text that comes out of this process can hardly be said to permit, with reasonable certainty, the implication that the parties actually wanted to choose the law under which the first draft was originally developed (if any) for their contract.

The simple fact that the contract is written in English and follows the common law drafting technique, therefore, is not sufficient to identify, with certainty, the law under which the contract was developed; choosing English or US law as the most representative or well known laws within that legal family would be totally arbitrary, and trying to apply a minimum denominator common to a majority of common law systems would be (very vague and) against the rule of article 3 of the Rome Convention, which assumes a clear choice of the law of a specific state.20

20 The draft Rome I Regulation (Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final) also permits a contract to be subjected to published restatements of international principles, such as the UNIDROIT Principles of

3. The first tier: private international law 33
If the parties have inserted a clause in the contract expressly choosing the governing law, it is even more difficult to consider the drafting legal technique to be a tacit choice of law. The interpreter would, in this case, deem the parties to have tacitly derogated from an express clause that they have willingly inserted in their contract. If at all feasible, such reasoning could be made at best by using the principle of severability of the contract: the express choice of law would have to be considered fully effective, and the chosen law would govern the interpretation of the contract, the contractual remedies, etc.; to the extent that a specific clause or part of the contract is not capable of having effects under the chosen law, but has effects under the original law of the contract model, the interpreter may see whether it is possible to sever that part of the contract and subject it to the original law. This process, however, would assume that the requirements for a tacit choice are met: therefore, it must be possible to affirm that the parties have intended to render the law of a specific state applicable to that particular part of the contract. The simple fact that part of the contract would not be effective under the expressly chosen law does not seem to be sufficient evidence of an actual will of the parties to (tacitly) choosing the other law.

The outcome of the analysis will be different if the contract contains specific references to a certain legal system, or if it applies a standard model that was unequivocally developed under a specific system of law. Standard contracts of this type are applied in specific branches, such as charter parties or marine insurance policies, but are not usual in general commercial practice.

International Commercial Contracts, the Principles of European Contract Law, or the Common Frame of Reference currently under preparation. The draft Regulation excludes the circumstance whereby general principles belonging to the lex mercatoria could be chosen as a governing law. General principles belonging to the common law would not qualify as either of these categories, and, therefore, would not be allowed according to the draft Regulation. The opening to international principles contained in the draft Regulation, moreover, is not uncontroversial, and it remains to be seen whether the final text of the Regulation will contain it as drafted.
3.4 Closest connection

If the parties have not expressed a choice of law, the connecting factor will be, according to article 4 of the Rome Convention, the closest connection.\textsuperscript{21} The rule of the closest connection is also applied in Norwegian law. Does the circumstance whereby the contract was inspired by the common law play a role in determining what country the contract is most closely connected with?

The first observation to be made is that, as long as no specific state law can be identified as the system of origin of the contract, no connection with a specific country may be assumed. Furthermore, and more importantly, such a connection would be irrelevant in identifying the closest connection.

While the first paragraph of article 4 contains a wording that may provide for a flexible approach to what circumstances may be considered in order to determine the closest connection, the second paragraph provides a presumption that renders the identification of the closest connection to be an objective exercise:\textsuperscript{22} The closest connection is presumed to be with the country of residence or main place of business of the party making the characteristic performance. The interpretation of this paragraph has not been uniform: some courts have considered it a weak presumption and have applied the fifth paragraph of article 4\textsuperscript{23} to rebut it whenever the circumstances of the case showed a closer connection with another country, while other courts have considered the presumption of section 4.2 to be strong and have

\textsuperscript{21} “[...] the contract shall be governed by the law of the country with which it is most closely connected.”

\textsuperscript{22} “[...] it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.”

\textsuperscript{23} “[...] the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.”
disregarded other circumstances of the case. Norwegian courts, which apply the rule of the closest connection on the basis of Norwegian judicial practice and not on the basis of the Rome Convention, have traditionally adopted an approach similar to the former of the mentioned approaches: without regarding any presumption, Norwegian courts have considered all of the circumstances of the case in order to assess which country is most closely connected with the transaction in the specific case. It must be noted, however, that a recent Supreme Court ordinance has adopted the latter mentioned interpretation and has expressly excluded the situation whereby circumstances other than the residence of the party making the characteristic performance should be relevant to determining the governing law.\textsuperscript{24} This latter interpretation corresponds better to the spirit of article 4, which inserted the presumption to ensure predictability in the application of the criterion of the closest connection\textsuperscript{25} and with the assumption that, if any other factors were permitted to be evaluated (such as, for example, the language of the contract or its legal style), it would deprive the choice of law of this predictability. The fact that the presumption is a strong one, and the other criteria are irrelevant, might become even clearer when the Rome Convention is transformed into a Council Regulation: the present approach of a flexible connecting factor (closest connection, in section 4.1) which is clarified by a presumption (of the habitual residence or main place of business of the party making the

\textsuperscript{24} Rt 2006 s 1008. For comments on the Norwegian approach to the rule of the closest connection and a more extensive discussion of this decision see G. C. Moss, “Lovvalgsregler for internasjonale kontrakter”, cit., pp. 18 ff.

characteristic performance, in section 4.2) is proposed to be changed into a series of objective rules (all based on the connecting factor of the characteristic debtor’s habitual residence or main place of business) with a residual flexible connecting factor (closest connection) for the eventuality that it cannot be identified which of the parties is making the characteristic performance.  

In conclusion, the legal style in which the contract is written does not seem to be a relevant criterion in assessing which country the contract has its closest connection with.

3.5 Conclusion

From the foregoing it seems possible to conclude that the drafting style, legal technique and language of a contract as such are not sufficient bases for a tacit choice of law (total or partial) or as a circumstance showing close connection.

From the point of view of private international law, therefore, an international commercial contract will be governed by, and interpreted, in accordance with the governing law that is (expressly or tacitly but with reasonable certainty) chosen by the parties, or, lacking such a choice by the parties, with the law of the country where the party making the characteristic performance has its residence or main place of business. If the governing law belongs to a civilian system, the contract will be interpreted according to the legal tradition of that law, and its clauses will have the effects that follow from the general principles and rules of that law, even if this may create some discrepancies with the interpretation and effects that the same contract would have if it was governed by a law belonging to the common law tradition.

Discrepancies in the interpretation of the contract may possibly be avoided if a certain contract clause has received a certain interpretation so consistently that the interpretation can be deemed to have become a

26 Proposal for a Regulation, cit.
trade usage, as will be seen in the section below: in such a case, however, the discrepancies between the civilian governing law and the common law inspiration will be avoided not because the contract is interpreted according to the common law, but because it is interpreted according to generally recognised trade usages.

Another possible way to reduce discrepancies would be if the civilian governing law contained a rule in its substantive doctrine of interpretation according to which international contracts are to be interpreted not according to the rules applicable to domestic contracts, but according to other rules. To the extent this substantive rule of interpretation creates the effects of a conflict rule, however, it would violate the principles of the Rome Convention on tacit choice of law and on the criteria used to assess the closest connection.

---

27 For an authoritative analysis of this question in respect of Norwegian maritime law, and excluding the existence of such rule, see E. Selvig, “Tolking etter norsk ret teller annen skandinavisk rett av certepartier og andre standardvilkår utformet på engelsk”, in Tidsskrift for Rettsvitenskap, 1986, pp. 1ff.
4. The second tier: international commercial law

The second phase in the interpretation of an international commercial contract, modelled on a legal tradition different from the governing law’s, consists of verifying whether a certain clause has an effect that is generally recognised in international trade in general or in the specific trade branch relevant to the contract. National contract laws generally refer to recognised trade usages as important sources of law, even more so when the contract is international or the dispute is submitted to arbitration. If it is possible to ascertain that certain effects correspond to a certain contract clause, and that the clause and those effects are a recognised trade usage, the contract will be interpreted accordingly even if that interpretation is not fully in compliance with the legal tradition of the governing law.

This prevalence of the trade usages over the governing law’s tradition should not be seen as a replacement of the national contract law with the international commercial law. The prevalence of the trade usages is mainly due to the reference to them made in the governing law, and this reference has the effect of incorporating the trade usages into the governing contract law, not of rendering the international commercial law as whole applicable instead of the governing law. If the effect was that of substituting the governing law with the international commercial law, what rules would be applicable to the contract in the areas where there are no generally recognised trade usages? It would be of little help to consider this reference to be a link to the lex mercatoria or some other transnational source of soft law that might be deemed to apply to international contracts: apart from the dubious
legitimacy of such an interpretation (which would always have the effect of excluding the applicability of the national contract law in its totality, even to contracts of domestic character, if the reference to trade usages also covers domestic contracts), the problem of how to fill the numerous gaps of such sources would persist, the soft sources of the *lex mercatoria* being more numerous than the generally recognised trade usages, but by no means representing an exhaustive system, as will be seen in the sections below.

### 4.1 Trade usages

Among the contract clauses typically adopted from common law contract models, and which can create problems of interpretation under civilian laws, are so-called boilerplate clauses such as no waiver, no oral amendments, entire agreement, no reliance, liquidated damages, sole remedy, assignment, representations and warranties, and several others.28 While each of these clauses is quite common in commercial contracts, there is no evidence that any of these clauses has specific legal effects that may be considered to be generally recognised on an international level. Even within English law, and even more so within the common law legal family, there is not necessarily one single generally acknowledged interpretation of the scope of each of these clauses.

There are, however, examples of clauses that have reached a uniformity of use, and where the awareness of their effects is so widespread internationally in a specific trade branch that they can be recognised as a trade usage: the clause “time is of the essence”, for example, which is generally used in charter parties. The origin of this clause is in English law: by defining in the contract that a certain term (in this case, the time, e.g. the day and hour when the vessel is to arrive) is of the essence,

---

28 These clauses appear in most commercial contracts, irrespective of the type of relationship that the contract regulates, and are the object of the publications collected in this series.
the parties have qualified it as a fundamental term of the contract (a condition). This has, under English law, very clear consequences: a breach of a fundamental term entitles the innocent party to repudiate and terminate the contract. By introducing the formula “time is of the essence”, therefore, the parties obtain, under English law, the possibility of terminating the contract in the case of a violation of the exact timing of the contract, irrespective of how insignificant that violation or its consequences are. In the context of the shipping contracts, this clause and its effects are so recognised that they can be deemed to be a trade usage. This means that, should a charter party be governed by a civilian law, and should it contain the clause “time is of the essence”, a breach of the time regulation will entitle the innocent party to terminate the contract, even if the circumstances are not such that the governing law would otherwise have permitted the remedy of termination.

The Norwegian maritime code has expressly provided for this possibility (§§ 348, 375), and the preparatory works justify this by referring to the international trade usage. This is a clear example of how trade usages may prevail over the national legal tradition. Had the prevalence in this specific case not been so clearly endorsed in the preparatory works of the maritime code, however, it could have been open to discussion whether the possibility of terminating the contract could have been automatic, even when made by an immaterial violation of the time regulation with no real negative effect on the innocent party’s position, since such a speculative use of the contract regulation is usually not compatible with the Norwegian legal tradition.

Other contract terms or contract practices that, to a great extent, can be considered to be generally recognised, and therefore may provide the means for interpreting a contract, are sometimes contained in branch publications or publications of business organisations, such

29 See, more extensively, T. Sandsbraaten’s essay in the framework of the project, and to be published in this series, “Conditions, Representations, Warranties and Covenants”, 59, at: http://www.jus.uio.no/ifp/anglo_project/essays/Avhandling_tor_sandsbraaten.pdf.
as the International Chamber of Commerce. These contract terms and practices, however, mainly have a specific scope of application and do not contribute to the interpretation of boilerplate clauses or of other questions of general contract law. Thus, for example, the INCOTERMS, published by the ICC, provide the means for interpreting the legal effects of specific terms of delivery that the parties may have incorporated in their contract, such as FOB and CIF; the UCP 500, yet another ICC publication, contain a codification of accepted business practice in relation to documentary credits, a practice for international payment that is widely adopted within international commerce (the UCP 500 will soon be replaced by the UCP 600, and it remains to be seen whether this will gain the same degree of recognition as their predecessor). In spite of the undeniably wide recognition of these contract terms and contract practice, it must be noted that they do not seem to be unanimously considered as trade usages and thus as customary law that is applicable unless the parties have excluded it. In some countries, they are considered as standard terms of contract that become effective between the parties only if the parties have expressly incorporated them in their contract.\textsuperscript{30} Furthermore, not all publications issued by the ICC enjoy the same degree of recognition as the INCOTERMS and the UCP 500; thus, the simple fact that there is an ICC publication is not sufficient evidence that there is a corresponding trade usage. Thus the main difficulty seems to be the assessment of whether a specific term or practice has a precise interpretation or legal effect that can be considered to be generally acknowledged and thus as a trade usage.

