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

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Abstract

Most commercial contracts are nowadays written on the basis of English or American contract models, irrespective of whether the legal relationship that the contracts regulate is governed by a law belonging to a Common Law system or not. These contract models are drafted on the basis of the requirements and structure of the respective Common Law system in which they were originally meant to operate. These models may therefore be in part ineffective or parts thereof may redundant, if the governing law belongs to a Civilian system. To overcome this tension between Common and Civil Law, it is sometimes recommended to subject international contracts to non-state sources of law (also referred to as transnational law, lex mercatoria, soft law). This article analyses the tension between the Common and the Civil Law of contracts, and to what extent non-state sources may represent a satisfactory solution to such tension. This is made by analyzing the role that good faith and fair dealing play in contracts according to the respective systems: English law as an illustration of Common Law systems, Norwegian, German and Italian law as illustrations of Civil Law Systems, the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law as illustration of non-state sources.

KEYWORDS: good faith, fair dealing, common law, civil law, lex mercatoria, UNIDROIT Principles, PECL, non-state law

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Introduction

It cannot be overseen that international commercial contracts are often written on the basis of Common Law contract models. Not only are they written in the English language, they frequently also adopt the Common Law legal terminology and legal structure.

The Common Law of Contracts is based on the principles of certainty and predictability. The parties are presumed to be able to assess the risks connected with the transaction and to provide for appropriate regulation of the relationship and allocation of risk. The contract, therefore, is deemed to be sufficient to regulate the transaction between the parties. Notions such as good faith and fair dealing are not necessary to integrate the regulation agreed between the parties; even, they are deemed undesirable, because they would introduce an element of discretion and uncertainty that is not acceptable in business and commerce.

The law of contracts in Civilian systems, on the contrary, is concerned with ensuring that justice is rendered in the specific case. The contract is interpreted in the light of implied principles of reasonableness, good faith or fair dealing (in different degrees in the respective national systems), thus permitting to avoid unjust solutions that might be based on a literal interpretation of the contract. Truly, in respect of commercial contracts the judge is expected to apply his discretion in a restrictive manner, since the parties are deemed to have the capability and the willingness to assess and take the risks connected with the transaction. Still, a party from a Civilian system might have a certain expectation of interference by the governing law, either to integrate or to correct the contractual regulation.

A contract governed by the law of a Civil Law system, therefore, is subject to interference by the governing law. When the contract is based on a Common Law model, however, the contractual structure seems to exclude any interference. This encounter of two opposed expectations towards the governing law might create difficulties of interpretation.

To overcome these difficulties, it is sometimes suggested to refer to sources of law that do not make reference to a specific national legal system. These may be sources of international law in the proper sense, i.e. international conventions such as the Vienna Convention on Contracts for the International Sale of Goods (“CISG”), or non-authoritative sources that can broadly be defined as *lex mercatoria* or trans-national law, and consisting primarily of generally acknowledged principles of international trade, international contract practice, trade usages, as well as private codifications of contract terms, standard terms of contract or code of conducts, such as those issued by the International Chamber of Commerce or by various branch associations. While some of these sources are
extremely useful and reflect the actual needs of the parties and their development, they may be difficult to ascertain and may have a fragmentary character. To overcome these aspects, in the past decades considerable efforts have been made in restating international contract practice or generally recognised principles and usages, for example in the UNIDROIT Principles of International Commercial Contracts and the European Principles of Contract Law (“PECL”). The restatements contribute doubtlessly to a better availability of lex mercatoria rules, and put the rules in a context that to a greater extent improves the fragmentary character of some of the sources. It is, however, questionable to what extent the restatements effectively contribute to clarifying the tension between the Common Law structure of the contract and the Civil governing law.

In this article I will analyse the principle of good faith and fair dealing, that plays a central role both in the UNIDROIT Principles and in the PECL. The aim of the analysis is to verify to what extent this principle allows for a uniform application of the law of contracts, thus permitting to overcome the tension that characterises common law contract models governed by civil law systems.

1. International contracts are based on Common Law contract models.

Most of the internationally distributed publications collecting model contracts reproduce Common Law-style contracts. As a result, law firms and corporate lawyers in a variety of jurisdictions (not only Common Law jurisdictions) learn to draft international contracts on the basis of these models. International financial institutions, like for example the European Bank for Reconstruction and Development (EBRD), impose the use of US or English-style contracts for the transactions that they are financing, irrespective of the fact that the financed entities do not come from Common Law states (in the case of the EBRD, which finances projects in Eastern Europe, the legal tradition of the financed entity is Civil Law), many of the investors participating in the project are not from Common Law states, and most of the contracts are not to be governed by English law or another system of Common Law. As a result, operators in Civil Law states get used to drafting in the Common Law style, in order to meet the expectations of financial institutions. Operators in states in transition to the market economy have during the ‘90s been brought up to draft contracts according to the Common Law style, notwithstanding their Civil Law tradition. Contract types developed by practice, such as, for example, swap contracts and other contracts for the trade of financial derivates, are standardised by branch associations following the Common Law contract style. As a result, new types of transactions are regulated exclusively by Common Law-style contracts, and these contracts are used to
regulate not only international transactions, but even domestic transactions within Civil Law systems. Contracts for the hedging of financial risk, for example, might be written in English and inspired by English law even if they are entered between a Norwegian company and a Norwegian bank, and are governed by Norwegian law.