Commendable initiatives that restate and systematise the\textit{ lex mercatoria}, as will be seem in the sections below, do not seem to provide an exhaustive and detailed explanation of all the implications of all these clauses, as will be seen in the following sub-sections. Should

\textsuperscript{30} See for references H. van Houtte, \textit{The Law of International Trade} (2nd ed.), London 2002, section 8.15
these sources develop into trade usages and should they permit the assessment of the legal effects of each of these clauses in international trade with a reasonable certainty, then the contracts may be interpreted in accordance with them. Until then, these restatements of contract principles can only to a restricted extent serve as a tool for the second of the above-mentioned phases of the interpretation of the contract, in which the interpreter tries to ascertain whether the contract clauses may be interpreted in accordance with a generally recognised trade usage. In particular, these restatements seem to reflect, rather than resolve, the very tension that exists between the common law and the civil law, that is the object of the research published in this series. The next section will analyse to what extent the restatements of contract principles are capable of guiding the interpreter in the situation of a common law inspired contract governed by a civilian law.

4.2 Non-state sources and the lex mercatoria

Legal theory sometimes invokes, for the regulation of international contracts, international sources such as conventions, or non-state sources - these latter sources are also often traditionally called lex mercatoria, or trans-national law, or, borrowing the terminology from public international law, soft law. The main sources of the lex mercatoria are rules and principles that are generally recognised or developed spontaneously in the trade.

The content of the lex mercatoria is traditionally difficult to assess, since it might be hard to establish objectively what is a trade usage or a generally recognised principle, what their respective scope of application is, etc..

As seen above, some sources of the lex mercatoria are codified, and therefore their content is easier to assess, although there may still be questions in respect of whether such codifications actually have the quality of lex mercatoria, or whether they are simply standard conditions of contract that the parties must make reference to in order for
them to become applicable. Among the most known codifications of this kind are the already-mentioned International Chamber of Commerce’s (ICC) INCOTERMS, which mainly regulate the passage of risk between the seller and the buyer, the ICC’s UCP 500, which regulate the rights and obligations of the parties involved in a documentary credit, as well as standard contracts or codes of conduct complied by branch associations, such as the construction contract published by the International Federation of Consulting Engineers (FIDIC), or the standard swap agreement published by the International Swap and Derivatives Association (ISDA). These codifications are directed at regulating specific aspects of specific transactions; they do not have the ambition of replacing the governing law, they integrate it with regulations that are tailored for the specific needs of certain transactions. These compilations, therefore, usually do not contain rules on the interpretation of contracts, nor on the validity of contracts, legal capacity, prescription or other aspects regulating the effect of legal relationships as such; these aspects are left to the regulation of the governing law. Even having assessed the quality of a source as *lex mercatoria*, therefore, and even after having established its applicability to the contract, the general questions of contract law will usually remain open and will be governed by the applicable state law.

Three instruments that will be looked at here have the ambition of representing a uniform, non-state law on international contracts, thus potentially replacing the governing state law: The UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and, to a certain extent, the Convention on Contracts for the International Sale of Goods. These instruments provide more extensive regulations, that are meant to be capable of regulating the effects of a legal relationship to the exclusion of a governing law. They represent, therefore, a special quality of sources within the *lex mercatoria*. Not only are they codified, and therefore easy to assess, they are also systematic and general in their scope, and,
therefore, potentially applicable to all types of contracts and to all legal questions arising in connection therewith.

(i) The UNIDROIT Principles

The UNIDROIT Principles of International Commercial Contracts\(^{31}\) were first published in 1994 and revised in 2004 by the UNIDROIT, an international organisation established in 1926 with the purpose of unifying the private law. The UNIDROIT Principles are not an international convention or a model law; rather, they have, on an international level, a function similar to the Restatements of the Law published by the American Law Institute. The principles are thus meant to formulate systematically, and in a way that may be interpreted equally all over the world, the main practices and principles prevailing in the field of international contracts. They are not merely a record of existing practices; they are partially a codification of generally adopted principles of international contracts, and partially they present original regulations that result from the work of a large group of experts from various parts of the world.

(ii) The Principles of European Contract Law

The Principles of European Contract Law (PECL) are drafted by the Commission on European Contract Law, a group of academics established in 1982 under the leadership of the Danish professor

---

\(^{31}\) The full text can be found at http://www.unidroit.org/english/principles/contracts/main.htm. The homepage of the Principles also contains useful links to bibliography and case law regarding the Principles; a useful database on cases and bibliography on the UNIDROIT Principles can also be found at http://www.unilex.info/
Ole Lando.\textsuperscript{32} The work on the PECL proceeded largely in parallel with the work on the UNIDROIT Principles, and many members of one working group were also members of the other one. As a result, the content, and, to a certain extent, the structure and terminology of these two collections of principles are similar to each other. The PECL, however, have a different territorial scope, in that they apply to contracts that are connected with Europe, whereas the UNIDROIT Principles apply to any international contract. Furthermore, the PECL have a higher degree of ambition than the UNIDROIT: they aspire to become the prevailing (and, in a long term perspective, binding) contract law within the European Union, instead of the national laws that prevail today in every state. This ambition would be impossible for the UNIDROIT Principles, which have the whole world as their field of application, and would therefore have to cope with nearly 200 different states, and convince them to adopt the Principles instead of their own contract laws. The PECL have the European Union as their field of application, and they therefore have a more feasible task, albeit this will be very difficult and probably unachievable before a couple more decades of intensive work.\textsuperscript{33} Extensive work is going on in the framework of the European Union sixth framework programme “Network of Excellence”, also

\textsuperscript{32} For more details on the Commission on European Contract Law, see http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/members.htm. The full text of the PECL can be found at http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/

\textsuperscript{33} The assessment of the feasibility and necessity of harmonising European contract law has been introduced by the European Parliament with the Resolution of 16.03.00, and followed up by a Commission Communication, and an Action Plan. These documents, together with the responses thereto by interested parties, papers from workshops and information that permits the process to be followed, can be found on the European Commission’s page on Contract Law Review, http://www.europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm
largely based on the PECL, towards the presentation of a so-called Common Frame of Reference for European Contract Law.\footnote{Information on the numerous groups working with the CFR can be found at www.copecl.org.}

(iii) The Vienna Convention on the international sale of goods

The Convention on Contracts for the International Sale of Goods (CISG) was drafted by the United Nations Commission on International Trade Law (“UNCITRAL”) and adopted in Vienna in 1980.\footnote{The full text can be found on the UNCITRAL’s homepage, http://www.uncitral.org, which also contains an updated list of the countries that have ratified it, of the reservations that were made, etc.} The Vienna Convention is based on two previous attempts to achieve a uniform law on international sales: the conventions relating respectively to the Uniform law on the Formation of Contracts for the International Sale (“ULF”) and to the Uniform Law on the International Sale of Goods (“ULIS”), both adopted in The Hague in 1964. These two predecessors of the Vienna Convention did not obtain widespread success, because, among other reasons, their provisions were said to primarily reflect the legal traditions and economic situation of Western Europe. Western Europe was also the region that had been most active in drafting the Conventions, thus enhancing the impression that these instruments expressed the interests of a certain part of the world. In 1968 the UNCITRAL was given the task of elaborating these two conventions into a text that could enjoy broader support. After having involved states from every geographical region in the process, the UNCITRAL presented the Vienna Convention (or CISG) as an elaboration of the two predecessors, with
modifications that render it acceptable to states with different legal, economic and social background.  

The Vienna Convention has been signed by 63 parties, and it is looked upon with extreme interest, especially in academic circles, as the first example of uniform law that not only creates binding law stemming from the authority of its status as an international convention that has been ratified by so many states, but it even gives recognition to the spontaneous rules born out of commercial practice and in itself becomes an autonomous body of international regulation that adapts to the changing circumstances, independently from the legal systems of the ratifying states.

For the sake of completeness it must be mentioned here that the Vienna Convention has not been ratified by such an important country in international commerce as the United Kingdom, nor by several states in Central and South America, as well as most Arabic and African countries, India and other South-Asian countries. It must also be mentioned that it is rather customary, particularly for parties coming from the United States, to make use of the possibility that article 6 gives them to exclude application of the Convention, thus they write in their contract that the CISG shall not be applied.

---

38 Because of the convention’s many references to trade usages.
39 Because of the particular rules on the convention’s interpretation, laid down in its article 7, which require an autonomous interpretation based on the principles underlying the convention.
It must also be mentioned that the Convention allows for a series of reservations that the ratifying states can make against the application of parts of the convention. The Scandinavian countries, for example, have excluded the applicability of part II of the Convention, on the formation of contracts (the so-called article 92 reservation), and have excluded the applicability of the Vienna Convention to inter-Scandinavian contracts (the so-called article 94 reservation). Several countries (including Argentina, Chile, China, Russia and the Ukraine) have made reservations against the provisions that permit contracts to be created, modified or terminated by other means than in writing (the so-called article 96 reservation). These, and other reservations, render the application of the Vienna Convention less uniform than would have been desirable for a uniform law, even among countries that have ratified it.

The Convention covers the questions of the formation of contracts and the substantive rights and obligations of the buyer and the seller that arise out of a contract of sale.

As seen above, the UNIDROIT Principles and the PECL on one hand, and the CISG on the other hand, are instruments with substantially different legal effects. The reason why they are nevertheless treated all under the heading “lex mercatoria” here is that both the non-authoritative compilations of principles and the international convention have the same purpose of harmonising the law relating to international contracts. All these sources have, as their starting point, the observation that state legal systems differ from one another, and consider this to be a hindrance for international commerce. The ideal situation for international commerce would be a regulation that is harmonised all

40 For a full list of the reservations and of the states that have made them, see http://www.uncitral.org
over the world and that is applied in a uniform way by the courts of the different countries. There are two different ways that the sources mentioned seek this aim.

The non-binding compilations of principles aim at serving as models for future legislators, as interpretation tools for international instruments, as guidance for private parties when they are drafting their contracts, as guidance for courts or arbitral tribunals when they are assessing international usages and practice, or even (if the parties to the contract have elected to do so) as substitutes for the governing law. The CISG, as an international convention, aims at directly regulating the matters falling within the scope of its application. Irrespective of the different legal effects, however, all of these three instruments are characterised by the express wish to harmonise the law for international commercial transactions. Furthermore, all three instruments are based on extensive comparative studies as a basis for elaborating modern and functional solutions that are not exclusively inspired by one system of law or another. Finally, all three instruments have been considered, or at least have the ambition of being considered, as an expression of trans-national trade usages; this in turn leads someone to consider them as a source of the *lex mercatoria*, a trans-national set of rules that is detached from any national system of law and that is sometimes deemed to be a proper source for regulating international transactions.

In light of the common ambitions of representing a uniform law of international contracts, therefore, it seems justified to analyse both the collections of principles and the CISG in respect of their capability of clarifying the differences between common law contracts and civilian governing laws.

In addition to these three instruments, an extremely useful tool in the assessment of the *lex mercatoria* in a highly recognised database 41

---

41 The CISG has been applied as a source of lex mercatoria in a series of cases (primarily arbitration cases) that were outside of its scope of application, see, for the references, http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1
on trans-national law, organised by the University of Cologne, the CENTRAL Transnational Law Database. This database lists the principle of good faith and fair dealing as one of the main principles of international contract practice, and refers to various sources upon which the principle relies: legal literature, arbitral awards, court decisions and international instruments.42

4.3 The tension between common law and civil law as a reason for desiring a lex mercatoria: the example of good faith and fair dealing

Before analysing to what extent the above-mentioned restatements of the lex mercatoria may be a satisfactory tool in releasing the tension between common law-inspired contracts and civilian governing laws, it may be useful to look at what kind of tension exists between these two legal families. A brief introduction to the main differences between the common law and the civil law of contracts follows below.

Common law contracts are structured to meet the requirements that arise under the common law, and these requirements might be very different from those that arise under a civil law system. This becomes particularly clear in connection with the principle of good faith and fair dealing in contracts. While the main difference in connection with this principle is to be found between the common law and the civil law systems, there are considerable differences in the degree of recognition, or of refusal of these principles, even within these respective families of legal systems. In the sections below English law will serve as an illustration of a common law system, while Norwegian, German and Italian law will illustrate the approach of civil law.

Comparative Law research has proven that many of the contradictions that are traditionally held to exist among the various legal systems and, notably, between the common law and the civil law, can be reduced

to a common core that is shared by most legal systems. To appreciate this common core, it is necessary to look at the legal phenomena in the totality of the respective legal systems, and the observer must focus on the result that the totality of the legal system permits us to reach, rather than on the doctrinal category into which the various rules may be organised in the respective system. By so doing, the scholar proves that different legal systems may have differing legal techniques in order to achieve the same result. These results constitute the common core of the analysed legal systems.43 While focusing on the common core is an extremely valuable scholarly tool, and can also be highly useful in connection with legislative reforms, it might prove less useful if the law is looked upon not as an object of academic study or as a field for legislative improvement, but as a tool to solve specific disputes existing between private parties. In this latter context, the focus must be on the technicalities required by the specific law, rather than on the common core: knowing that the applicable law would have permitted a party to reach the wished result, if only the contract had been written in a certain way or other circumstances had been present, highlights the fact that a certain result is achievable under that law, but does not permit that party to achieve it in the specific case (if the applied legal technique was not complied with in the circumstances). When deciding specific disputes, therefore, or when advising how to draft a contract in the anticipation of potential disputes, the lawyer’s awareness must be directed at the specific characteristics of the governing legal system, rather than at the disguised similarities among various systems. The following sections will, accordingly, focus on the main differences between the legal systems, rather than on their underlying similarities.

43 “The Common Core of European Private Law Project”, under the general editorship of Mauro Bussani and Ugo Mattei, is perhaps the most systematic enterprise aiming at assessing the common core within European private law. Among the books published in the frame of this project is R. Zimmermann, S. Whittaker, Good Faith in European Contract Law, Cambridge 2000, which is of particular relevance to the topic of this article.
4.3.1 English law privileges predictability

The English law of contracts is clearly based on the liberal ideal of the individual's autonomy. The parties’ determination of their own interests and the consequences thereof are respected by the legal system, even if this should be to the detriment of justice or fairness. An English judge is very reluctant to interfere with the parties’ own regulations, and his primary task is to enforce what the parties have agreed, rather than creating justice on a different basis. This attitude is based on the central position that England has had for centuries, and still has in international business exchanges, particularly in the fields of maritime law, finance and insurance. In these areas, the parties must be expected to be able to take care of their own interests; they do not expect the legal system to protect them and patronise them, but they expect the legal system to give them tools in order to enforce what they have agreed.

4.3.1.1 Good faith and interpretation

In England, the interpreter of a contract is expected to establish the mutual intention of the parties on the basis of the document itself. The wording of the provisions has to be understood according to its plain and literal meaning; even though the interpreter will attempt to read the provisions in a manner that does not lead to absurdity or inconsistency with the remaining provisions, it will not be possible for the contract to be construed in a manner that runs against the language. A famous restatement of the principles on the interpretation of contracts made by Lord Hoffmann renders the interpretation of contracts more lenient to adapting the wording to the purpose of the contract, by taking into account the factual background of which the parties could reasonably have had knowledge at the moment of enter-

---

ing into the contract (excluding, however, the previous negotiations of the parties, their declarations of subjective intent, and the subsequent conduct of the parties), the so-called “factual matrix” of the contract. However, this purposive rather than literalist approach does not go so far as permitting the substitution of a bargain which the interpreter deems to be more reasonable or commercially sensible for the bargain actually made by the parties; this is not allowed under the English law on contract interpretation.\(^{47}\) The importance of the literal interpretation is also strengthened by the interpretation rule, according to which reference in the contract to a certain case will exclude the circumstance that the contract applies to other corresponding cases that have not been expressly mentioned: \textit{expressio unius est exclusio alterius}.\(^{48}\)

The English interpreter is, in other words, bound by the language of the contract. As a general rule, the interpreter will not be allowed to take external circumstances into consideration when construing the contract, such as the parties’ conduct during negotiations or after the signature of the contract.\(^{49}\) This is traditionally known as the \textit{parol evidence} rule, which prevents the parties from producing any evidence to add to, vary, or contradict the wording of a contract, and imposes the requirement that the contract must be read exclusively on the basis of the provisions that are written therein.\(^{50}\) The purpose of this rule is to enhance predictability in the course of commerce; in balancing the interest in establishing the real intention of the parties and preserving predictability within commercial transactions, the parol evidence rule favours the latter. In the interest of certainty, therefore, a written contract is to be interpreted objectively and independently from extrinsic circumstances characteristic of the factual transaction. However, the interpreter has to be aware of the factual background in which the parties were when they entered into the contract. Therefore,

\(^{48}\) \textit{Hare v. Horton} (1883) 5 B. & Ad. 715  
\(^{50}\) \textit{Adams v. British Airways plc} [1995] I.R.L.R 577
the parol evidence rule has a series of exceptions that admit evidence of the factual background existing at or before the date of the contract (but not after that date, as opposed to the civilian systems), at least in respect of facts that were known to both parties.51 The parties may prevent admission of evidence of the factual background by inserting a so-called merger clause in their contract, stating that the document contains the entire contract.52

In addition to having little access to surrounding circumstances, the English interpreter also has little possibility of filling gaps in the contract by reading implied terms. Some acts have introduced statutory terms that are to be deemed implied terms of the contracts falling within the scope of those acts (for example, the Sale of Goods Act 1979). In the absence of statutory terms, however, the general rule is that a judge is only to interpret the contract that the parties have made, and is not to make the contract for the parties.53 The courts do not fill gaps in the contract even if it would be reasonable to do so; they fill gaps only where this is necessary in order to give business efficacy to the contract, or when inclusion of such a term is obvious (which assumes, however, that both parties are satisfied with the implied term, and renders this alternative of little viability when the parties have conflicting interests or motives).54

This approach finds its historical explanation in the selective borrowing of Roman law based doctrines of natural law, which was carried out by the English lawyers who first systemised the law of contracts at the end of the XVIII century.55 English lawyers did not borrow the naturalistic doctrines that classified contracts into different types, each

52 McGrath v. Shaw (1987) 57 P.& C.R. 452
55 See, for more extensive references, J. Gordley, The philosophical origins, of modern contract doctrine, Oxford 1991, pp. 146ff., 159.
type with its own set of regulations that were deemed to express natural obligations attached to that particular kind of contract. Hence, English law failed to adopt a systematic set of rules for each contract type that could integrate or guide the interpretation of contracts. The judge's respect of the parties' will was not mediated by the existence of a statutory or doctrinal set of rules governing the specific type of transactions. Consent by the parties was conceived not as consent to a type of contract with its immanent rules, but to the very words of the contract. This approach to the interpretation of contracts, opposed to the approach of the civil law systems, is today mitigated by a series of statutory rules that have created implied terms of contract similar to the declaratory rules that civil law systems attach to the various types of contracts. This is particularly true in the field of the protection of the weaker contractual party, this being mainly identified with the consumer. In commercial contracts, statutory implied terms are more seldom.

4.3.1.2 Good faith as a corrective of the regulation agreed to by the parties
Not only can the will of the parties be integrated merely to a restricted extent, the extent to which it may be corrected by applying the principle of good faith is also negligible in commercial contracts.

It is not unusual to read English court decisions that give effect to the wording of a contract, while at the same time admitting that they consider the result unsatisfactory. For example, if the parties have stipulated sufficiently clearly in the contract the legal consequences of a default, and if the stipulation does not violate mandatory rules of law, those consequences will be enforced even if it may be unfair to do so. In a contract for the lease of a computer, for example, the contract entitled the leasing company, in the case of a breach of the obligation to pay the instalments punctually, to recover possession of the computer and to claim payment of the overdue unpaid instalments, as well as payment of all the future instalments that were not yet due and payable at the moment of terminating the contract. The court realised that the
contract regulation would lead to the leasing company obtaining the possession of the computer (that was later sold to a third party), as well as the full price for the same computer. The court also realised that this result would have been illegal if the contract had been worded in such a way that the payment of the full price could be interpreted to be a penalty on the defaulting party. However, the court observed that the terms of the contract were such that the payment of the full price could not be interpreted as a penalty, but as a consequence of a breach of condition and therefore of a repudiation of the contract. Repudiation of the contract entitles, under common law, the innocent party to obtain the full value of the bargain. In spite of the dissatisfaction created by this situation, the court decided that the wording of the contract should be given effect to.\textsuperscript{56}

To this day, English law maintains the element of consideration, \textit{i.e.} the requirement that, to be enforceable, a contract must contemplate an exchange between the parties. This is based on the elaboration which the natural lawyers made of the Roman \textit{causa} up to the XVIII century, according to which a contract is only enforceable if it can be justified in philosophical terms by applying the virtues of liberality or commutative justice. This, however, should not lead the observer to the conclusion that English law recognises the same significance in the element of consideration as the natural lawyers saw in it, and that therefore English law pays attention to ensuring an equitable content of the contracts. Quite to the contrary, the element of consideration is essential for the existence of an enforceable contract, but the English judge is expected to ascertain the formal existence of the consideration, not to examine the adequacy of the consideration. Evaluating the adequacy of the consideration, \textit{i.e.} verifying whether the contract is fair or not, is considered to be paternalistic and not in compliance with the expectations that English lawyers have in respect of their

\textsuperscript{56} Lombard North Central plc v. Butterworth [1987] 1 All ER 267, Court of Appeal
legal system.\textsuperscript{57} Even the equitable relief for a so-called unconscionable bargain, which could at first sight be deemed to be equivalent to an assessment of the transaction’s reasonableness, is not meant to reinstate the balance between the contractual parties, but is based on its value as evidence that a fraud has taken place. A significant inadequacy of the consideration, in other words, might be considered to be one of the elements used to prove that a fraud has taken place and might therefore serve to exclude the enforceability of that contract even if the contract is binding at law. The question of ensuring fairness in the exchange, however, is not relevant at all. The attitude of English law towards the risk of being bound by a contract that is not fair is clearly expressed in the formula used by Lord Mansfield in 1778, and still often referred to: \textit{caveat emptor}, the buyer has to pay attention.\textsuperscript{58} As already pointed out, this is usually justified by reference to the central role that maritime and financial transactions have played and still play in the English system, whereby the interests of the operators are deemed to be better served by ensuring the enforceability of the contracts according to their words rather than by intervening in the agreement between the parties in the name of unpredictable justice.

4.3.1.3 Good faith as a duty between the parties
The English law of contract does not have a general duty of good faith between the parties. The common law is concerned with preserving the parties’ freedom to contract and ensuring that their contracts are performed accurately according to their precise wording, rather than with providing means for ensuring the fairness in the relationship between the parties. As has already been seen, the English judge does not have the task of creating an equitable balance between the parties, but has to enforce the deal that the parties have voluntarily entered into. The parties are expected to take care of their own interests, and

\textsuperscript{57} See, for further references, Gordley, \textit{The philosophical origins}, \textit{cit.}, pp. 146ff.
they expect a predictable possibility of enforcing their respective rights, in accordance with the terms of the contract, from the system. A correction or integration of these terms would run counter these expectations, and consequently the English judge does not assume that role (unless specific statutory rules requires him to do so, which happens mainly in the context of consumer contracts). This is seen as the most appropriate attitude for a system where commercial and financial business flourishes.

The same attitude is to be found in the phase of negotiations, prior to the conclusion of the contract: expecting that a party will also take the needs and expectations of the other party into consideration runs counter the very essence of a negotiation, where each of the party positions itself, opens alternative possibilities, and plays the various possibilities against each other to achieve the best economic result for itself. In a frequently quoted House of Lords decision, Lord Ackner states that, “[…] the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.”59 Restrictions to the liberty to organise the negotiations as is most profitable for itself would have to be founded on an ideal of solidarity and loyalty between the parties which, as seen, is unknown in a system that privileges the economic aspects of the transaction.60 English law, however, is not a “hard-hearted Dickensian orge”, as was incisively and authoritatively said.61 Other legal techniques are applied to reach results similar in part to a general duty of good faith. A frequently quoted decision has expressed this clearly: “English law has, characteristically, committed itself to no such overriding principle [as the principle of good faith] but has developed piecemeal solutions in response to demonstrated

61 Zimmermann, Whittaker, Good Faith in European Contract Law, cit., pp. 45ff.
problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law has also made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.  

These piecemeal solutions, however, do not always necessarily have the same scope of application as a general principle. Thus, failure to give to the other party information relevant to that party’s evaluation of the risk or the value of the transaction would not be sanctioned under English law, since this conduct would not violate a duty of loyalty between the parties which does not exist. Even the doctrine of misrepresentation, which could at first sight be deemed to be equivalent to a duty to exercise good faith during negotiations, does not ensure the same results. False information given to the other party during negotiations gives rise to damages in tort; however, silence is not considered to be false information. Withholding relevant information during negotiations, therefore, does not constitute misrepresentation, and the parties remain free to adopt such a conduct without consequences.

The case of an unjustified break-off of negotiations is a further example of how the piecemeal solutions of English law do not necessarily correspond to a general principle. The lack of a duty to act in good faith during the negotiations permits a party to conduct negotiations

63 In some situations, a duty of care arises between the parties; it does not seem, however, that negotiations of commercial contracts are within that group, see, for example, Chandler v. Crane, Christmas & Co, [1951] 2 K.B. 164., and see Walford v Miles, cit.
without even having the intention of concluding an agreement with the other party (for example, for the sole reason of preventing the other party from negotiating with a third party, or for obtaining business information, etc.). Even the doctrine of restitution, which could at first sight be deemed to be equivalent to a duty to enter into negotiations in good faith, does not ensure the same results. Restitution aims not at compensating the losses suffered by the other party, but at recovering a benefit gained by the party breaking off the negotiations.65 Thus if the unjustified break-off has caused losses for the other party, but has not resulted in a gain for the party breaking off, the party suffering losses is not necessarily entitled to compensation under the doctrine of restitution.66

4.3.2 Civil law privileges justice, but to different extents

Civil law systems have developed in quite a different way. Until the XVIII century, continental Europe elaborated Roman law on the basis of natural law. The natural lawyers justified the legal effects of contracts on the basis of the Aristotelian philosophy and its classification of the virtues. During the XIX century the doctrine of natural law was abandoned, in favour of a more positivistic-exegetic approach in France, and in favour of a historic-teleological approach in Germany. These two approaches influenced the remaining civilian countries, and on this background civil law systems are divided into Romanistic (influenced by the French approach) and Germanic (influenced by the German approach) systems. To the former belongs, i.a., Italian law, to the latter Norwegian law (the Scandinavian systems are sometimes

65 Guest, *Chitty on Contracts*, cit., p. 1632
66 In some cases, however, restitution was given even if no benefit has been gained: *ivi*, pp. 1638, 1645. In these cases, the losses incurred by the other party consisted in services rendered at the request of the party breaking off the negotiations. It remains to be seen whether the lack of benefit can be disregarded as a prerequisite for restitution, in cases where the losses were not incurred at the request of the party breaking off.
classified as a separate legal family, but the influence of German law is undeniable in the field of contract law).