The above-described widespread use of Common Law models is such, that it is increasingly affecting even traditional contract types and domestic legal relationships, such as rental of real estate or sale agreements within the borders of the same country. Also contract models applied by the Norwegian public sector for public procurement are increasingly drafted on the basis of these models, that are generally considered to represent the state-of-the-art for contracting among the law firms that might be hired by the relevant state body to draft the tender documentation. The Anglo-Americanisation of contract models, therefore, influences not only firms and companies that engage in international commerce, but also individuals, companies and even public bodies with purely domestic interests.

2. Possible tension between the contract model and the expectations towards the governing legal system

2.1 Briefly on the main differences between Common Law and Civil Law

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. As the most prominent illustration of a Common Law system we will focus on English law, while we will look mainly at Norwegian, German and Italian law to illustrate the approach of Civil Law.

Comparative Law research has proven that many of the contradictions that traditionally are 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 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 to achieve the same result. These results constitute the common core of the analysed legal systems. 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 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 under the circumstances. When deciding specific disputes, therefore, or when advising on how to draft a contract in the anticipation of potential disputes, the awareness of the lawyer must be directed at the specific characteristics of the governing legal system, rather than at the similarities among various systems. In the following sections we will, accordingly, focus on the main differences between the legal systems, rather than on their underlying similarities.

### 2.1.1 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 the 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

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1 “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 ZIMMERMANN, WHITTAKER, *Good Faith in European Contract Law*, Cambridge 2000, that has particular relevance to the topic of this article.
them and patronise them, but they expect the legal system to give them tools in order to enforce what they have agreed.

a) 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 if 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 to construe the contract in a manner that runs against the language. A famous restatement of the principles on interpretation of contracts made by Lord Hoffmann renders the interpretation of contracts more lenient to adapt 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 entering into the contract (however excluding 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 to permitting to substitute for the bargain actually made by the parties one which the interpreter deems to be more reasonable or commercially sensible; this is not allowed under the English law on contract interpretation. The importance of the literal interpretation is strengthened also by the interpretation rule according to which reference in the contract to a certain case will exclude that the contract applies to other corresponding cases that have not been expressly mentioned: expressio unius est exclusio alterius.

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 into consideration external circumstances for construing the contract, such as the parties’ conduct during negotiations or after the signature of the contract. This is traditionally known as the parol evidence rule, which prevents the parties from producing any evidence to add to, vary or contradict the wording of a contract, and imposes to read the contract exclusively on the basis of the provisions that are

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2 Investors Compensation Scheme Ltd. v. West Bromwich B.S. [1998] 1 W.L.R. 898 (H.L.)
6 Hare v. Horton (1883) 5 B. & Ad. 715
written therein. The purpose of this rule is to enhance predictability in the course of commerce; in the balancing between 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. The interpreter has, however, to be aware of the factual background in which the parties were when they entered into the contract. Therefore, 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. The parties may prevent admission of evidence of the factual background by inserting in their contract a so called merger clause, stating that the document contains the entire contract.

In addition to having little access to surrounding circumstances, the English interpreter has also little possibility to fill 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 has only to interpret the contract that the parties have made, not to make the contract for the parties. 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 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 little viable when the parties have conflicting interests or motives).

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

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13 See, for more extensive references, GORDLEY, The philosophical origins, of modern contract doctrine, Oxford 1991, pp. 146ff., 159.
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 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 protection of the weaker contractual party, this being mainly identified with the consumer. In commercial contracts, statutory implied terms are more seldom.

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

Not only can the will of the parties be integrated only to a restricted extent; also the extent to which it may be corrected by applying the principle of good faith is 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 case of breach of the obligation to pay punctually the instalments, 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 realised also 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.14

14 Lombard North Central plc v. Butterworth [1987] 1 All ER 267, Court of Appeal
English law maintains to this date the element of the consideration, *i.e.* the requirement that a contract, to be enforceable, must contemplate an exchange between the parties. This is based on the elaboration that the natural lawyers made of the Roman *causa* up to the XVIII century, according to which a contract is enforceable only 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 to the element of the consideration the same significance that 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 the 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, *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 legal system.  

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 reasonability, 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 as one of the elements 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: *caveat emptor*, the buyer has to pay attention.  