In the XIX century the contract was deemed to be based on the parties' will, not on some virtues, duties or imperatives naturally stemming from human relations, as the natural lawyers had assumed earlier. The drafters of the French Code Civil clearly affirmed that an adult's duty is to contract with prudence, and that the law owes him no protection against his own acts. The legal system's task became to respect and enforce the parties' will, without evaluating it on the basis of equality in exchange or other criteria that had been central in natural doctrines. However, the continental legal systems had already adopted a developed system of regulations relating to the various types of transactions and based on the natural doctrines. Contracts had been classified into types, and to each type belonged a detailed list of natural obligations. These regulations were not abandoned during the XIX century, since they had lost their aura of natural law and had become positive law. The respect of the parties' will was, therefore, tempered by the application of the detailed rules on the various types of contract. Hence, continental lawyers interpreted the contracts in the light of the concurring or integrating rules which the legal system had for every type of contract.

4.3.3 German law

In Germany contract law was codified in 1900 in the Bürgerliches Gesetzbuch (BGB). The object of the codification was the elaboration of the law that had been carried out very actively by German legal doctrine during the preceding two centuries; legal scholars had devoted considerable energy to classifying and systemising Roman law primarily. The BGB thus codified the result of the scientific

ideals of the XVIII and XIX centuries: rules were expressed on the highest possible level of abstraction, whereby the internal consistency of the system was the ultimate aim to be reached. In addition to the ideal of scientific abstraction and consistency, the BGB was inspired by the ideal of liberalism, according to which each individual should be permitted to regulate its own interests as he deems fit and should be expected to take responsibility thereof. In addition to the ideal of liberalism, the BGB also partially reflects the sociological engagement of the historic line of thought, as is witnessed by the few so-called general clauses contained therein: not abstract rules that simply require the judge to apply them mechanically, but rules that contain guidelines (such as the rule on good faith in the performance of contracts) and require an evaluation and concretisation by the judge.

4.3.3.1 Good faith and interpretation

A contract has primarily to be interpreted, under German law, so as to establish the common intention of the parties. However, the principle of good faith shall also inspire the interpretation of a contract, in accordance with § 157. One of the functions of this rule is to integrate a contract regulation by filling the gaps that the parties may have left open. In a famous decision, for example, the Supreme Court affirmed that a contract that is silent on a certain aspect has to be integrated with the regulation that the parties would have agreed on in accordance with the principle of good faith, had they had given consideration to that particular aspect. The Court decided that a contract for the swap of professional activity between two medical doctors should be interpreted as though it also contained a restriction on the possibility of competing with the transferred practice, in spite of the fact that the contract was silent on this matter.69 As seen above, the matter would have been decided quite differently by an English court, which

69 BGHZ 16, 71.
would probably have applied the interpretation rule *expressio unius est exclusio alterius*.

### 4.3.3.2 Good faith as a corrective of the regulation agreed to by the parties

The liberalism of the XIX century was corrected in the BGB by taking the historical school into consideration as well. Particularly in connection with the hyperinflation after the First World War and the situation after the Second World War, German judicial practice showed a keenness to apply the general clauses contained in the BGB actively, thus bringing the law of contract heavily in the direction of a concrete judge-made evaluation of the social effects of the legal relationships. The dramatic hyperinflation after the First World War was the background for the Supreme Court’s active application of the general clause on good faith contained in § 242 of the BGB. This was used to reverse the BGB’s focus on the will of the parties, and to privilege an equitable balance of the parties’ interests from a substantive point of view, rather than the formal application of the words of the contract.70 Since then the German courts have applied § 242 so often, and in so many active ways, that a systematisation and classification of court practice requires about 800 pages in the most acknowledged commentary on § 242.71 One of the functions of this rule is as a barrier against the

---

70 RGZ 107, 18ff. See also, for further references, among others Zimmermann, Whittaker, *Good Faith in European Contract Law*, cit., pp. 20ff.
71 Staudinger, J. von, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, §241-243, Berlin 1995. The reform of 2001 has modernised the BGB, which by that time was more than one century old, and has at the same time implemented the European standards on consumer protection into German law, extending most of them to all contracts, not only consumer contracts. The immediate background for the reform was the necessity of implementing the EU directives within the required term; however, the process of the reform of the law of contracts had already been ongoing for several decades, and the 2001 reform can be said to be as much an implementation of the EU consumer directives as a reception of the uniform law on sales contained in the
enforcement of a contractual right, in case the exercise of that right brings unfair results or disrupts the balance of interest between the parties. Thus a decision like the above-mentioned English decision, which admits the unfairness of a literal interpretation of the contract in the specific case, and nevertheless directs the party to pay the total price of the computer in addition to the restitution of the computer, would probably be avoided by an application of § 242.

4.3.3.3 Good faith as a duty between the parties
The rule on good faith contained in § 242, and a rule in § 241(2) BGB providing for a duty of care towards the rights, things and interests of the other party, expressly regulate the performance of the contract, but are extended to the phase of negotiations by § 311. One of the most important obligations that arise in connection with this duty of care is the obligation to inform the other party of material aspects that are relevant to the proper assessment, understanding or performance of the contract.

4.3.4 Norwegian law
Norwegian law of contracts is strongly influenced by German legal doctrine, especially of the XIX century. The Act on Formation of Contracts of 1918 is clearly inspired by German doctrinal categories.

73 BGHZ 132, 175, BGH NJW 1973, 542
74 On the relationship between German legal doctrine and the Nordic law of contracts see, i.a., Gambaro, Sacco, Sistemi giuridici comparati, cit., pp. 400ff., and Zweigert, Kötz, Einführung in die Rechtsvergleichung, cit., pp. 270ff.
and so is the traditional doctrinal explanation of the subject-matter.\textsuperscript{75} However, Norway has not codified the law of obligations systematically, as Germany and the other countries influenced by German law have. Furthermore, the Norwegian judge and interpreter have less inclination than their German colleagues to indulge in abstract categorisations; the purpose of applying the law is seen in Norway to be the fair solution of a concrete case, rather than the abstract confirmation of the consistency of the system. The lack of a systematic codification of the law of obligations and the pragmatic attitude of the Norwegian lawyer is coupled with a strong ideal of social solidarity, which privileges the ideal of equitable justice over the individual’s autonomy. All these features have brought the Norwegian law of contracts to focus less on the individual freedom, and more on justice and reasonableness, than German law. In Norway, the interpreter enjoys a considerable flexibility in the interpretation process.

4.3.4.1 Good faith and interpretation

The main goal of interpreting a contract remains the establishment of the objective intention of the parties; however, the interpreter will be heavily influenced in this process by the purpose of the contract, and the contractual provisions will be interpreted in a way that, according to the interpreter, is most consistent with the function of the contract.\textsuperscript{76} In addition, the interpretation will be affected by considerations of fair dealing and good faith.\textsuperscript{77} The wording of the contract, therefore, will be read in a way that permits the principles of fair dealing and good faith to be implemented. Thus in a case corresponding to the German decision that integrated the contract between two medical doctors with a good faith-based term of non-competition,\textsuperscript{78} a Norwegian court would

\textsuperscript{76} Hov, \textit{op.cit.}, pp. 167f., and Woxholth, \textit{op.cit.}, pp. 445ff
\textsuperscript{77} Hov, \textit{op.cit.}, pp. 168f., and Woxholth, \textit{op.cit.}, pp. 450ff.
\textsuperscript{78} See footnote 69 above.}
also avoid the English approach based on the principle *expressio unius est exclusio alterius*. Norwegian law might, however, follow a different path from the German, which would lead to a different result: rather than interpreting an implied obligation limiting competition into the contract, the court might consider that the absence of competition was a precondition for the transaction, and, therefore, that the contract is not binding because an essential condition has ceased to exist.79

4.3.4.2 Good faith as a corrective of the regulation agreed to by the parties

The importance of good faith and fair dealing in the Norwegian legal system became even clearer in 1983 with the introduction of § 36 into the Act on the Formation of Contracts. The judge was given extensive power to correct the parties’ will in the name of reasonableness. This reform was the result of a joint Nordic legislative cooperation, and can therefore be looked upon as an expression not only of the Norwegian legal system, but also of the Nordic system. This Nordic rule on reasonableness cannot be seen as a drastic departure from the traditions of German law, since German judicial practice has developed the general clause of good faith, contained in § 242 of the BGB, in the course of the XX century, largely to serve the same purpose of equitable justice. However, the Nordic rule goes further than the German general clause (although it must be remembered that the judge is expected to be very restrictive when applying this rule to commercial contracts). Therefore, not only would a Norwegian Court (unlike an English court, and like a German Court) correct the literal interpretation of a contract to avoid an unfair result, and integrate the terms of the contract in case of gaps, it would go even further than a German court, and would correct the wording of the contract to achieve a better balance of interest

79 For a more extensive reasoning, as well as references to judicial practice, see the contribution of V. Hagstrøm to Zimmermann, Whittaker, *Good Faith in European Contract Law*, cit., pp. 490f.
between the parties, even if the contract regulation does not lead to unfair results. In a long term lease agreement between a landlord and a mining company, for example, the Supreme Court interpreted a clause that gave the mining company the option to renew the lease for a further period “at the same conditions” as if the landlord was entitled to renegotiate the price (and this was done in spite of the fact that the contract contained a clause for the indexing of the price, therefore providing for an automatic adjustment of the price and avoiding gross unfairness).80

4.3.4.3 Good faith as a duty between the parties
The principle of good faith and fair dealing results in extensive duties of loyalty between the parties, both during performance as well as in the phase of negotiations. In this latter phase the principle of good faith results, among other things, in a duty to take the other party’s reliance on contractual negotiations into consideration, and in a duty to inform the other party of matters that might have a material significance for that party’s evaluation of the prospective contract.81 As a consequence of the latter, § 33 of the Act on Formation of Contracts provides that a contractual provision is not binding on a party if enforcement thereof would be unfair because of circumstances that were known to the other party at the moment of the conclusion of the contract.

4.3.5 Italian law
The Italian law of contracts is codified in the Codice Civile of 1942. This code is largely based on the Code of 1865, which was, in turn, clearly inspired by the French Code Civil of 1804. Italian legal doctrine was heavily influenced by German legal doctrine during the end of the XIX and at the beginning of the XX century; this has not, however,

80 Rt 1990 s. 626.
81 On the duty of information see, extensively, V. Hagstrøm, M. Aarbakke, Obligasjonsrett, Oslo 2003, pp. 131ff.
been reflected significantly in the codification of 1942 (apart from the adoption of a general part on obligations that precedes the regulation of contracts). The Codice Civile, therefore, can be deemed as an expression of the Romanistic school based on the French Code Civil.82

The ideals of the Code Civil, which also inspired the Codice Civile, are characteristic of the era in which the Code was conceived. Issued shortly after the French revolution, the Code Civil is based on a desire to establish a liberalistic order where the individual enjoys the freedom to regulate its interests as he deems fit, where private property is respected, and where the public system’s interferences are reduced to a minimum. Furthermore, the ideals of Enlightenment are clearly present, and the law is seen as a scientific system that consists of abstract rules, with a perfect consistency with each other, and with no need for subjective evaluations. The task of the judge is simply to apply these rules to specific cases in a mechanical way, deprived of any moral or social evaluation. The lawyer is aware of the possibility that the mechanical application of the law can sometimes bring unjust results according to the circumstances of the case, but this consequence of the formal rigidity of the system is gladly accepted in the name of the higher value of predictability of the legal system.

The only true law is deemed to be positive law, i.e. the codified text of the law, and this has to be applied without making any recourse to natural reason or equity.83 This mentality towards the application of law, also known as the exegetical school, was seen to be prevailing in France throughout the XIX century, and has heavily influenced the Italian legal thought, so much so that it can still be deemed to be vividly present in Italian judicial practice. Italian legal doctrine has, during the late XIX and early the XX centuries, also been influenced by the German historic line of thought, which integrated the text of the law

82 On the influence of French and German law on Italian law see, i.a., Gambaro, Sacco, Sistemi giuridici comparati, cit., pp. 377ff.
83 For a historical analysis and further references see Gordley, The philosophical origins, cit., pp. 220ff.
with considerations of sociological and teleological character. The positivistic approach, however, is still prevailing.

Because the Codice Civile was issued nearly a century and a half after the Code Civil, and society had gone through dramatic developments during that period, the Codice Civile contains a series of rules that modernise the original French model and mitigate its liberalism in favour of a larger attention to the social justice in legal relationships. Most of these mitigations, however, are codified as specific rules and applied by the Italian judge with the same mechanical approach to the law as described above. Furthermore, some few general clauses were inserted into the Codice Civile by the legislator of 1942; however, these are certainly not applied by the Italian judges as extensively and creatively as by their German colleagues (not to mention the Norwegian ones).