We have already pointed out that 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 enforceability of the contracts according to their words rather than by intervening on the agreement between the parties in the name of an unpredictable justice.

c) Good faith as a duty between the parties

Also in the context of good faith as a standard for the parties’ conduct we see that the Common Law is concerned with preserving the parties’ freedom to contract and to ensure that their contracts are performed accurately according to their precise wording, rather than with providing means for ensuring the fairness in the

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15 See, for further references, GORDLEY, *The philosophical origins*, cit., pp. 146ff.
relationship between the parties. We have already seen that 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 they expect from the system a predictable possibility to enforce their respective rights in accordance with the terms of the contract. A correction or integration of these terms would run counter these expectations, and the English judge does not consequently 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 takes into consideration also the needs and expectations of the other party 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 an often 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.” 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 we have seen, is unknown in a system that privileges the economic aspects of the transaction. English law, however, is not a “hard-hearted Dickensian orge”, as was incisively and authoritatively said. Other legal techniques are applied to reach results in part similar to a general duty of good faith. An often 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 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 also has 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.”

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17 Walford v Miles [1992] 1 All ER 453, House of Lords.
19 ZIMMERMANN, WHITTAKER, Good Faith in European Contract Law, cit., pp. 45ff.
These piecemeal solutions, however, do not necessarily always 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 that does not exist.²¹ 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 raise 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.²²

The case of unjustified break-off of negotiations is a further example showing how the piecemeal solutions of English law 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 even without having the intention to conclude 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.²³ If the unjustified break-off has caused losses for the other party but has not resulted in a gain for the party breaking off, therefore, the party suffering losses is not necessarily entitled to compensation under the doctrine of restitution.²⁴

2.1.2 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

²¹ In some situations a duty of care arises between the parties; it does not seem, however, that negotiations of commercial contracts are within that number, see, for example, Chandler v. Crane, Christmas & Co, [1951] 2 K.B. 164., and see Walford v Miles, cit.
²³ GUEST, Chitty on Contracts, cit., p. 1632
²⁴ 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.
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 an 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 classified as a separate legal family, but the influence by German law is undeniable in the field of contract law).

The contract was in the XIX century 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 affirmed clearly 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, therefore, was tempered with 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 that the legal system had for every type of contract.

### 2.1.3 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 primarily Roman law. 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 reach. In addition to the ideal of scientific

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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 the responsibility therefor. In addition to the ideal of liberalism, the BGB reflects also partially the sociologic 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 by the judge to be applied 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.

a) 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, if 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 to contain also a restriction of the possibility to compete with the transferred practice, in spite of the fact that the contract was silent on this matter.27 As we have seen above, the matter would have been decided quite differently by an English court, that would probably have applied the interpretation rule *expression unius est exclusion alterius.*

b) 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 into consideration also the historical school. Especially in connection with the hyperinflation after the First World War and the situation after the Second World War, German judicial practice showed keen to apply actively the general clauses contained in the BGB, 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

27 BGHZ 16, 71.
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.\textsuperscript{28} 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.\textsuperscript{29} One of the functions of this rule is to function as a barrier against enforcement of a contractual right, in case the exercise of that right brings to unfair results or disrupts the balance of interest between the parties. A decision like the above mentioned English decision that admits the unfairness of a literal interpretation of the contract in the specific case, and nevertheless directs to pay the total price of the computer in addition to the restitution of the computer,\textsuperscript{30} therefore, would probably be avoided by an application of § 242.

c) 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, regulate expressly 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.\textsuperscript{31}

\textsuperscript{28} RGZ 107, 18ff. See also, for further references, among others ZIMMERMANN, WHITTAKER, \textit{Good Faith in European Contract Law}, cit., pp. 20ff.

\textsuperscript{29} STAUDINGER, J. von, \textit{Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen}, §241-243, Berlin 1995. The reform of 2001 has modernised the BGB, that by that time was more than one century old, and has at the same time implemented into German law the European standards on consumer protection, extending most of them to all contracts, not only consumer contracts. The immediate background for the reform was the necessity to implement within the required term the EU directives; however, the process of 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 Vienna Convention for Contracts for the International Sale of Goods of 1980. On the reform of 2001 see, \textit{i.a.}, SCHLECHTRIEM, P., \textit{The German Act to Modernize the Law of Obligations in the context of common principles and structures of the law of obligations in Europe}, at http://www.iuscomp.org/gla/index.html and SCHULTE-NÖLKE, H., \textit{The new German law of obligations: An introduction}, at http://www.iuscomp.org/gla/literature/schulte-noelke.htm.

\textsuperscript{30} Lombard North Central plc v. Butterworth., cit. (see above, footnote 14).

\textsuperscript{31} BGHZ 132, 175, BGH NJW 1973, 542
2.1.4 Norwegian law

Norwegian law of contracts is strongly influenced by German legal doctrine, especially of the XIX century.\textsuperscript{32} The Act on Formation of Contracts of 1918 is clearly inspired by German doctrinal categories, and so is the traditional doctrinal explanation of the subject-matter.\textsuperscript{33} However, Norway has not codified the law of obligations systematically, as Germany and the other countries influenced by German law have. Also, 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 are coupled with a strong ideal of social solidarity, that privileges the ideal of equitable justice over the individual 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.

a) Good faith and interpretation

The main goal of interpreting a contract remains the establishment of the objective intention of the parties; however, in this process the interpreter will be heavily influenced by the purpose of the contract, and the contractual provisions will be interpreted in the way that according to the interpreter is most consistent with the function of the contract.\textsuperscript{34} In addition, the interpretation will be affected by considerations of fair dealing and good faith.\textsuperscript{35} The wording of the contract, therefore, will be read in a way that permits to implement the principles of fair dealing and good faith. 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{36} therefore, also a Norwegian court would avoid the English approach based on the principle expression unius est exclusion alterius.

\textsuperscript{32} On the relationship between German legal doctrine and the Nordic law of contracts see, i.a., GAMBARO, SACCO, \textit{Sistemi giuridici comparati}, cit., pp. 400ff., and ZWEIGERT, KÖTZ, \textit{Einführung in die Rechtsvergleichung}, cit., pp. 270ff.


\textsuperscript{34} HOV, \textit{op.cit.}, pp. 167f., and WOXHOLTH, \textit{op.cit.}, pp. 445ff

\textsuperscript{35} HOV, \textit{op.cit.}, pp. 168f., and WOXHOLTH, \textit{op.cit.}, pp. 450ff.

\textsuperscript{36} See footnote 27 above.
Norwegian law, however, might follow a different path, that would lead to a
different result: rather than interpreting into the contract an implied obligation
limiting competition, the court might consider that the absence of competition was
a precondition for the transaction, and that the contract therefore is not binding
because an essential condition has ceased to exist.37

b) 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 in the Act on Formation of
Contracts of § 36. 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. This Nordic rule on
reasonableness cannot be seen as a drastic departure from the traditions of
German law, since German judicial practice has developed in the course of the
XX century the general clause of good faith contained in § 242 of the BGB to
largely serve the same purpose of equitable justice. However, the Nordic rule goes
further than the German general clause (although it must be reminded that the
judge is expected to be very restrictive in the application of this rule to
commercial contracts). Not only, therefore, a Norwegian Court would (unlike an
English court, and like a German Court) correct the literal interpretation of a
contract to avoid an unfair result, and would 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 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 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).38

c) 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

37 For a more extensive reasoning as well as references to judicial practice see the contribution of
HAGSTROM to ZIMMERMANN, WHITTAKER, Good Faith in European Contract Law, cit.,
pp. 490f.
38 Rt 1990 s. 626.
negotiations. In this latter phase the principle of good faith results, among other things, in a duty to take into consideration the other party’s reliance on contractual negotiations, 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.\textsuperscript{39} 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 conclusion of the contract.

2.1.5 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, that again was 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, however, has not 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.\textsuperscript{40}

The ideals of the Code Civil, that inspired also the Codice Civile, are characteristic for the era in which the Code was conceived. Issued shortly after the French revolution, the Code Civil is based on the desire to establish a liberalistic order where the individual enjoys the freedom to regulate its interests as he deems fit, the private property is respected, the public system’s interferences are reduced to the minimum. Also 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 no need of subjective evaluations. The task of the judge is simply to apply these rules to specific cases, in a mechanic 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 to 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, \textit{i.e.} the codified text of the law, and this has to be applied without making any recourse to natural reason or

\textsuperscript{39} On the duty of information see, extensively, HAGSTRØM, V., AARBAKKE, M., \textit{Obligasjonsrett}, Oslo 2003, pp. 131ff.

\textsuperscript{40} On the influence of French and German law on Italian law see, \textit{i.a.}, GAMBARO, SACCO, \textit{Sistemi giuridici comparati}, cit., pp. 377ff.
This mentality towards the application of law, also known as the exegetical school, was prevailing in France throughout the XIX century, and has heavily influenced the Italian legal thought, so much that it can be deemed to be still vividly present in Italian judicial practice. Italian legal doctrine has, during the late XIX and early the XX centuries, been influenced also by the German historic line of thought, that integrated the text of the law 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. Also 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).

a) Good faith and interpretation

Articles 1362 to 1371 of the Codice Civile direct the interpreter to establish the intention of the parties first of all on the basis of the text of the contract, though integrated with the parties’ conduct. If the language of the contract is clear, the interpreter cannot come to a different result 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).
b) 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.\(^{48}\) Considerations of balance of the parties’ interests are even more subordinated, and can, according to article 1371, be made only to the extent 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 example in the contract does not exclude that the contract is 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 as 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.

An Italian judge, therefore, would probably interpret like an English judge the contract entitling the lessor to regain possession of the computer as well as to obtain the whole price for it.\(^ {49}\) However, the Italian decision might be similar in the result to a German or Norwegian decision, because the Italian judge might apply other principles of the legal system to prevent the unfair result, for example the rule on unjust enrichment.

Similarly, the gap in the contract on the swap of professional activities, that was silent on the question of competition,\(^{50}\) 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 did. However, the result might not differ in the substance, because the Italian court might apply other principles of the legal system on limitations to the competition in case of transfer of activity.\(^ {51}\)

It must be noted that, in spite of the clearly subordinated ranking that the principle of good faith has in the hierarchy of interpretative tools set forth by the Codice Civile, and in spite of the positivistic attitude still shown by the

\(^{48}\) C.88/303

\(^{49}\) Lombard North Central plc v. Butterworth, see above footnote 14.