4.3.5.1 Good faith and interpretation

Articles 1362 to 1371 of the Codice Civile direct the interpreter to firstly establish the intention of the parties on the basis of the text of the contract, although integrated with the parties’ conduct. If the language of the contract is clear, the interpreter cannot come to a different result by applying other criteria among those contained in the interpretation rules of the Codice Civile, such as the purpose of the contract or considerations of fair dealing. Such other interpretation criteria are subordinated to the literal interpretation (in claris non fit interpretatio).

84 For a vivid explanation of the conflict between these two influences and further references, see Gambaro, Sacco, Sistemi giuridici comparati, cit., p. 385. See also P.G. Monateri, The Weak Law: Contaminations and Legal Cultures, in Transnational Law & Contemporary Problems, vol. 13, pp. 584ff.
85 Gambaro, Sacco, Sistemi giuridici comparati, cit., pp. 389f.
86 C. 95/4563
87 Article 1362 CC.
88 C.95/6050
4.3.5.2 Good faith as a corrective of the regulation agreed to by the parties

The Italian interpreter is, in other words, bound by the clear language of the contract (integrated by the conduct of the parties), and the purpose of the contract will be taken into consideration only to the extent the language of the contract is not clear; considerations of good faith will be made only if the remaining interpretation rules have not created sufficient clarity. Considerations of the balance of the parties’ interests are even more subordinated, and can, according to article 1371, be made only to the extent that all other criteria have not created clarity. In this process, however, the interpreter is free to interpret the contract extensively, as article 1365 states that reference to one case as an example in the contract does not exclude the possibility that the contract can be applied to other comparable cases, even if they have not been referred to explicitly. The construction of the contract, however, is not meant to extend the object of the contract, or to impose new obligations on the parties beyond those that are expressly regulated in the contract.

In addition to having to pay attention to the general clause of good faith, the Italian judge interprets a contract in light of a vast system of declaratory and (less frequently) mandatory rules regulating the specific types of contract. These rules will be considered to be implied terms of the contract. A contract, therefore, will always be integrated by the judge on the basis of general rules on contracts and specific rules on the relevant contract type.

Thus an Italian judge would probably, like an English judge, interpret the contract entitling the lessor to regain possession of the computer, as well as entitling the lessor to obtain the whole price for it. However, the Italian decision might be similar in its result to a German or Norwegian decision, because the Italian judge might apply

---

90 C.88/303
91 Lombard North Central plc v. Butterworth, see above footnote 56.
other principles of the legal system to prevent an unfair result, such as, for example the rule on unjust enrichment.

Similarly, the gap in the contract on the swap of professional activities, which was silent on the question of competition, would probably not be filled by an Italian judge on the basis of the hypothetical will of the parties and the principle of good faith, as the German court chose. However, the result might not differ in substance, because the Italian court might apply other principles of the legal system on limitations to the competition in the case of transfer of activity.

It must be noted that, in spite of the clearly subordinated ranking that the principle of good faith has in the hierarchy of the interpretative tools set forth by the Codice Civile, and in spite of the positivistic attitude still shown by the conservative jurisprudence, there are examples of Supreme Court decisions that consider the principle of good faith to be an interpretation standard that can integrate or even correct the clear wording agreed to by the parties in the contract.

4.3.5.3 Good faith as a duty between the parties
The principle of good faith, therefore, seems to play a significantly less important role in the interpretation of contracts under Italian law than under German and Norwegian law. However, this difference is not necessarily mirrored in the outcome of the decisions that would be taken in the respective systems. An Italian court might reach similar results to a German or a Norwegian court by integrating the contract: not on the basis of the rules of interpretation, but with principles and rules regulating the activity that is the object of the contract, which become implied terms of the contract.

92 BGHZ 16, 71, see above footnote 69.
93 See the contribution of M. Graziadei to Zimmermann, Whittaker, Good Faith in European Contract Law, cit., pp. 486f.
94 See, for example, C.89/3362 and C. 94/3775. For references to legal doctrine on this judicial approach, see A. D’Angelo, La buona fede, Torino 2004, pp. 242ff.
The principle of good faith has, however, an independent significance in the Italian legal system: for example, article 1337 of the Civil Code provides that the parties have to act in good faith during the phase of negotiation of a contract. The main area of application of this article is the unjustified break-off of the negotiations; however, it is increasingly applied to other aspects of the contract negotiations. Thus, it would be a violation of this rule if one party, who is aware of the other party’s motives for entering into the contract, does not disclose, to the other party, that there are circumstances that make the prospective contract unfit for the other party’s purpose. Italian law, as well as German and Norwegian law, would consider the seller to have breached a duty of disclosure that it has towards the buyer. English law, on the contrary, would consider that it is the buyer that has a duty of diligence in enquiring about the quality of the contract’s object.

4.3.6 The tension between the common law drafting technique and the civil law governing law

As opposed to common law, concepts such as good faith or fair dealing, and rules governing contracts in general, or a certain type of contract in particular, may be invoked in civil law to interpret the contract, to integrate it, or even to correct it. International contractual practice adopts the models developed under common law, where little or no integration of the contract is expected, and therefore includes clauses in the contract expressing the assumptions of the parties, the purpose of the contract, the duties of the parties, the remedies in the case of unexpected events, the limitation of liability in case of unforeseen events, etc. This results in extensive and detailed contracts regulating all aspects of the deal and aiming at being self-sufficient, rather than relying on the rules and principles that are implied by law and would

95 See, for references, Sacco, De Nova, Il Contratto, cit., p. 240 and footnote 2.
integrate the contract by applying the governing law anyway (if the
governing law belongs to a civil law system).

This can lead to a double tension. First of all, a tension between the
detailed regulation of the contract and the rules of the governing law
regulating the same matters. The details of the contract will, to a large
extent, overlap with the regulation of the governing law. How should this
be interpreted: as if the contractual regulation was redundant, and simply
a repetition of the governing law principles? As an integration or correc-
tion of the governing law? Or as if the parties had waived the regulation
of the governing law and opted instead for a contractual regulation of
the same matter? Would the inclusion of extensive lists of representation
and warranties mean that the parties have decided to take the question
of the seller’s duty to inform into their own hands? What if the list of
representation and warranties does not contemplate a representation that
would have been covered by the duty of information contained in the
governing law? Shall that particular duty become non applicable because
the parties left it out of their representations and warranties?

The second tension is between the contract and any principles of
the governing law that the parties may have relied on, but have not
been referred to in the contract. This will be particularly relevant for
rules that assume good faith and fair dealing. The whole contract
may be drafted on the basis of a structure that denies the relevance
of good faith and fair dealing, privileging the literal interpretation of
the mechanisms that are expressly regulated in the contract. Yet one
party may have accepted this contractual structure because it knew that
the (civilian) governing law would intervene in the case of hardship,
or conduct against good faith, etc.. On the contrary, the parties may
have, on purpose, chosen the common law drafting technique, in order
to rely on the common law doctrine of interpretation, and create an
exhaustive regulation of their relationship.

The question then arises: to what extent can the governing law be
invoked if it contradicts the assumption of a contractual practice that
is based on different expectations? The governing law will certainly
prevail in the case of mandatory rules; but if the relevant rules are not mandatory, how will the judge interpret the parties’ choice of a contractual structure that is based on the exclusion of these principles? Will the judge apply the governing law’s criteria of good faith and fair dealing if the contract is based on a strict allocation of risks between the parties?

The answer to these questions will vary from legal system to legal system, and will depend significantly on the degree of information and commercial sense of the judge. This creates an uncertainty that is detrimental to business relationships. This is the aspect that the papers to be collected in this series focus on.

4.4 Good faith and fair dealing in the restatements of the lex mercatoria

In the interpretation of contracts, there are differences not only between the common law and civil law systems, but even within these latter systems. While the civil law systems contain rules that are largely equivalent to each other from a morphological point of view, they apply these similar rules in different ways. In Italy the rule on good faith is mainly an interpretative tool, whereas in Germany (and in Norway) it is considered to be an operative guideline. As we have already observed, this is linked to the different role of the judge towards the law; while the German (and Norwegian) judge has the authority to base the decision on evaluations of the adequacy of the contract in respect of standards of justice, such as reasonableness and good faith, the Italian judge is more prone to look at the text of the law and apply it rather mechanically. Hence, to ensure an equitable justice, the Italian legislator had to codify a clause on good faith in the negotiation and

97 See, for a clear analysis and relevant references, albeit related to the German system and the French system (which has influenced the Italian system), Sonnenberger, Treu und Glauben – ein supranationaler Grundsatz?, in Festschrift für Walter Odersky, Berlin 1996, pp. 703ff., 705ff.
interpretation of contracts. Judicial practice has predominantly refused to apply the latter as a tool for creating equitable justice and limits itself to using it as a tool for interpreting the contract.

The non-state sources mainly follow the civilian approach, although not uniformly. Adopting these trans-national sources, therefore, does not seem to contribute to the clarification of the contradiction between the common law contract models and the civilian governing law.

4.4.1 Good faith and interpretation

The civilian systems and the trans-national systems require the surrounding circumstances to be taken into consideration during contract interpretation, such as the conduct of the parties during negotiations or even after the signature of the contract. Some systems can, in the process of interpretation, attach considerable weight to the principles of fair dealing and good faith (first of all, Norwegian law and the PECL, and, to a lesser extent, German law and the UNIDROIT Principles, and to an even lesser extent Italian law). The UNIDROIT Principles contain a series of articles regulating the interpretation of contracts, particularly articles 4.1 to 4.8. Under the Principles the interpreter has to establish the common intention of the parties (or the objective understanding of reasonable persons, art. 4.1(2)) having regard to all the relevant circumstances of the case. Article 4.3 sets forth a non-exhaustive list of the relevant circumstances that may be used in the interpretation of a contract: preliminary negotiations between the parties, practices established between the parties, the conduct of

---

98 It might be tempting to notice an interesting symmetry: While the PECL, where the works have been lead by a Nordic professor, have an approach that is close to the Germanic-Nordic tradition, the UNIDROIT Principles, where the works were lead by an Italian professor, have an approach that is close to the Romanistic tradition. However, in view of the truly international composition, attitude and research that characterised both restatements, it seems unlikely that the legal background of the respective chairmen should have played such an important role.
the parties subsequent to the conclusion of the contract, the nature and the purpose of the contract, the meaning commonly given to words and expressions in the relevant branch of trade, usages. The Principles do not mention good faith as a criterion for finding the meaning of the contract. The Principles recognise, in article 2.17, the validity of so-called merger clauses, provisions in which the parties affirm that their entire agreement is contained in the contract and that no other documents or evidence shall be admitted to add to or modify the content of the contract. This clause is interpreted literally in the English system, as seen above, and it reinstates the effects of the parol evidence in full. Unlike English law, the UNIDROIT Principles affirm that extrinsic evidence may still be produced in respect of the interpretation (i.e. establishing the meaning, rather than the content) of the contract, even if the contract contains a merger clause.

In the process of interpretation, gaps may be filled according to the following criteria set forth in article 4.8: the intention of the parties, the nature and purpose of the contract, good faith and fair dealing, reasonableness.

The Principles of European Contract Law, too, contain a series of rules on interpretation, primarily articles 5:101 to 5:107. The regulation set forth in the PECL is substantially similar to the regulation contained in the UNIDROIT Principles, therefore there is no need to repeat the observations already made in respect of the UNIDROIT Principles. It is, however, worthy to point out that the (subjective and objective) intention of the parties has to be assessed on the basis of the criteria set forth in article 5:102: preliminary negotiations and circumstances of the conclusion of the contract, conduct of the parties, even subsequent to the conclusion of the contract, nature and purpose of the contract, practices established between the parties, usages, good faith and fair dealing (the latter not being mentioned by the UNIDROIT Principles in the context of interpreting the meaning of the contract, but only in the context of filling the gaps of the contract).
In the process of interpretation, the gaps may be filled according to the criteria set forth in article 6:102: the intention of the parties, the nature and purpose of the contract, good faith and fair dealing.

4.4.2 Good faith as a corrective of the regulation agreed to by the parties

The principle of good faith and fair dealing is given a central role in the UNIDROIT Principles and the PECL, and a restricted role in the CISG, as is explained in sub-section c) below. Because the scope of this principle is uncertain, as will be explained below, it is also uncertain to what extent it may be applied in the context of a correction of the contract under non-state law.

4.4.3 Good faith as a duty between the parties

Another uncertainty that the adoption of trans-national sources does not seem to clarify is seen in respect of the role of the principle of good faith and fair dealing between the parties. The tendency must be, in spite of the opposite appearance, towards a restrictive application of this principle.

The CISG is silent on the matter, in spite of repeated requests during the drafting phase to expressly mention that the parties have to perform the contract according to good faith. During the legislative works, specific proposals were presented on good faith in the pre-contractual phase, as well as general proposals dealing with the requirement of good faith. The specific proposals relating to pre-contractual liability were rejected, and the generic proposals on good faith were incorporated in article 7 in such a way that the principle of good faith is not directed at regulating the parties conduct in the contract, but at the contracting state’s interpretation of the convention.⁹⁹ The main

⁹⁹ For an extensive evaluation of this matter, as well as references to literature and to the legislative history in this respect, see A. Kritzer, Pre-Contract Formation, editorial remark on the internet database of the Institute of International Commercial Law of the Pace University School of Law, www.cig.law.pace.edu/cisg/
arguments against the inclusion of good faith as a duty of the parties were that the concept is too vague to have specific legal effects, and that it would be redundant if mention thereof only had the character of a moral exhortation.

The UNIDROIT Principles contain a general clause on good faith in article 1.7, requiring each party to act in accordance with good faith and fair dealing in international trade. This rule is said to be mandatory in the second paragraph of the article. The UNIDROIT Principles also contain a clause regulating good faith in negotiations, article 2.15. Contrary to the rules that were seen in the other civil law systems, however, this rule does not mention a duty of disclosure, and it simply concentrates on the unjustified break-off of negotiations and on the circumstance whereby negotiations are started without any real intention of completing them. A duty of disclosure could, however, possibly be inferred in article 5.3, which regulates the duty of co-operating with the other party if such co-operation may reasonably be expected for the performance of the other party’s obligations. This article obviously refers to the phase of performance, and therefore it is rather uncertain whether it can also be extended to the phase of negotiations.

In the comment to article 1.7, the UNIDROIT affirms that the standard of good faith must always be understood as “good faith in international trade”, and that no reference has to be made to any standard that has been developed under any national law. This approach is in line with the requirement for the autonomous interpretation of the Principles contained in article 1.6 thereof: the Principles are an instrument with an international character, and it would not serve their purpose of becoming a uniform law if the courts of every state

biblio/kritzer1.html, pp.2ff., which also has extensive references to the Minority Opinion of BONELL, M., who represented Italy under the legislative works. According to BONELL, an extensive interpretation of the CISG would justify the application of both the concepts of pre-contractual liability and of good faith.

100 http://unidroit.org/english/principles/paragraph-1.htm, comment No 2 to art. 1.7.
each interpreted them in a different way, in light of their own legal culture. While the requirement for the autonomous interpretation of the Principles is understandable in light of the ambition of harmonising the law of contracts, however, it does not contribute to creating clarity in respect of the content of good faith as a standard, as will be seen below in section 4.3.1.

Similar considerations as those made in respect of the UNIDROIT Principles may also be made for the PECL. Article 1:201 regulates a general duty to act in accordance with good faith and fair dealing, and article 1:202 regulates a duty to co-operate. Article 2:301 regulates the same eventualities of negotiations in bad faith as the UNIDROIT Principles (the unjustified break off of negotiations and engaging in negotiations without any real intention of concluding them).

Whether these rules may be applied to imply, for example, specific duties of disclosure during negotiations (thereby choosing the civil law rather than the common law approach) is uncertain; Article 4:107, on invalidity of the contract due to fraud, seems to confirm such a duty indirectly, since it considers it equivalent to fraud if a party fails to disclose, with the intent of deceiving the other party, information that should have been given according to good faith (which in turn has to be determined on the basis of a discretionary evaluation by the judge, based, among other things, on the qualifications of the parties, the availability of the information, etc.). The requirement that non-disclosure has to be fraudulent101 seems to indicate a restrictive approach to the duty to disclose, close to the common law’s approach. The notion of information that should have been disclosed in accordance with good faith and fair dealing seems to indicate an extensive approach. Until judicial practice specifies, with a certain amount of uniformity, how this contradiction is to be interpreted, it is rather uncertain what the specific content of this article is.

101 Article 4:106, on incorrect information does not require an intent to deceive, but it applies only to information given, not to information withheld.
The PECL, like the UNIDROIT Principles, are to be interpreted without reference to specific national systems of law, a circumstance that renders it hard to ascertain the scope of the principle of good faith, lacking an acknowledged international standard.

4.4.4 Good faith and fair dealing as an autonomous standard in international trade

The regulation contained in the UNIDROIT Principles and the PECL, as seen above, refers to the standard in international trade, in order to ascertain the scope of the principle of good faith. But how can the standard in international trade be assessed?

The most important sources of the *lex mercatoria* (generally recognised principles, trade usages, contract practice) seem not to give any specific criteria upon which a notion of good faith and fair dealing may be shaped:

i. There is no uniform notion of good faith and fair dealing that might be valid for all types of contracts on an international level, and there is hardly a notion that is generally recognised for one single type of contract either. There is no evidence of trade usages in respect of how the standard of good faith (if any) is applied in practice. As seen from the outline above, there are few principles in respect of good faith and fair dealing that may be considered common to civil law and common law systems, and, even among civil law systems, there are considerable differences. Even focusing on the common core that underlies the different legal techniques of the various systems may be of little help. To what extent the existence of piecemeal solutions in English law, which might permit us to reach results comparable

---

102 Despite the observation that the principle of good faith is relevant to all or most of the doctrines of modern laws of contract, even Zimmermann and Whittaker, in *Good Faith in European Contract Law*, cit, p. 678, conclude that each system draws a different line between certainty and justice.
to the general principle of good faith in other systems, may be
to substantiating a general clause on good faith in interna-
tional trade, is uncertain. English law may, by applying its own
remedies or techniques, achieve results similar in part to those
that the principle of good faith may permit us to achieve in some
of the other systems; this may be used as a basis for the com-
parative observation that conduct tending to avoid such results
would be inconsistent with a generalised acceptance, by various
legal systems, of the appropriateness of those results, and of the
consequent inappropriateness of conduct aiming at avoiding the
same results. This, in turn, could be seen as a concretisation of a
non-national standard of good faith. An indirect determination
of a standard of good faith such as this, if at all feasible, assumes
a clear consistency in terms of the results that the various legal
systems consider appropriate. In many situations, however, the
results do not coincide, as was seen above.

ii. The instrument that is generally considered to be a high ex-
pression of the *lex mercatoria*, the CISG, has willingly chosen
not to include good faith as a duty between the parties, which
renders the very existence of this criterion in the trans-national
context to be dubious.

iii. As has been seen above, contract practice is generally adopting
contract models prepared on the basis of English law or at least
of common law systems, which, according to the traditional
conception, do not contemplate good faith and fair dealing
as a standard. Even if, as seen above, the system in its totality
might contain features that mitigate this aspect, common law
contract models are clearly drafted on the assumption that the
contracts shall be interpreted literally and without influence
from principles such as good faith. As a consequence of the
broad adoption of this contractual practice, the regulations
between the parties move more and more away from the as-
sumption of a standard of good faith and fair dealing, even in
countries where the legal system does recognise an important role for good faith.

iv. The CENTRAL database lists the principle of good faith and fair dealing as one of the main principles of international contract practice, and refers to various sources upon which the principle relies: legal literature, arbitral awards, court decisions and international instruments. The database’s list of legal literature dealing with the principle of good faith and fair dealing is long and impressive, and it reflects the large variety of positions in respect of the subject, including those that deny the existence of an international legal standard for good faith and fair dealing. No uniform opinion arises from the doctrine quoted in the CENTRAL. From this source, therefore, it is not possible to clarify and specify the content of the standard in international trade.

v. Among the eleven arbitral awards listed in the CENTRAL database in support of the principle, four awards seem to have applied the standard of good faith of a national law, and the remaining awards refer mainly to the principle in general terms, as a moral rule of behaviour. On the basis of these seven awards it seems difficult to conclude whether or not the standard of good faith and fair dealing in international trade is to be interpreted as a moral rule that does not require an active duty

---

104  For example, Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, Rome 1997.
106  ICC award No 5832 of 1988 applies Austrian law, ICC award No 6673 of 1992 applies French law, ICC award No 8908 of 1999 applies Italian law (corroborated by the UNIDROIT Principles), and ICC award No 9593 No 1999 applies the law of the Ivory Coast.
of loyalty (as the standard would be interpreted in common law), as a rule that must ensure that the contract is interpreted and performed accurately (as it would be interpreted in Italian law), as a rule that permits the integration of the contract and balances the interests of the parties (as it would be interpreted in German law), as a rule that permits the correction of the contract and also requires each party to actively take into consideration and protect the interest of the other party (as it would be interpreted in Norwegian law), or, in yet another way, only characteristic of international trade.

vi. The international conventions mentioned in the CENTRAL database are the CISG, the UNIDROIT Convention on Factoring and the Vienna Convention on the Law of Treaties of 1969.

vii. As seen above, the relevance of the CISG in respect of the principle of good faith and fair dealing is questionable.

viii. Unlike the CISG, the Factoring Convention contains a rule prescribing good faith between the parties, in addition to the rule on the interpretation of the convention also present in article 7 of the CISG (thus indirectly confirming the fact that the rule contained in article 7 of the CISG is not sufficient to create a duty of good faith between the parties). The Factoring Convention regards a very specific kind of contract, and it can be questioned to what extent its provisions may be extended to all branches of international trade.107 Even if such an extension was possible, however, the rule on good faith is written in a general way and does not provide criteria that can be useful for clarifying its scope.

ix. The Vienna Convention on the Law of Treaties is a convention on how states are supposed to perform the treaties that they

---

107 At the moment of writing this paper, nearly 20 years after its conclusion, the convention has been ratified by six countries (http://www.unidroit.org/english/conventions/1988factoring/main.htm). It cannot, therefore, be deemed to enjoy a significant scope of application.
have ratified, and it does not seem to have direct relevance to the standard between private parties in international trade.

x. Of the three trans-national instruments mentioned in the CENTRAL database (beyond the already mentioned UNIDROIT Principles and PECL), two are restatements of state law, and therefore cannot be used to support an autonomous interpretation of the standard in international trade, and one is of dubious relevance (the Cairo Regional Centre for International Commercial Arbitration).

xi. The CENTRAL database also mentions various state laws and court decisions: however, it was seen that these sources have been expressly excluded by the interpretation of the standard of good faith and fair dealing under the UNIDROIT Principles or the PECL, and that this standard shall be assessed autonomously on the basis of sources within international trade.

xii. The sources in the CENTRAL database that seem most able to furnish support in the interpretation of the standard of good faith and fair dealing in international trade are the UNIDROIT Principles and the PECL. However, as seen, these sources assume an autonomous interpretation that has to be based on the standard applied in international trade. Therefore, a vicious circle is created when making reference to the UNIDROIT Principles and the PECL in support a principle of good faith in international trade, since they in turn make reference to international trade practice in order to substantiate this principle.

The foregoing shows that the trans-national compilations of principles give good faith and fair dealing a central role; however, they do not define their scope and meaning, but instead they emphasise that these must be understood on the basis of the practice of international trade.

and without reference to the meaning developed in the single national systems of law. This reference to international trade law seems to be a sword with two edges. On the one hand, it prevents us from giving application to the most restrictive doctrines, such as the English law doctrine on good faith. On the other hand, however, it also prevents us from giving application to the progressive doctrines of good faith, such as those contained in German or Norwegian law. Generally recognised definitions of these standards do not seem to exist; international contractual practice is mainly based on common law contract models, the very structure of which rejects the interference of good faith. Thus a strict application of the autonomous interpretation of the compilations of principles would lead to a restrictive interpretation of the standard of good faith; this, however, seems to contradict the spirit of these compilations, which give good faith such a central role.

4.5 Non-state sources and the interpretation of contracts

Would the application of non-state sources solve the interpretation problems connected with the interpretation under a civilian governing law of a common law contract model?

One of the main obstacles to the interpretation of common law models according to their original principles is, as seen above, the extensive role given to a civilian judge in respect of the terms of the contract: by using the principle of good faith and fair dealing, the terms of the contract may be extended, gaps may be filled, even the agreed regulation may be corrected. This is, from the point of view of the original drafters of the model, an unexpected interpretation, and may create undesired results. Would undesired results be avoided by subjecting the contract to a non-state source rather than to a state law?

As seen above, the restatements of the lex mercatoria contained in the UNIDROIT Principles and in the PECL seem to be closer to civil law systems than to the common law, particularly in the central role that they give to the principle of good faith and fair dealing. At first
sight, therefore, the interpretative problems connected with the use of a common law model do not seem to be solved.

A more detailed analysis of the matter, however, shows, as seen above, that the specific content of the principle of good faith and fair dealing is not clear under these sources. It is, therefore, uncertain whether the principle of good faith and fair dealing, as contained in these sources, would permit a judge to disregard the clear wording of the parties permitting them to obtain the full payment of the price as well as the restitution of the goods,\(^{109}\) to fill the gap in a contract on the mutual assignment of professional activities without a non-competition clause,\(^{110}\) to permit renegotiation of the price in a contract with an option to renew,\(^{111}\) or to require a duty of disclosure during the negotiations in relation to one of the parties’ motives.\(^{112}\)

The definition of the scope and function of the principle of good faith and fair dealing in these sources is too vague to permit an independent application. On the one hand, this vagueness permits us to avoid a direct contradiction between the non-state sources and the

---

109 In the English case *Lombard North Central plc v. Butterworth*, cit. in footnote 56 above, the wording was interpreted literally, even though the judge was dissatisfied by the result; the civilian systems analysed herein would probably come to different results, see above, sections 4.3.3.2, 4.3.4.2, 4.3.5.2.

110 The German Supreme Court decided that a good faith interpretation of the contract permits a non-competition clause to be read into a contract that is silent on the matter (BGHZ 16, 71, see above, footnote 69); the English system would most probably not permit this interpretation (see above, section 4.3.1.1), and the Norwegian and Italian systems might each reach a different result (see, respectively, section 4.3.4.1 and 4.3.5.2).