\(^{50}\) BGHZ 16, 71, see above footnote 27.

\(^{51}\) See the contribution of GRAZIADEI to ZIMMERMANN, WHITTAKER, *Good Faith in European Contract Law*, cit., pp. 486f.
conservative jurisprudence, there are examples of Supreme Court decisions that consider the principle of good faith as an interpretation standard that can integrate or even correct the clear wording agreed to by the parties in the contract.52

c) 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 as 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, that become implied terms of the contract.

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.53 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.54 Italian law, as well as German and Norwegian law, would consider that the seller has 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.

2.2 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.

52 See, for example, C.89/3362 and C. 94/3775. For references to legal doctrine on this judicial approach, see D’ANGELO, A., La buona fede, Torino 2004, pp. 242ff.
53 See, for references, SACCO, DE NOVA, Il Contratto, cit., p. 240 and footnote 2.
International contractual practice adopts the models developed under Common Law, where little or no integration of the contract is expected, and therefore includes in the contract clauses expressing the assumptions of the parties, the purpose of the contract, the duties of the parties, the remedies in case of unexpected events, 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 anyway integrate the contract by applying the governing law (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 correction 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 particularly be 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 case of hardship, or conduct against good faith, etc. On the contrary, the parties may on purpose have 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 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.

3. Can non-state sources release the tension?

3.1 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 often also called, traditionally, lex mercatoria, or trans-national law or, borrowing a terminology from the public international law, soft law). We will look at three instruments that have the ambition of representing a uniform, non-state law on international contracts.

3.1.1 The UNIDROIT Principles

The UNIDROIT Principles of International Commercial Contracts \(55\) were published in 1994 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; they have rather, 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.

3.1.2 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

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\(55\) The full text can be found at [http://www.unidroit.org/english/principles/contracts/main.htm](http://www.unidroit.org/english/principles/contracts/main.htm). The homepage of the Principles contains also 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/](http://www.unilex.info/)
leadership of the Danish professor Ole Lando.\textsuperscript{56} 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. Also, the PECL have a degree of ambition that is higher than the UNIDROIT: they aspire at becoming the prevailing (on a long term binding) contract law within the European Union, instead of the national laws that prevail today in every state. This ambition would be impossible to have for the UNIDROIT Principles, that 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 have therefore a more feasible task, albeit very difficult and probably not achievable before a couple of more decades of intensive work.\textsuperscript{57}

\subsection{3.1.3 The Vienna Convention on 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.\textsuperscript{58} 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 a widespread success, among other reasons because their provisions were said to reflect primarily the

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\footnotesize \textsuperscript{56} 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/
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\footnotesize \textsuperscript{57} The assessment of the feasibility and necessity to harmonise European contract law has been introduced by the European Parliament with the Resolution of 16.03.00, OJ C 377, 29.12.00, p. 323, 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 to follow the process, 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
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\footnotesize \textsuperscript{58} The full text can be found on the UNCITRAL’s homepage, http://www.uncitral.org , that contains also an updated list of the countries that have ratified it, of the reservations that were made, etc.
\end{flushright}
legal traditions and economic situation of Western Europe. Western Europe was also the region that had been most active in the drafting of 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 to elaborate these two conventions into a text that could enjoy broader support. After having involved in the process states from every geographical region, 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.59

The Vienna Convention has been signed by 63 parties, and it is looked upon with extreme interest especially in academic circles,60 as the first example of uniform law that not only creates binding law in authority of its status as international convention that was ratified by so many states, but even gives recognition to the spontaneous rules born out of commercial practice61 and becomes itself an autonomous body of international regulation that adapts to the changing circumstances independently from the legal systems of the ratifying states.62

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 writing in their contract that the CISG shall not be applied.

It must also be mentioned that the Convention opens 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 applicability of part II of the Convention, on formation of contracts (so called article 92 reservation), and have excluded the applicability of the Vienna Convention to inter-Scandinavian contracts (so called article 94 reservation). Several countries (including also Argentina, Chile, China, Russia and the Ukraine) have reserved against the provisions that permit contracts to be created, modified or terminated by other means than in writing (so called article 96

61 Because of the convention’s many references to trade usages.
62 Because of the particular rules on the convention’s interpretation laid down in its article 7, that require an autonomous interpretation based on the principles underlying the convention.
reservation). These and other reservations render the application of the Vienna Convention less uniform than it would have been desirable for a uniform law, even among countries that have ratified it.

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

### 3.1.4 Sources of the lex mercatoria

As we have 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 I nevertheless treat them all under the heading “trans-national law” in the context of this article 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 their starting point in the observation that state legal systems differ from one another, and consider this as a hindrance for international commerce. The ideal situation for international commerce would be a regulation that is harmonized all over the world and that is applied in a uniform way by the courts of the different countries. This aim is sought reached in two different ways by the mentioned sources.

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 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 these three instruments are characterized by the expressed wish to harmonise the law for international commercial transactions. Also, 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 to considering them as a source of the *lex mercatoria*, a trans-national set of rules.

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63 For a full list of the reservations and of the states that have made them see http://www.uncitral.org
64 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
that is detached from any national system of law and that is sometimes deemed as a proper source for regulating international transactions. 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. 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 simply are 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 International Chamber of Commerce’s (ICC) INCOTERMS, that regulate mainly the passage of risk between the seller and the buyer, the ICC’s UCP 500, that 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, do not contain rules on 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.

The UNIDROIT Principles and the PECL, on the contrary, and to a certain extent also the CISG, 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.

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.

### 3.2 Good faith and fair dealing in the restatements of the *lex mercatoria*

In the interpretation of contracts, we have seen that Common Law and Civil Law systems differ from each other, but that there are differences even within these latter. 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 as an operative guideline.\(^{65}\) This is linked to the already observed 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 interpretation of contracts. Judicial practice has predominantly refused to
apply the latter as a tool for creating equitable justice and limits itself to use it as a
tool for interpreting the contract.

The non-state sources follow mainly the Civilian approach, although not
uniformly. Adopting these trans-national sources, therefore, does not seem to
contribute to clarifying the contradiction between the Common Law contract
models and the Civilian governing law.

a) Good faith and interpretation

The Civilian systems and the trans-national systems require to take into
consideration the surrounding circumstances for interpreting contracts, 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, to a lesser extent German law and the UNIDROIT Principles, and
to an even lesser extent Italian law).\(^{66}\) 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 subsequent to the conclusion of the

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\(^{65}\) See, for a clear analysis and relevant references, albeit related to the German system and the
French one (which has influenced the Italian system), SONNENBERGER, *Treu und Glauben –

\(^{66}\) 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 might have played such an important role.
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 we have 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.

Also the Principles of European Contract Law 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 of the conclusion of the contract, nature and purpose of the contract, practices established between the parties, usages, good faith and fair dealing (the latter being not 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: intention of the parties, nature and purpose of the contract, good faith and fair dealing.

b) 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 correction of the contract under non-state law.
c) **Good faith as a duty between the parties**

Another uncertainty that the adoption of trans-national sources does not seem to clarify is 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 to regulating the parties conduct in the contract, but the contracting state’s interpretation of the convention. The main 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 had only 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 contain also a clause regulating good faith in negotiations, article 2.15. Contrary to the rules that we have seen in the other Civil Law systems, however, this rule does not mention a duty of disclosure, and it concentrates simply on the unjustified break off of negotiations and on the start of negotiations without the real intention to complete them. A duty of disclosure could, however, possibly be inferred in article 5.3, regulating the duty to co-operate with the other party if such co-operation may reasonably be expected for the performance of the other party’s obligations. This article refers obviously to the phase of performance, therefore it is rather uncertain whether it can be extended also to the phase of negotiations.

In the comment to article 1.7, the UNIDROIT affirms that the standard of good faith always must be understood as “good faith in international trade”, and that no reference has to be made to any standard that has been developed under

67For an extensive evaluation of this matter, as well as references to literature and to the legislative history in this respect, see KRITZER, A., *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/biblio/kritzer1.html, pp.2ff., with extensive references also to the Minority Opinion of BONELL, M., who was representing Italy under the legislative works. According to BONELL, an extensive interpretation of the CISG would justify application of both concepts of pre-contractual liability and of good faith.
any national law.\textsuperscript{68} This approach is in line with the requirement of 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 the purpose of becoming a uniform law, if the courts of every state interpreted them each in a different way, in light of their own legal culture. While the requirement of autonomous interpretation of the Principles is understandable in light of the ambitions 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 we will see below in section 3.2.1.

Similar considerations as those made in respect of the UNIDROIT Principles may be made also 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 (unjustified break off of negotiations and engaging in negotiations without real intention to conclude 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 indirectly to confirm such a duty, since it considers it equivalent to fraud if a party fails to disclose, with intent to deceive 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 others on the qualifications of the parties, the availability of the information, etc.). The requirement that non-disclosure has to be fraudulent\textsuperscript{69} seems to indicate a restrictive approach to the duty to disclose, close to the Common Law’s. 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 uniformity how this contradiction is to be interpreted, it is rather uncertain what the specific content of this article is.

Also the PECL, as the UNIDROIT Principles, are to be interpreted without reference to specific national systems of law, which circumstance renders it hard to ascertain the scope of the principle of good faith, lacking an acknowledged international standard.

\textsuperscript{68} http://unidroit.org/english/principles/paragraph-1.htm, comment No 2 to art. 1.7.

\textsuperscript{69} Article 4:106, on incorrect information, does not require intent to deceive, but it applies only to information given, not to information withheld.
3.2.1 Good faith and fair dealing as 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:

a) 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 we have 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, that might permit to reach results comparable to the general principle of good faith in other systems, may be useful to substantiating a general clause on good faith in international trade, is uncertain. English law may, by applying own remedies or techniques, achieve results in part similar to those that the principle of good faith may permit to achieve in some of the other systems; this may be used as a basis for a comparative observation that a conduct tending to avoid such results would be inconsistent with a generalized acceptance by various legal systems of the appropriateness of those results and of the consequent inappropriateness of a conduct aiming at avoiding the same results. This, again, could be seen as a concretization of a non-national standard of good faith. An indirect determination of the good faith standard such as this, if at all feasible, assumes a clear consistency in the results that the various legal systems consider appropriate. In many situations, however, the results do not coincide, as was seen above.