111 The Norwegian Supreme Court interpreted the wording as representing a right of first refusal rather than an option, and permitted renegotiation even though there were no competing offers by third parties (Rt 1990 s. 626, footnote 80 above); the other systems analysed herein would probably not go that far in the interpretation of the contract, see above, sections 4.3.1.2, 4.3.3.2, 4.3.5.2.

112 Whereby English law would not recognise such a duty (see above, section 4.3.1.3), the civilian systems analysed herein would (see above, sections 4.3.3.3, 4.3.4.3, 4.3.5.3).
common law-inspired contract models; on the other hand, however, this vagueness renders an independent application of the sources quite difficult and unpredictable.

If an English lawyer chose the UNIDROIT Principles or the PECL as governing law, he or she would probably need to adapt the drafting style, originally aimed at accommodating the requirements of English law system (privileging predictability against fairness), to a system that focuses more on fairness. If a Norwegian lawyer chose these non-state sources, he or she would probably need to draft on the assumption that the governing system focuses more on predictability than Norwegian law. Exactly just how far the non-state laws would deviate from the English rule of predictability and the Norwegian rule of fairness is difficult to assess, as the analysis above has shown.
If, after the first two phases of the interpretation, it has been excluded that the parties have tacitly chosen the law of origin of the contract model, and it was not possible to ascertain that specific legal effects of a certain clause are to be considered as trade usages, the clause will have to be interpreted, as any other clause of any contract, on the basis of the governing law’s doctrine of interpretation.

Doctrines of interpretation generally direct the interpreter, first of all, to read the contract in accordance with the common intention of the parties, if that can be ascertained.

5.1 The meaning of the choice of model

It is, therefore, legitimate to wonder whether, by adopting a contract model inspired by common law, the parties may be deemed to have had a common intention to interpret the contract in a specific way.

It is not correct to assume that the parties intended to apply a (no better identifiable) common law system to their contract; this would be an implicit choice of law, and, as seen in section 3 above, in most contracts loosely drafted on a common law model the requirements of an implicit choice of law are not met. The parties may, however, have been aware of the effect of that clause in the original system and they may have wanted to achieve that result: this would not be a will to apply that law, but a will to achieve the result that is achieved in that law. A variation of the same scenario would be that the parties were
not aware or not interested in the legal effect under the original law, but they were aware of the results that they wanted to achieve with that particular clause (the results of which happen to be the same as those which the clause would have achieved in the original system).

In both cases, it can be assumed that the parties wanted to achieve a certain result. This common will of the parties obviously has to be ascertained with the interpretative tools and evidence provided for by the doctrine of interpretation of the applicable contract law.

5.2 Choice of model as a presumption of choice of effects?

Can this common intention be presumed on the basis of the observation that the parties have adopted a contract model that, under the original law (under which it was developed), it had certain legal effects?

Such a presumption would have the clear character of a *fictio juris*, because experience shows that it is only seldom that parties not belonging to a common law system and using English as the drafting language are actually aware of the different legal effects of using, for example, the word “condition” as opposed to the word “term”.

Moreover, such a presumption would encounter the already mentioned problem that the specific legal system of origin is not often identifiable. The various common legal systems differ from each other, and therefore it does not make sense to presume that the parties intended to give the clauses the effects that those clauses would have under “the common law”.

Last but not least, such a presumption would have the indirect effect of considering the adoption of a contract model to be an implicit choice of law, i.e. it would have the effects of private international law. However, as seen above, the requirements that an implicit choice of law must fulfil under private international law are not met.

Thus it does not seem possible to presume a common will of the parties simply by reference to the effects that a certain clause would
have if the contract was governed by a common law system. What must be ascertained is that the parties wanted to achieve a particular regulation of their interest: in other words, that they wanted to achieve the regulation that a certain clause usually has in the common law, but that they wanted a specific regulation of their relationship (such as for certain information to be considered to be exhaustive, a certain default to lead to certain consequences, etc.).

It seems to be very difficult to make such an assessment on the basis of a presumption. If the common will cannot be presumed, it must be ascertained in accordance with the applicable rules on the interpretation of contracts and upon the consideration of all the circumstances of the case, such as the quality of the parties, the documentation exchanged during the negotiations, etc..

5.3 Compatibility with the governing law

Assuming that the common intention of obtaining certain results is specifically ascertained, the interpreter must proceed as in any contract interpretation. Among the aspects that must be verified is whether the desired results may be achieved under the governing law or whether they violate mandatory rules of that law.

5.3.1 Convergence of common and civil law assumes no clear wording to the contrary

As seen in section 4 above, comparative research shows that the common law and the civil law systems do, to a large extent, converge in substance, if not in form, to what has been defined as a common core of contract law. There should not, therefore, be particular problems of compatibility between common law inspired contracts and civilian governing laws.

113 In respect of Norwegian law, it has authoritatively been excluded that the choice of a foreign model might influence the judge's interpretation of the disputed clauses: E. Selvig, “Tolking etter norsk eller annen skandinavisk rett av certepartier og andre standardvilkår utformet på engelsk”, cit.
However, this convergence between the two legal families seems to be particularly dependant on a consideration of the common law in its totality, i.e. including both its body of law and of equity (as well as the statutory law). The effects of a contract under the common law in its strict meaning, its effects “at law”, seem to differ quite dramatically from the legal conceptions of a civilian law; the equitable rules and remedies moderate the harshest effects achievable at law. Thus, it is mainly the equity that permits the convergence between the different legal traditions and therefore the compatibility of a common law inspired contract with a civilian governing law (in addition come sectorial statutory rules aiming at protecting certain weaker contractual parties).

What does have a material impact on the present subject-matter, however, is that in many instances the effects achievable in equity may be avoided by sufficiently clear expressions of intention made by the parties. Many of the contract clauses that are relevant to the project’s topic are specifically written with the purpose of avoiding the remedies or other default mechanisms existing in the system. Thus, these clauses are responsible for annulling the convergence between the common law and the civil law systems. In other words, the original intention of the clauses is to allow for the harsh legal effects that mostly distinguish the common law in the strict sense from the civil law. In this situation, it should not be surprising that some effects of these clauses are not compatible with the civilian governing law. The equitable rules and principles that the convergence was based on may be derogated from by a sufficiently clear contract clause; the corresponding rules and principles in a civilian system, however, are often considered so fundamental that they cannot be derogated from by the contract.

The governing law might provide various tools to ensure that the contract does not violate mandatory principles of the law, such as considering the particular clause null and void or giving the judge the power to correct it so that it becomes compatible with the system. The least invasive tool, and one that often remains concealed to the observer and possibly even to the interpreter, consists not in directly intervening
in the contract regulation, but in interpreting the contract in such a way that it excludes a priori a conflict with the system’s mandatory rules (the judge would, for example, consider it clear that the parties have not written a certain clause with a situation in mind like the one where the clause would permit results that are not compatible with the governing law; in this way, the restrictive assessment of the clause’s scope of application prevents us from interpreting the clause in a way that would violate mandatory rules of the governing law).

5.3.2 Formally correct use of clauses with speculative purposes
Irrespective of which tools the judge applies, there might be situations where the results originally intended under the common law system of the origin of the contract model may not be achieved under the civilian system that ends up governing the contract. In particular, this seems to happen when the clear wording of the contract permits one party’s conduct that is motivated not in the balance of interests as regulated in the contract, but in speculation or abuse. To make only a few examples:

i. The so-called “no waiver” clause, a typical boiler plate clause, says that failure by one party to exercise a remedy that it is entitled to under the contract does not constitute a waiver by that party of that remedy. This clause is originally meant to exclude the effects of the rule on acquiescence under English law. According to this rule, if the party entitled to a remedy behaves in such a clear and unequivocal way that the other party may understand it as a representation of the former to waive of its remedy, then the former party loses its possibility of exercising its remedy. Inserting a no waiver clause in the contract prevents any passive behaviour of the former party to be interpreted as a clear and unequivocal representation.114

114 For an analysis of this clause and its implications, with further references, see F. Skribeland’s essay in the framework of the project and to be published in
Under normal circumstances such a clause is not incompat-
able with the main principles of civilian systems, and it would
not be problematic to adopt a model contract with this clause
and subject it to a civilian law. This clause, however, may also
be used to speculate and to reach results that are accepted
under English law but not necessarily achievable under all
legal systems. A party entitled to a remedy (for example, to
terminate the contract) may behave passively, give the other
party the impression that it will not terminate the contract,
wait until the other party has, for example, refrained from
entering into other contracts with third parties, in reliance on
the continuation of this contract, or wait until, for example,
prices have changed so much that it will gain by terminating
this contract and entering into a corresponding contract with
a third party, and then terminate the contract. In many civilian
systems this behaviour would be considered to be against good
faith, an abuse of a contractual right. The judge would therefore
prevent that this clause from being used to obtain such a result.
Whether the judge will proceed by interpreting the clause in
such a way that this result is excluded (“the parties have not
intended this clause to be applied to such circumstances”), or
whether it will be the result that it is considered to be against
a mandatory rule of the system (for example, on good faith
in the performance of the contract), will depend on the legal
tradition of the governing law.

Some terms of the contract are so fundamental (so-called
conditions), that, under English law, in the case of a breach by
one party, the other party is entitled to repudiate the contract,
i.e. to terminate it with immediate effect and to obtain the

---

this series, “No-waiver-klausuler og bortfall av misligholdsbeføyelser”, 29 ff.,
38f., at: http://www.jus.uio.no/ifp/anglo_project/essays/Avhandling Fredrik
Skribelnd.pdf
full value that it would have received if the contract had been properly performed. The parties may also regulate in their contract that certain terms are fundamental and that any breach thereof will be treated as a breach of condition, and entitle the other party to termination and reimbursement of the full value of the contract (as was seen in respect of the clause “time is of the essence”, mentioned above).

iv. Under normal circumstances, this regulation is not incompatible with civilian legal principles. However, this contractual regulation may also be used to serve speculative purposes: for example, a minor difference from the performance, which does not have a meaning for the other party, may be used to terminate a contract. The default is obviously immaterial and has no bearing for the other party; it would not be considered to be a fundamental breach had there not been a formulation in the contract that renders a certain clause to a condition; the innocent party is interested in terminating the contract only because, for example, fluctuations in the prices have made it more profitable to enter into a similar contract with a third party. If the formal requirements of the clause are met, a contract governed by English law may be terminated. In this situation, like in the scenario seen above, it seems difficult to imagine that a civilian judge would accept the situation whereby the formalities of a clause are used to obtain speculative results that are not proportionate to the interests as regulated in the contract.

As seen, therefore, there is one more hurdle, beyond the already discussed necessity of ascertaining whether the parties had a common intention to actually achieve results corresponding to those

115 For an example of an immaterial breach without significant consequences that can be used to invoke termination, see Sandsbraaten, op.cit., 88ff.
achievable under the law under which the adopted contract model was developed. The second hurdle is in ascertaining whether those results are compatible with the mandatory rules of the governing law. Contract laws generally do not contain many mandatory rules (apart from areas relating to the protection of the weaker contractual party or other areas of regulatory concern, which are generally not relevant to the questions that may arise out of commercial contracts and boiler plate clauses), therefore most of the results that the parties wanted to achieve will be compatible with the governing law. In exceptional situations, however, particularly where the contractual mechanism is abused for speculative purposes, the governing law might put a stop to the full implementation of the parties’ will. This occurs when a common law contract model subject to a civilian governing law might be interpreted in a different way from the one envisaged by the original drafters.

5.4 The impact of the contract style: does it affect the interpretation doctrine?

Rationally thinking, contracts should be drafted with the criteria that must be met in order to induce the interpreter (the judge) to reach a certain result in case of differences in the interpretation in mind, in case of gaps, in case of unexpected developments, in case of default, etc. To obtain this result, contracts should be drafted with the criteria of interpretation that will be applied by the judge when reading the contract in mind. This happens when the drafters write a contract that responds to the legal tradition and the legal structure of the legal system that will govern it. This does not happen when the drafters adopt a contract that was developed under another legal system and disregard the legal tradition of the law that they chose to govern it.

A common law contract is written with the idea of expressing the whole relationship between the parties as much as is possible, and in as detailed a manner as is possible, because that document will
be, with few exceptions that are not very significant in commercial matters, the only basis upon which the judge will render its decision on any dispute. A civil law contract is traditionally written with the idea of regulating the specifics of the case, while leaving the rest to the legal system, which integrates the contract. As seen above, this may have surprising and undesired implications if the clauses turn out to be incompatible with the chosen law and have to be interpreted more restrictively or extensively than they would have been interpreted in the original system.

It is now time to turn the matter around. Rather than asking ourselves what the governing law does with the contract clauses, the following question can be asked: what does the contract style do with the way the interpreter reads the contract? If the interpreter is faced with a commercial contract practice that disregards the legal tradition of the governing law and adopts another drafting style, is it legitimate to superimpose the governing law’s expectations on how contracts should be written onto the contract?

5.4.1 Exhaustiveness of the contract regulation
The style of drafting the contract may certainly be given importance during its interpretation. It is, however, a question of evaluating to what extent the will of the parties (of which the drafting style is an expression) may be stretched. As seen above, the simple adoption of a contract model inspired by the common law may not be deemed to be a tacit choice of the common law to govern the contract (particularly because the common law is not a defined system). As seen, it cannot be used to presume that the parties wanted certain specific legal effects to take place either. The drafting style, however, may be deemed to be an expression of the parties’ will to exhaustively regulate their legal relationship in the contract. A document that sets forth a very extensive regulation, which specifies, in every detail, all the consequences of various situations that may arise during the life of the contract, which contains clauses with long lists of information exchanged between the
parties, which contains a clause specifying that the contract document is to be deemed the exhaustive regulation of the relationship between the parties,\textsuperscript{116} etc., seems clearly to indicate that the parties wanted their contract to regulate all aspects of their relationship and intended to exclude any addition from outside the contract.

As known, most civilian doctrines of interpretation do not operate with the maxim \textit{inclusio unius est exclusio alterius}, which is at the basis of the assumption of exhaustiveness. Traditionally, a civilian judge will not refrain from extending, by analogy or otherwise, the scope of the written contract, if the circumstances so require. An antithetic interpretation, according to which anything that the parties have not expressly regulated in the contract may not be deemed to have been intended to be part of the contract, is not usual in the civilian tradition. Should the contract contain a choice of law clause in favour of a civilian governing law (and even more if the governing law was determined on the basis of other conflict rules), this might seem to contradict the intention by the parties to have the contract interpreted as if it was exhaustive, as was just mentioned. How can this contradiction be overcome?

It seems that within international commercial transactions, the use of this drafting style is so widespread that it may, to a certain extent, be considered to be an acknowledged contract practice. As seen above, the argument for international commercial practice may not be stretched as far as to recognising that contract clauses shall have specific legal effects corresponding to (for example) the legal effects that they would have under English law, unless there is a specific trade usage to that extent, such as in the case of the clause “time is of the essence”. What the widespread drafting style can achieve, however, is to render it more likely that the parties have desired to limit, to an extent possible,

\textsuperscript{116} For an extensive analysis of this kind of clause, known as merger clause or entire agreement clause, see Bjornstad”s essay in the framework of the project and to be published in this series, “Entire Agreement”, at: http://www.jus.uio.no/ifp/anglo_project/essays/avhandling_bjornstad.pdf
any interference from outside the contract, by taking the regulation of most of the thinkable details in their own hands. The likelihood of this intention emerges by the size and degree of detail of the contract regulation, and it may be inferred even if the contract was looked upon individually. When the majority of international commercial contracts adopt this style, it is even easier to conclude that the parties were aware of the habit of giving an exhaustive character to the contract and wanted to adhere to this contract practice.

5.4.2 Exhaustiveness within the scope of freedom of contract

This exhaustiveness-intention by the parties, however, does not give them more power to regulate their relationship than they have under the freedom of contract which the governing law grants them.

While the parties may, by adopting a certain detailed and extensive style, avoid creative additions to the contract that the interpreter may be tempted to make under the applicable doctrine of interpretation, they cannot go further than regulating their interests in a way that is permitted under the governing law, i.e. they cannot use the drafting style as a tool to avoid interference by the governing law and obtain results that would violate mandatory rules or fundamental principles of the governing law.

Fundamental principles of the governing law, such as good faith in the performance of the contract and the prohibition of abuse of a right, in other words, may still correct and limit the contractual regulation. However, the only purpose of applying these rules will be to prevent a violation of these mandatory rules. These principles will not correct and limit the contract if the only purpose is to integrate the contractual regulation in order to obtain a better result, a more balanced contract, or a fairer distribution between the parties. This latter integration of the
contract regulation, which might be permissible under certain civilian systems, is excluded by the exhaustive character of the contract.\textsuperscript{117}

To clarify how a presumption of exhaustiveness affects the judge's power to intervene in the contract under the governing law's doctrine of interpretation, the examples that were made above may be useful:

i. In the case of a speculative use of the no waiver clause (whereby one party behaves passively for a long period in respect of a default by the other party, awaits the development of the events and terminates the contract after it has ascertained that the other party has missed the possibility to enter into a similar contract with a third party, or that the contract is not as profitable any more due to a change in prices), the literal interpretation of the clause might well be considered to permit an exercise of the right that is in violation of a mandatory rule in the governing law, for example on good faith in the performance of contracts. In this case, the exhaustive character of the contract is not incompatible with the judge's preventing these results (by considering the clause not written with that kind of circumstances in mind, by considering those results against good faith, abuse of right or in any other manner permitted in the governing law);

ii. In the case of a speculative use of a contractual definition of a term as fundamental, whereby an immaterial breach with no real consequences for the innocent party may permit this

\textsuperscript{117} That commercial contracts should be interpreted objectively on the basis of their wording is even recognised in legal systems that traditionally give significant importance to the necessity of obtaining a fair decision, thus allowing for relatively free interpretations on the basis of the purpose of the contract, of good faith principles, etc.. The Norwegian Supreme Court has in the past few years repeatedly affirmed that commercial contracts should be interpreted objectively, so as to respect the parties' interest in predictability (Rt. 1994 s. 581, Rt. 2000 s. 806, Rt. 2002 s. 1155, Rt. 2003 s. 1132).
party to terminate the contract, with serious consequences for the other party, the governing law may find that a literal application of the contract may contrast with principles on the proportionality of remedies or on good faith. Thus once again, the exhaustiveness of the contract would not prevent an intervention by the judge in this case;

iii. In the case of a contract containing a list of so-called representations and warranties (whereby one party guarantees the correctness of the quality of the sold goods, of circumstances that are relevant to the price of the goods, etc. to the other party), if the clause lists the qualities and circumstances that are guaranteed, the judge will not be in a position to extend the guarantee to other qualities and circumstances that are not listed. Even if the qualities and circumstances that are left out may seem a natural complement of the list, the exhaustive character of the contract speaks against deeming their absence as the result of forgetfulness rather than as the wilful exclusion from a carefully negotiated list. However, once again, in this context the mandatory principles of the governing law may not be overruled by the contract style: therefore, if the qualities or circumstances that were left out are considered to be so fundamental that the governing law mandatorily requires the seller to inform the buyer thereof, the seller may not invoke the exhaustiveness of the clause in order to escape its information duty;

iv. In the case of a long-term contract containing a clause for the indexing of the price, giving one party an option to renew the contract at the same conditions, it does not seem compatible with the character of exhaustiveness if the judge also extends the option clause to cover a renegotiation of the price.
6. Do contract practice and contract regulation develop in opposite directions?

By adopting the common law contract models, international commercial contract practice, signalises that the drafters have thought of all eventualities and have resolved to regulate them in detail in the precise manner set forth in the contract clauses. This practice embraces a contract style that requires an objective interpretation of the very wording written in the contract, an exclusion of an interpretation by analogy, and a literal application of the contract. A formula that summarises the attitude underlying this sort of contract style is “caveat emptor”, which expresses that it is the responsibility of each party (in this case, the buyer) to take care of its own interests, to assess the risks connected with the contract and to arrange the contractual relationship in such a way that the risks are minimised and the consequences of their realisation is sufficiently and satisfactorily regulated. The party has to rely on its own evaluations, negotiations and drafting, and cannot count on the interpreter of the contract’s intervention to improve deficient drafting or help out in unexpected situations.

How aware this attitude is, could be questioned: experience shows that some parties adopt these contract models because they are customary, and they do not reason too much on their implications. It could also be questioned how intentional this attitude is: experience shows that some parties choose a civilian governing law with the purpose of balancing this approach exactly, by subjecting the contract to a legal system that permits the judge to integrate or correct the contract, to interpret it extensively or by analogy, etc.. Irrespective of the real intention of the drafters and irrespective of the actual effectiveness of
the draft under the governing law, however, international commercial contract practice is clearly heading in the direction indicated by the *caveat emptor* maxim.

Some legal systems seem to go in the opposite direction, with an increase in regulatory activity. More and more mandatory rules are being issued for the regulation of certain types of contract, for allocating liability between the parties in certain transactions, for restricting the applicability of contractual clauses that excessively favour one party to the detriment of the other one. An absolute respect paid to the wording of the contract favours the stronger contractual party, who is able to impose conditions favourable to it thanks to its bargaining power. To protect the weaker contractual party, mandatory regulations are being issued that prevail over the text of the contract, and many terms are implied by law in order to prevent the situation whereby the party with the strongest negotiating power imposes contractual terms that are excessively unfavourable to the other party. These mandatory regulations are mainly issued in the field of consumer contracts or other contracts where there is a significant imbalance between the parties; therefore, the regulations for the protection of the weaker party do not directly affect commercial contracts. Thus this regulatory trend in favour of the weaker party does not seem to be directly in contradiction with the attitude in opposition to this, upon which commercial contractual practice seems to be based, i.e. the *caveat emptor*. However, it cannot be excluded that the new, protective attitude might expand from the law on consumer contracts to all contract law, at least in some countries. In Germany, for example, the 2001 reform, which was issued to implement various EU directives on consumer contracts, extends to the whole contract law.

The most important restatements of principles of international contract also seem to go in the opposite direction, as do the UNIDROIT Principles and the Principles of European Contract Law. In these restatements, the principles of reasonableness, good faith and fair dealing have a central role. Not only are they stated as general
duties for the parties (article 1.7 of the UNIDROIT Principles and article 1:201 of the PECL), they are frequently repeated in specific contexts throughout the restatements. For example, article 5.1 of the UNIDROIT Principles provides that “The contractual obligations of the parties may be expressed or implied”, and article 5.2 specifies that “Implied obligations stem from [...] (c) good faith and fair dealing; (d) reasonableness.” A similar regulation is contained in article 6:102 of the PECL. This leads to a contract interpretation that does not simply objectively interpret the wording of the document in order to apply it precisely and in full. Should such a precise and full application permit a speculative or abusive conduct, these principles would permit us to intervene, for example, by implying obligations derived from the duty of good faith. In other words, these restatements aim at achieving a balanced contractual regime that moderates the harshest effects of the maxim caveat emptor. An argument was made above that the style in which contracts are drafted can be taken as an indication that the parties wanted to avoid extensive interpretation, interpretation by analogy, correction by the judge to obtain a more balanced result, etc., and that these intentions should be given effect, to the extent this would not violate mandatory rules or fundamental principles. In other words, the intention of exhaustiveness clearly shown by the contract style is not always necessarily compatible with the heavy focus on good taken by the restatements.

To the extent these restatements (particularly the PECL) are being used as a basis for the preparation of instruments that can in the future become part of the EU contract law,118 this discrepancy might even render the gap described above between international commercial contract practice and the legislative and regulative framework that shall govern it to become larger.

118 For example, in connection with the already mentioned ongoing work towards a Common Frame of Reference for European contract law, see www.copecl.org.

6. Do contract practice and contract regulation develop in opposite directions? 105
The contractual practice based on the common law *caveat emptor* principle would have to cope with some governing laws that have an even stronger “paternalistic” attitude than the one that some systems already show today (to use the term that English writers often use to (negatively), characterise the legal systems that permit the judge to intervene in the text of the contract in order to protect one party). It remains to be seen whether this contradiction is going to influence the contractual practice, rendering it less prone to blindly adopting common law models, or whether international commercial contracts will continue to exist in this contradiction, counting on avoiding the unexpected consequences thereof by solving any disputes that might arise out of them out of court. The availability of arbitration as a method of resolving disputes connected with international contracts is often referred to as a solution to the possible contradictions between contractual practice and national governing laws. Even the choice of arbitration, however, does not address this question in a totally satisfactory manner: arbitrators do enjoy a more flexible scope of action than national judges, but they are still bound to apply the law accurately.
7. Conclusion

The reasoning presented in this paper shows that there is a need for analysing how typically common law contract practice is to be interpreted and given effect if the contract is governed by a civilian law. This is the core of the research activity carried out in the project introduced here, the results of which are to be published in this series.

The papers that follow in this series will, thus, primarily focus on the question presented in section 5.3 above: is the clause or contract practice to which each paper is devoted compatible with the civilian (primarily Norwegian) governing law?

In order to answer this question, a comparative analysis is necessary: what was the clause or contract practice originally meant to achieve in the common law? What are the features of the common law that make that particular clause or contract practice necessary or advisable in order to achieve that result? Does the civilian (primarily, Norwegian) governing law present similar features, so that the same kind of clause is necessary or advisable under that law? Is the originally intended result even achievable under that law?
8. List of literature


D’angelo, A., *La buona fede*, Torino 2004


Moss, G.C., “Tacit choice of law, partial choice and closest connection: The case of Common Law contract models governed by a Civilian law”, in Giertsen, J., Frantzen T. Moss,

Moss, G.C., “International contracts between Common Law and Civil Law: Is non-state law to be preferred? The difficulty of interpreting legal standards such as good faith”, *Global Jurist*: Vol. 7: Iss. 1 (Advances), Article 3 pp.1-38


Selvig, E., “Tolking etter norsk rett eller annen skandinavisk rett av certepartier og andre standardvilkår utformet på engelsk”, in *Tidsskrift for Rettsvitenskap*, 1986


Woxholth, G. Avtalerett, Oslo 2003

Zimmermann, R., Whittaker, S., Good Faith in European Contract Law, Cambridge 2000

Zweigert, Kötz, Einführung in die Rechtsvergleichung, 1996