70 Even ZIMMERMANN, WHITTAKER, Good Faith in European Contract Law, cit, p. 678, despite the observation that the principle of good faith is relevant to all or most of the doctrines of modern laws of contract, conclude that each system draws a different line between certainty and justice.
b) The instrument that is generally considered as a high expression of the *lex mercatoria*, the CISG, willingly has not included good faith as a duty between the parties, which renders dubious the very existence of this criterion in the trans-national context.

c) Contract practice is generally adopting contract models prepared on the basis of English law or at least of Common Law systems, which, as seen above, 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 assumption of a good faith and fair dealing standard even in countries where the legal system does recognise and important role to good faith.

Other sources of the *lex mercatoria* may be found in a highly recognised database 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.71

d) The CENTRAL 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 also those that deny the existence of an international legal standard for good faith and fair dealing.72 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.

e) Among the 11 arbitral awards listed in the CENTRAL database in support of the principle,73 4 awards seem to have applied the standard of good faith

72 For example, SCHLECHTRIEM, *Good Faith in German Law and in International Uniform Laws*, Rome 1997.
73 ICC award No 2291 of 1976; ICC award No 3131 of 1983; ICC award No 4972 of 1989; ICC award No 5721 of 1990; ICC award No 5832 of 1988; ICC award No, 5953 of 1989; ICC award
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 awards it seems difficult to conclude if 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 of loyalty (such 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 to integrate the contract and balance the interests of the parties (as it would be interpreted in German law), as a rule that permits to correct the contract and requires each party to actively take into consideration and protect also the interest of the other party (as it would be interpreted in Norwegian law), or yet in another way, characteristic only of international trade.

f) 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 if 1969.

- As we have seen above, the relevance of the CISG in respect of the principle of good faith and fair dealing is questionable.
- The Factoring Convention contains, unlike the CISG, a rule prescribing good faith between the parties, in addition to the rule on interpretation of the convention present also in article 7 of the CISG (thus indirectly confirming 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. Even if such an extension was possible, however, the rule on good faith is written in a general way and does not give criteria that can be useful for clarifying its scope.
- The Vienna Convention on the Law of Treaties is a convention on how states are supposed to perform the treaties that they have ratified, and it

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74 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.

75 At the moment of writing this article, 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.
does not seem to have a direct relevance to the standard in international trade.

g) Of the 3 trans-national instruments mentioned in the CENTRAL database (beyond the already mentioned UNIDROIT Principles and PECL), 2 are restatements of state law,\textsuperscript{76} and can therefore not 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.

h) The CENTRAL database mentions also various state laws and court decisions: however, we have 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.

g) The sources in the CENTRAL database that mostly seem 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 we have 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 by making reference to the UNIDROIT Principles and the PECL to support a principle of good faith in international trade, since they in turn make reference to international trade practice 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 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 the international trade law seems to be a sword with two edges. On the one hand, it prevents to give application to the most restrictive doctrines, such as the English law doctrine on good faith. On the other hand, however, it prevents also to give 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.

\textsuperscript{76} The Contract Code drawn by the English Law Commission and the Uniform Commercial Code of the United States
A strict application of the autonomous interpretation of the compilations of principles, therefore, would lead to a restrictive interpretation of the standard of good faith; this, however, seems to contradict the spirit of these compilations, that give good faith such a central role.

3.3 **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 interpretation of Common Law models according to their original principles is, as we have 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 to obtain the full payment of the price as well as the restitution of the goods,77 to fill the gap in a contract on the mutual assignment of professional activities without a non-competition clause,78 to permit

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77 In the English case *Lombard North Central plc v. Butterworth*, cit. (see above, footnote 14), the wording was interpreted literally, even if the judge was dissatisfied by the result; the Civilian systems analysed herein would probably come to different results, see above, sections 2.1.3 (b), 2.1.4 (b), 2.1.5 (b).

78 The German Supreme Court decided that a good faith interpretation of the contract permits to read a non-competition clause into a contract that is silent on the matter (BGHZ 16, 71, see above, footnote 27); the English system would most probably not permit this interpretation (see above, section 2.1.1 (a)), and the Norwegian and Italian systems might each reach a different result (see, respectively, section 2.1.4 (a) and 2.1.5 (b)).
renegotiation of the price in a contract with an option to renew,\textsuperscript{79} or to require a duty of disclosure during the negotiations in relation to one of the parties’ motives.\textsuperscript{80}

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 to avoid a direct contradiction between the non-state sources and the 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 might 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. Just how far exactly the non-state laws would deviate from the English rule of predictability and the Norwegian rule of fairness, it is difficult to assess, as the above analysis has shown.

\section*{4. Conclusion}

We have seen that there are significant differences between English law and the Civil Law systems, as well as among the Civil Law systems themselves, that are due to a different conception of the role of the judge towards the law, of the role of the judge towards the parties, of the purpose of the legal system. Whether a system privileges predictability or equitable justice in the specific case, is going to heavily influence the rules and the application of the rules, as well as the expectations of the parties. These differences are deeper than the mere use of varying technicalities, and affect the structure of the legal instruments that have to be employed in the respective system to obtain the desired results. It may be difficult to overcome these differences by adopting a uniform text of law, since they go to the roots of the system and an equal rule would most probably be applied differently.

\textsuperscript{79} The Norwegian Supreme Court interpreted the wording as to represent a right of first refusal rather than an option, and permitted renegotiation even if there were no competing offers by third parties (Rt 1990 s. 626, see above, footnote 38); the other systems analysed herein would probably not go that far in the interpretation of the contract, see above, sections 2.1.1 (b), 2.1.3 (b), 2.1.5 (b).

\textsuperscript{80} Whereby English law would not recognise such a duty (see above, section 2.1.1 (c), the Civilian systems analysed herein would (see above, sections 2.1.3 (c), 2.1.4 (c), 2.1.5 (c).
In the field of commercial contracts, the conception of contracts proper of the Common Law (whereby the contract is to be interpreted literally, notions of fairness or good faith are not central, the liability for non-performance is strict) is being adopted by contractual practice because most contracts are written on the basis of Common Law contract models. Commercial contractual practice is, therefore, increasingly following the *caveat emptor* approach that leaves it to the parties to regulate their interests in their contract without having the possibility to relying on implied terms that may protect them. The model contracts, the general conditions, the standard forms have the ambition to regulate exhaustively all aspects of the transaction, irrespective of what country’s law is governing the contract. At the same time, many of these contracts are governed by the laws of Civil Law systems, and are written by lawyers educated in Civil Law systems, with their expectations of integration of the contract by implied terms contained in the law, correction of the text of the contract with the criteria of fairness and good faith, relevance of the diligence or negligence of the non-performing party, etc. Their understanding of the contract’s scope, function and relation to the governing law, therefore, may be different from the assumptions that the used contract models are based on. How these opposed assumptions are to be coordinated, is left to the sensibility and degree of information of the judges who may be called to decide upon disputes arising out of these contracts.

The commendable initiatives to create trans-national compilations of principles that may be used to govern international contracts instead of or in addition to the national laws seem to suffer under the tension between the mentalities of Common Law and of Civil Law. This is particularly true in respect of the role that subjective evaluations or objective standards of equitable justice should play in the interpretation or enforcement of contracts. While the trans-national compilations seem to follow the Civil Law tradition and attach a great importance to these evaluations and standards, they insist on detaching these criteria from the legislative, judicial and doctrinal tradition of specific legal systems in favour of an autonomous interpretation based on international standards. Not many sources are available to establish the meaning of good faith and fair dealing as a standard in international trade. The CISG does not contain any rule that might be used as a guideline, which makes it difficult to make an argument in favour of a strong basis for a progressive doctrine of good faith within international trade law. The international contractual practice, largely influenced by Common Law, seems to assume that these criteria should not play any role in international contracts, and this is in contradiction with the central role that they are expected to play in the trans-national compilations of principles.

Another tendency that creates tension is the increasing regulatory activity that characterises the European Community and consequently the national legal systems analysed here. More and more mandatory rules are being issued for
regulating 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. The absolute
respect that the legal systems paid to the will of the parties, characteristic of the
law of the early XIX century, resulted in the respect of the wording of the contract
and favoured therefore the stronger contractual party, who was able to impose
conditions favourable to it thanks to its bargaining power. This has gradually been
replaced by the aim of protecting the weaker contractual party. The mandatory
regulations prevail over the text of the contract, and many terms are implied by
law to prevent that 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. This regulatory trend in favour of the weaker party
seems therefore not to be directly in contradiction with the opposed attitude upon
which contractual practice seems to be based, the caveat emptor, whereby each
party has to protect its own interests by the express contractual regulation.
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, that was issued to implement various
EU directives on consumer contracts, has reformed the whole contract law.

Should this become a generalised trend, 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 today show (to use the term that English writers often use for –
negatively- characterising the legal systems that permit the judge to intervene on
the text of the contract for the protecting one party).

It remains to be seen whether this contradiction is going to influence the
contractual practice, rendering it less prone to blindly adopt Common Law
models, or to influence the application of Civilian laws, restricting the
interference of the governing law with the contractual regulation of commercial
relationships. For the time being, international commercial contracts exist in this
contradiction, counting on avoiding the unexpected consequences thereof by
solving out of court any disputes that might arise out of them. The availability of
arbitration as a method of dispute resolution for disputes connected with
international contracts is often referred to as a solution to 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 may well enjoy a more flexible scope of action than national judges, but they are still bound to apply the law accurately.\(^8\)